

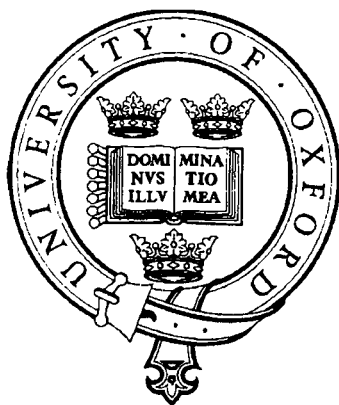
Procedural Detachment in International Commercial Arbitration

The Law Applicable to Arbitral Procedure

by

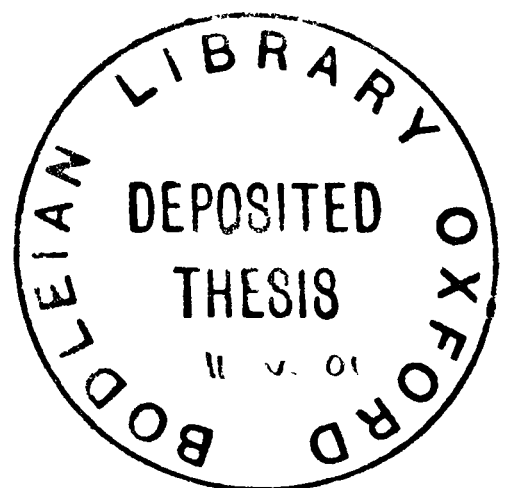
Georgios C Petrochilos

Trinity College



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Doctor of Philosophy

Trinity Term 2000



Procedural Detachment in International Commercial Arbitration

The Law Applicable to Arbitral Procedure

Abstract

This thesis seeks to ascertain the rules of private international law determining the procedural law of international commercial arbitral proceedings. In an Introduction, the author outlines the fundamental notions, introduces the topic and the major doctrines and issues, and sets out his methodology and structure of the work.

The thesis examine first, as a preliminary issue, the considerations influencing the assumption of jurisdiction over arbitral proceedings. Chapter 1 discusses the various theories on the *lex arbitri* (the law supplying the general legal framework of an arbitration) as relevant to the procedural law, and concludes that they are deductive and therefore unable to satisfactorily to determine the applicable procedural law. Chapter 2 analyses major national laws as case-studies of the technique and scope of application of international arbitration law, and suggests a model of legislative and court jurisdiction based on the legal concept of 'seat of the arbitration' and on considerations based on the most appropriate court to control an arbitration. Chapter 3 discusses the obligations of the state of the seat under the European Convention on Human Rights and confirms the findings in Chapter 2.

In a second part, the thesis elaborates on the title and extent of permissible municipal law interference. Chapter 4 tests the validity of the propositions derived from Chapters 2 and 3 against arbitral practice and concludes that seldom will arbitrators derogate from the law of the seat. Chapter 5 examines the particular case of arbitrations with states and similar entities.

The third part discusses the relevance of compliance with the law of the seat at the stage of enforcement of an award. Chapter 6 deals with the technical issue of whether annulment at the place of making precludes enforcement in other *fora*. That chapter gives the opportunity to discuss models of separation of international jurisdiction and co-operation between different jurisdictions from a practical perspective. It thus serves as a convenient introduction to Chapter 7, which discusses the more abstract question of the nexus required between an arbitral award and the municipal law of the state of rendition in order for the award to enter, *in limine*, the scope of application of the international instruments in the field.

The thesis ends with Conclusions in the form of model provisions for municipal law and arbitration rules.

The delocalization of international arbitration is an old debate. The view of authors who, with Dr Mann, condemned the autonomy of arbitration in relation to municipal procedural law and, at the same time, the principal role of party autonomy in the determination of the rules applicable to the procedure and the merits is today so isolated and dissociated from international practice, the positive law of the majority of states, and modern trends that it would be without doubt useless to revisit the question.

(Fouchard, (1992) 37 McGill LJ at 646)

On problems of validity of arbitration agreements, procedure, applicable law, etc, there is some consensus. But on each of these questions, the underlying problem, the importance of the law of the seat, has not yet mustered consensus.

(Gaillard, (1999) 125 JDI at 646)

[C]ontrary to popular belief, the law, justice and common sense are not unrelated concepts.

(Donaldson J in *Durham Fancy Goods Ltd v Michael Jackson (Fancy Good) Ltd* [1968] 2 QB at 847)

Acknowledgments

The author is both obliged and happy to acknowledge his debt to all those who parted with their time and wisdom for the benefit of this work. First and foremost among them are Professor Sir Roy Goode and Mr Adrian Briggs, who went beyond the call of duty as supervisors of this work. I am particularly indebted to Adrian for his friendship, and encouragement in dire times. Additionally, I am grateful to Dr Julian Lew, Dr Adrian Zuckermann, Mr Adam Samuel, The Hon Michael Beloff QC, Professor Konstantinos Kerameus, Professor Charalambos Pamboukis, Professor Stelios Koussoulis, Dr Anna Mantakou, Dr Søren Schønberg, Mr Raed Fathallah, and Dr Sienho Yee for reading and commenting upon parts of this work. The usual disclaimer applies with particular force in this case, as each one had objections to different propositions of this author.

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Nothing would have happened without the constant love and support, on every front, of my family: Christos, Kalliope, Elias, and Katerina. If to any extent it would repay their generosity, this thesis is devoted to them.

Tables

TABLE OF CONTENTS

TABLES	I
INTRODUCTION	1
CHAPTER 1 THEORIES ON THE <i>LEX ARBITRI</i>	12
CHAPTER 2 REPRESENTATIVE MUNICIPAL LAWS AND SUGGESTED MODEL OF ARBITRATION REGULATION	33
CHAPTER 3 HUMAN RIGHTS LAW REQUIREMENTS, JURISDICTIONAL AND SUBSTANTIVE	79
CHAPTER 4 ARBITRAL PRACTICE: CONFLICTS AND MATERIAL RULES ON PROCEDURE	105
CHAPTER 5 ARBITRATIONS INVOLVING A STATE OR ANALOGOUS ENTITY: THEIR PROCEDURAL RÉGIME AND ITS RELEVANCE	139
CHAPTER 6 ENFORCEABILITY OF AWARDS ANNULLED IN THEIR STATE OF ORIGIN	194
CHAPTER 7 THE REQUISITE DEGREE OF CONNECTION BETWEEN THE AWARD AND MUNICIPAL LAW	218
CONCLUSIONS	248
BIBLIOGRAPHY	253

* **NB:** No word-processor proved capable of electronically creating tables of authorities at the scale required in this thesis. The tables below therefore cannot serve as tables of authorities in the full sense of the term. They do, however, contain the full reference of the item concerned (and often multiple publication references), which word-limits excised from the text. It is hoped that the breakdown of the tables into subcategories will aid the reader and to some extent offset the lack of page pointers.

TABLES	I
TABLE OF CONTENTS	I
TABLE OF ABBREVIATIONS AND SHORT TITLES	IX
LEGISLATION FREQUENTLY CITED BY ABBREVIATED NAME	XVI
TABLE OF LEGISLATION	XVIII
INTERNATIONAL TREATIES AND CONVENTIONS	XVIII
<i>Treaties and Conventions in general: Multilateral</i>	<i>xviii</i>
<i>Treaties and Conventions in general: Bilateral</i>	<i>xix</i>
<i>Treaties for the Mutual Encouragement and Protection of Investment ('Bilateral Investment Treaties' or 'BITs')</i>	<i>xx</i>
MUNICIPAL LEGISLATION	XXII
<i>England</i>	<i>xxii</i>
<i>Other States</i>	<i>xxii</i>
TABLE OF AUTHORITIES	XXIV
DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS	XXIV
<i>International Court of Justice</i>	<i>xxiv</i>
<i>European Court of Human Rights</i>	<i>xxiv</i>
<i>European Commission of Human Rights</i>	<i>xxv</i>
<i>Iran – United States Claims Tribunal</i>	<i>xxvi</i>
<i>European Court of Justice</i>	<i>xxvii</i>
<i>Other International Tribunals, including ad hoc</i>	<i>xxvii</i>
DECISIONS OF MUNICIPAL COURTS	XXIX
<i>England</i>	<i>xxix</i>
<i>France</i>	<i>xxxii</i>
<i>United States</i>	<i>xxxv</i>
<i>Switzerland</i>	<i>xxxvi</i>
<i>Germany</i>	<i>xxxviii</i>
<i>Greece</i>	<i>xxxix</i>
<i>Other Civil Law Jurisdictions</i>	<i>xl</i>
<i>Other Common Law Jurisdictions</i>	<i>xli</i>

Tables

ARBITRAL AWARDS	XLIII
<i>International Chamber of Commerce</i>	<i>xlili</i>
<i>Other Awards</i>	<i>xliv</i>
TABLE OF ARBITRATION RULES	XLVII
TABLE OF RESOLUTIONS, PROPOSED LEGISLATION, ETC	XLIX
INTRODUCTION	1
I. THE AREA OF INQUIRY: INTERNATIONAL COMMERCIAL ARBITRATION	1
II. THE OBJECT OF INQUIRY	3
A. THE ELEMENTS OF THE <i>LEX ARBITRI</i>	3
B. <i>LEX ARBITRI</i> CONSIDERATIONS IN THE LAWS APPLICABLE TO SUBSTANCE AND PROCEDURE	7
III. THE METHOD AND PURPOSE OF THE INQUIRY	10
CHAPTER 1 THEORIES ON THE <i>LEX ARBITRI</i>	12
I. INTRODUCTION TO THE NOTIONS	12
II. SEAT THEORIES	14
A. THE TERRITORIALISTS	14
B. IMPUTED CHOICE OF FORUM: THE 1957 RESOLUTION OF THE <i>INSTITUT DE DROIT INTERNATIONAL</i>	17
III. LEGAL LOCALIZATION	20
A. THE PROCEDURAL LAW CRITERION	20
B. THE LEGAL CONTINUUM THEORY	22
C. THE DISPLACEMENT OF JURISDICTION CRITERION	23
IV. APPROACHES TO DELOCALIZATION	24
A. TRANSNATIONAL ARBITRATION	24
B. DELOCALIZATION BY CONTRACT THEORY	27
V. CONCLUDING REMARKS: DESIDERATA	29
CHAPTER 2 REPRESENTATIVE MUNICIPAL LAWS AND SUGGESTED MODEL OF ARBITRATION REGULATION	33

I. LOCALIZATION BY CHOICE OF LAW: ITS SHORTCOMINGS AND ABANDONMENT	33
A. GREECE, PRE-1999: HALF-HEARTED AND UNCERTAIN	33
B. GERMANY, PRE-1998: ALL ABOUT BEING ROUNDABOUT	35
C. FRANCE, PRE-1981: <i>DENI DE JUSTICE?</i>	37
D. ENGLAND, PRE-1996: PRESUMPTIONS CANONIZED	38
E. CONCLUSIONS	44
II. THE BASIC TENETS OF MODERN ARBITRATION LAW	44
A. THE CONCEPT OF SEAT AS THE BASIS OF FUNCTIONAL JURISDICTION	44
B. PROCEDURAL AUTONOMY AS A SUBSTANTIVE LAW MATTER	51
C. EXCLUSION OF SETTING ASIDE BY AGREEMENT	54
1. <i>Questions of Principle</i>	54
2. <i>Municipal Legislation</i>	56
III. THE SEAT AS THE FOCAL POINT IN INTERNATIONAL ARBITRATION: ITS JURISDICTIONAL TITLE AND FUNCTIONS	58
A. THE RELEVANCE OF PUBLIC INTERNATIONAL LAW IN GENERAL	58
B. THE FOUNDATIONS AND NATURE OF PRIMARY JURISDICTION	60
1. <i>Types and Functions of Primary Jurisdiction</i>	60
2. <i>Annulment Jurisdiction: The Relevant Considerations</i>	61
(a) The Jurisdictional Title of the Seat	61
(b) Limits to Annulment Jurisdiction	68
3. <i>Support Jurisdiction</i>	74
IV. CONCLUSIONS	77
CHAPTER 3 HUMAN RIGHTS LAW REQUIREMENTS, JURISDICTIONAL AND SUBSTANTIVE	79
I. THE PRINCIPAL OBLIGATIONS	79
II. ARBITRATION AGREEMENTS AS WAIVERS OF THE RIGHT TO A COURT: FORMAL REQUIREMENTS	82
III. MATERIAL REQUIREMENTS UNDER ARTICLE 6(1)	83
A. ARBITRABILITY	83
B. PROCEDURAL IMPEDIMENTS IN MUNICIPAL COURTS: ESTOPPEL	84
C. PROCEDURAL GUARANTEES: DUE PROCESS	86

Tables

<i>1. Reasonable Time and Public Hearing</i>	87
<i>2. Independence and Impartiality</i>	87
<i>3. Equality of the Parties</i>	91
IV. ARE ARBITRAL TRIBUNALS BOUND TO APPLY THE ECHR?	92
V. AN INTERNATIONAL OBLIGATION TO CONTROL ARBITRAL PROCEEDINGS?	95
A. THE PRELIMINARY ISSUE: JURISDICTION AND RESPONSIBILITY	96
B. OBLIGATIONS IN RESPECT OF CONSENSUAL AND STATUTORY ARBITRATION: AN ABSOLUTE DISTINCTION?	98
<i>1. Consensual Arbitration</i>	98
<i>2. Statutory Arbitration</i>	98
(a) <i>De Novo</i> Proceedings Insufficient	98
(b) The Jurisdiction of the Reviewing Court	100
C. A PERVASIVE APPLICATION OF THE PROCEDURAL AUTONOMY PRINCIPLE	101
VI. CONCLUSIONS	103
CHAPTER 4 ARBITRAL PRACTICE: CONFLICTS AND MATERIAL RULES ON PROCEDURE	105
I. A SURVEY OF ARBITRATION RULES	106
A. RULES OF NATIONAL INSTITUTIONS FOR FOREIGN TRADE	107
<i>1. East European Rules</i>	107
<i>2. Other Rules</i>	109
B. UNIVERSAL RULES	110
<i>1. The Genealogical Tree of the UNCITRAL Rules</i>	111
<i>2. The Rules of the ICC: Historical and Textual Analysis</i>	114
C. CONCLUSIONS	118
II. OVERVIEW OF ARBITRATION PRACTICE WITH PARTICULAR REFERENCE TO ICC PRACTICE	120
A. THE PRACTICE IN REGARD TO CHOICE OF PROCEDURAL LAW BY THE PARTIES	120
<i>1. Preliminary Questions</i>	120
<i>2. 'Plain Vanilla' ICC Agreements</i>	121
<i>3. Municipal Law as Suppletive</i>	123
<i>4. Mandatory Provisions Safeguarded</i>	124
<i>5. Negative Choice</i>	125

B. THE PRACTICE OF ARBITRAL TRIBUNALS	125
1. <i>The Law of the Seat as the Lex Arbitri</i>	126
(a) Possible Foundations	126
(b) The Law of the Seat should not provide more than Fundamental Standards of Validity	129
2. <i>An Autonomous Lex Arbitri?</i>	130
III. GENERAL PRINCIPLES OF ARBITRAL PROCEDURE	132
CHAPTER 5 ARBITRATIONS INVOLVING A STATE OR ANALOGOUS ENTITY: THEIR PROCEDURAL RÉGIME AND ITS RELEVANCE	139
I. DEFINING THE ISSUES	139
II. THE IRAN – UNITED STATES TRIBUNAL	140
A. THE INTERNATIONAL LAW FOUNDATIONS	141
1. <i>No International Responsibility for the Netherlands</i>	142
2. <i>Interpretation of the Algiers Accords with Particular Reference to the Jurisprudence of the Tribunal</i>	144
(a) International Tribunals: The Principles	144
(b) The Practice of and in connection with the Tribunal	147
III. FOREIGN INVESTMENT TREATY ARBITRATION	152
A. BILATERAL INVESTMENT TREATIES	153
B. MULTILATERAL INVESTMENT TREATIES	156
C. ICSID ARBITRATION	157
1. <i>Self-contained Character</i>	157
2. <i>Incorporation</i>	160
3. <i>Recapitulation</i>	161
IV. AD HOC PROCEEDINGS INVOLVING STATES OR INTERNATIONAL ORGANIZATIONS	161
A. THE CASE OF INTERNATIONAL ORGANIZATIONS	162
1. <i>Legal and Practical Considerations: General Observations</i>	162
2. <i>Immunity and Internationalization: Communicating Vessels</i>	164
(a) Practice	164
(b) Discerning the Principles	168
2. <i>Particular Arrangements: Standing Tribunals</i>	169

Tables

3. <i>Conclusions on International Organizations</i>	170
B. THE STATE AS ARBITRATING PARTY	171
1. <i>Arbitral Practice is Inconclusive</i>	171
(a) The Exception: Express Choice and its Modalities	171
(b) The Rule: No Choice	174
2. <i>The Practical Needs</i>	180
3. <i>Theoretical Considerations and Suggested Approach</i>	183
(a) Returning to the Fundamental Questions	183
(b) Selective Immunity	185
V. CONCLUSIONS	192
CHAPTER 6 ENFORCEABILITY OF AWARDS ANNULLED IN THEIR STATE OF ORIGIN	194
I. THE GENERAL CONVENTION FRAMEWORK	194
II. THE CASE-LAW	199
A. THE FRENCH PARADIGM: DISCOUNTING ANNULMENT THROUGH ARTICLE VII	199
B. A DISCRETIONARY STANDARD: THE UNITED STATES <i>CHROMALLOY</i> CASE	205
III. THE PROPER LIMITS FOR DISCOUNTING ANNULMENT	206
A. CORRELATING ARTICLES V AND VII	207
B. GROUNDS FOR EXERCISING DISCRETION	207
IV. THE CASE FOR RESTRAINT	211
V. CONCLUSION	216
CHAPTER 7 THE REQUISITE DEGREE OF CONNECTION BETWEEN THE AWARD AND MUNICIPAL LAW	218
I. SOME CLARIFICATIONS	218
II. FOREIGN AND NON-DOMESTIC AWARDS	220
A. LEGISLATIVE HISTORY	220
1. <i>The Origins</i>	220
2. <i>The Subsequent Drafting Process</i>	222
B. ANALYSIS: ARTICLE I(1) AS A SINGLE-PURPOSE VEHICLE	225
1. <i>Determining a 'Foreign Award' is by no means tantamount to determining its Nationality</i>	225

2. <i>The True Purpose of Article V(1)(d)</i>	226
3. <i>Reconciling the Provisions</i>	227
C. NON-DOMESTIC AWARDS	231
1. <i>The Theoretical Considerations</i>	231
2. <i>The Relevant Practice</i>	232
D. CONCLUSIONS	235
III. AWARDS OF THE IRAN – UNITED STATES CLAIMS TRIBUNAL	236
A. THE ISSUES	236
B. THE APPROACH OF THE COURTS	237
C. SOME DISTINCTIONS AND A POSTSCRIPT ON NOMENCLATURE	240
IV. ANATIONAL AND STATELESS AWARDS	240
A. ANATIONAL AND HOMELESS AWARDS	241
B. AN AWARD BY ANY OTHER NAME	244
V. CONCLUSIONS	246
CONCLUSIONS	248
BIBLIOGRAPHY	253

TABLE OF ABBREVIATIONS AND SHORT TITLES

A	European Court of Human Rights: Series A, <i>Reports of Judgments and Decisions</i> [up to 1995]
AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
ABA	American Bar Association
AC	<i>The Law Reports: Appeal Cases (England)</i>
ACWS	<i>All Canada Weekly Summaries</i>
AD	<i>Annual Digest and Reports of Public International Law Cases</i> (predecessor of <i>ILR</i>)
ADRLJ	<i>Alternative Dispute Resolution Law Journal</i>
AFDI	<i>Annuaire Français de Droit International</i>
Afr JICL	<i>African Journal of International and Comparative Law</i>
AIR	<i>All India Reporter</i>
AJCL	<i>American Journal of Comparative Law</i>
AJIL	<i>American Journal of International Law</i>
ALI	The American Law Institute
ALJ	<i>Australian Law Journal</i>
All ER	<i>All England Law Reports</i>
ALR	<i>Australian Law Reports</i>
Am Rev Int Arb	<i>American Review of International Arbitration</i>
AMC	<i>American Maritime Cases</i>
Ann IDI	<i>Annuaire de l'Institut de Droit International</i>
Annales FDL	<i>Annales de la Faculté de Droit de l'Université de Liège</i>
AP	<i>Areios Pagos</i> [Court of Cassation, Greece]
APD	<i>Archives de Philosophie du Droit</i>
Arb Int	<i>Arbitration International</i>
Arb J	<i>Arbitration Journal</i> (predecessor of the <i>DRJ</i>)
Art(s)	Article(s)
ASDI	<i>Annuaire Suisse de Droit International</i>
ATF	<i>Arrêts du Tribunal Fédéral: Recueil Officiel</i> (Switzerland)
B	European Court of Human Rights: <i>Pleadings, Oral Arguments, Documents</i>
BCLR	<i>British Columbia Law Reports</i>
BFSP	<i>British and Foreign State Papers</i>
BGBI	<i>Bundesgesetzblatt</i> (Germany) [and thus: öBGBI = <i>Bundesgesetzblatt der Republik</i>

Österreich]

BGH	<i>Bundesgerichtshof (Germany)</i>
BGHZ	<i>Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)</i>
BLI	<i>Business Law International</i>
Bull ASA	<i>Bulletin de l'Association Suisse de l'Arbitrage</i>
Bull Civ	<i>Bulletin Civil</i>
Bus Law	<i>The Business Lawyer</i>
BYIL	<i>British Yearbook of International Law</i>
CA	Court of Appeal (or equivalent)
Cass (followed by chamber)	Cour de cassation (France)
Cass (It)	Corte di cassazione (Italy)
Cath ULR	<i>Catholic University Law Review</i>
CCP (followed by state)	Code of Civil Procedure
CFI	Court of First Instance
Ch	<i>The Law Reports: Chancery Division (England)</i>
ch	(after citation of a book:) chapter
CJ	Code Judiciaire (Belgium)
CJQ	<i>Civil Justice Quarterly</i>
CLC	<i>Commercial Law Cases</i>
CLJ	<i>Cambridge Law Journal</i>
CLOUT	<i>Case Law on UNCITRAL Texts (UN Docs A/CN.9/SER.C/ABSTRACTS/1- (1993-))</i>
CLP	<i>Current Legal Problems</i>
Cmd	<i>Command Papers (UK)</i>
CMLR	<i>Common Market Law Reports</i>
Col JTL	<i>Columbia Journal of Transnational Law</i>
Coll	European Commission of Human Rights: <i>Collection of Decisions</i>
Com LR	<i>Commercial Law Reports</i>
<i>Compendium</i> (followed by vol number)	United Nations Conference on Trade and Development, <i>International Investment Instruments: A Compendium</i> , Doc UNCTAD/DTCI/30 (3 vols, 1996)
Con L YB	<i>Construction Law Yearbook</i>
Cornell LQ	<i>Cornell Law Quarterly</i>
Cr Arb YB	<i>Croatian Arbitration Yearbook</i>
CTS	<i>The Consolidated Treaty Series (Parry ed)</i>
D	<i>Recueil Dalloz (formerly Dalloz – Sirey)</i>
Dept St Bull	<i>Department of State Bulletin (United States)</i>
Dir Maritt	<i>Diritto Marittimo</i>

Tables

DLR	<i>Dominion Law Reports</i>
Doc	Document
DP	<i>Dalloz Périodique</i>
DPCI	<i>Droit et Pratique du Commerce International</i>
DR	European Commission of Human Rights: <i>Decisions and Reports</i>
DRJ	<i>Dispute Resolution Journal</i>
EC Bull	<i>Bulletin of the Commission of the European Communities</i>
ECR	<i>European Court Reports</i>
ed(s)	editor(s)
EHRR	<i>European Human Rights Reports</i>
EJIL	<i>European Journal of International Law</i>
ETS	<i>European Treaty Series</i>
F	<i>Federal Reporter</i> (United States)
FHCLR	<i>Federal High Court Law Reports</i> (Nigeria)
<i>Fischer</i> (followed by vol no)	Fischer, P (ed), <i>A Collection of International Concessions and Related Instruments, Contemporary Series</i> (I-VII, 1981-1988)
For It	<i>Il Foro Italiano</i>
FSupp	<i>Federal Supplement</i> (United States)
FTAC	Foreign Trade Arbitration Commission attached to the USSR Chamber of Commerce and Industry
Gaz Pal	<i>Gazette du Palais</i> (France)
Giust Civ	<i>Giustizia Civile</i>
Gutachten <i>Handbook</i>	<i>Gutachten zum internationalen und ausländischen Privatrecht</i> Paulsson, J (ed), <i>International Handbook on Commercial Arbitration</i> (2 vols, loose-leaf)
Harv LR	<i>Harvard Law Review</i>
HKC	<i>Hong Kong Cases</i>
HKLR	<i>Hong Kong Law Reports</i>
HL	<i>House of Lords</i> (England)
HR	Hoge Raad (Netherlands)
HRLJ	<i>Human Rights Law Journal</i>
IBA	International Bar Association
IBL	<i>International Business Lawyer</i>
IBLJ	<i>International Business Law Journal</i>
ICC	International Chamber of Commerce
ICC Bull	<i>ICC International Court of Arbitration Bulletin</i>
ICCA	International Council for Commercial Arbitration

Procedural Detachment in International Arbitration

<i>ICJ Pleadings</i>	<i>International Court of Justice: Pleadings, Oral Arguments, Documents</i>
<i>ICJ Reports</i>	<i>International Court of Justice: Reports of Judgments and Decisions</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ICSID Rep	<i>Reports of Cases decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965</i>
ICSID Rev-FILJ	<i>ICSID Review – Foreign Investment Law Journal</i>
<i>id</i>	<i>idem</i>
IDI	Institut de Droit International
ILA	International Law Association
ILA Rep	<i>Reports of [conferences of] the International Law Association</i>
ILC	(United Nations) International Law Commission
ILM	<i>International Legal Materials</i>
ILO	(United Nations) International Labour Organization
ILOAT	Administrative Tribunal of the International Labour Organization
ILPr	<i>International Litigation Procedure</i>
ILR	<i>International Law Reports</i>
Indian JIL	<i>Indian Journal of International Law</i>
Int ALR	<i>International Arbitration Law Reports</i>
Int Law	<i>The International Lawyer</i>
IPRax	<i>Praxis des Internationalen Privat- und Verfahrensrechts</i>
Iran-US CTR	<i>Iran – United States Claims Tribunal Reports</i>
It YBIL	<i>The Italian Yearbook of International Law</i>
J	Judge or Justice (and thus: PJ = Presiding Judge, CJ = Chief Justice, LJ = Lord Justice)
J Int Arb	<i>Journal of International Arbitration</i>
Japanese Annual	<i>The Japanese Annual of International Law</i>
JBl	<i>Juristenblätter</i>
JBL	<i>Journal of Business Law</i>
JCI Arb	<i>Arbitration: The Journal of the Chartered Institute of Arbitrators</i>
JCI	<i>Jurisclasseur</i>
JCMS	<i>Journal of Common Market Studies</i>
JCP	<i>Jurisclasseur Périodique – La Semaine Juridique</i>
JDI	<i>Journal du Droit International (Clunet)</i>
JdT	<i>Journal des Tribunaux (Switzerland)</i>
JIEL	<i>Journal of International Economic Law</i>
JMLC	<i>Journal of Maritime Law and Commerce</i>
JO	<i>Journal Officiel de la République Française</i>
JPSch	<i>Jahrbuch für die Praxis der Schiedsgerichtsbarkeit</i>

Tables

JT	<i>Journal des Tribunaux (Belgium)</i>
JTLP	<i>Journal of Transnational Law and Policy</i>
JWTL	<i>Journal of World Trade Law</i>
KRZ	Kos-Rabcewicz-Zubkowski, I, <i>East European Rules on the Validity of Arbitration Agreements (1970)</i>
KTS	<i>Konkurs-, Treuhand- und Schiedsgerichtswesen</i>
L & P Int Bus	<i>Law and Policy in International Business</i>
LG	<i>Landgericht (Germany)</i>
Lloyd's Rep	<i>Lloyd's Law Reports</i>
LMCLQ	<i>Lloyd's Maritime and Commercial Law Quarterly</i>
LNTS	<i>League of Nations Treaty Series</i>
LQR	<i>Law Quarterly Review</i>
MAC	Maritime Arbitration Commission (USSR)
McGill LJ	<i>McGill Law Journal</i>
MDR	<i>Monatschrift für Deutsches Recht</i>
Mealey's Int Arb Rep	<i>Mealey's International Arbitration Reports</i>
Mich L Rev	<i>Michigan Law Review</i>
MLJ	<i>Malayan Law Journal</i>
MLR	<i>Modern Law Review</i>
NILR	<i>Netherlands International Law Review</i>
NJ	<i>Nederlandse Jurisprudentie</i>
NJB	<i>Nederlands Juristenblad</i>
NJW	<i>Neue Juristische Wochenschrift</i>
Nw J Int L & Bus	<i>Northwestern Journal of International Law and Business</i>
NYIL	<i>Netherlands Yearbook of International Law</i>
NYLJ	<i>New York Law Journal</i>
NYU JILP	<i>New York University Journal of International Law and Politics</i>
NYUL Rev	<i>New York University Law Review</i>
NZLR	<i>New Zealand Law Reports</i>
OASTS	<i>Organization of American States Treaty Series</i>
OG	Oberster Gerichtshof (Austria)
OJ ('L' or 'C' series)	<i>Official Journal of the European Communities</i>
OLG	Oberlandesgerichtshof
OPEC (followed by vol no)	OPEC (ed), <i>Selected Documents of the International Petroleum Industry (14 vols, covering the period up to 1978)</i>
ÖZJ	<i>Österreichische Juristen-Zeitung</i>
ÖZöR	<i>Österreichische Zeitschrift für öffentliches Recht</i>

Procedural Detachment in International Arbitration

Pace LR	<i>Pace Law Review</i>
PC	Privy Council (United Kingdom)
PCA	Permanent Court of Arbitration
PCIJ	Publications of the Permanent Court of International Justice: <i>Series A</i> Judgments <i>Series B</i> Advisory Opinions <i>Series A/B</i> Cumulative Collection of Judgments and Advisory Opinions (since 1931)
PID	<i>All Pakistan Legal Decisions</i>
Proc ASIL	<i>Proceedings of the American Society of International Law</i>
QB [KB]	<i>The Law Reports: Queen's [King's] Bench Division</i>
RabelsZ	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
Rass Arb	<i>Rassegna dell'Arbitrato</i>
RBDI	<i>Revue Belge de Droit International</i>
RCDIP	<i>Revue Critique de Droit International Privé</i>
RCEA	<i>Revista de la Corte Española del Arbitraje</i>
RDAI	<i>Revue de Droit des Affaires Internationales</i>
RdC	<i>Recueil des Cours de l'Académie de Droit International de La Haye</i>
RDIC	<i>Revue de Droit International et de Droit Comparé</i>
RdW	<i>Recht der Wirtschaft</i>
REDP	<i>Revue Européenne de Droit Public</i>
Reports	<i>Reports of Judgments and Decisions of the European Court of Human Rights</i> [from 1996]
Rev Arb	<i>Revue de l'Arbitrage</i>
RGDIP	<i>Revue Générale de Droit International</i>
RGZ	<i>Entscheidungen des Reichsgerichts (Germany)</i>
RHDI	<i>Revue Hellénique de Droit International</i>
RIAA	<i>Reports of International Arbitral Awards</i>
RIDC	<i>Revue Internationale de Droit Comparé</i>
Riv DI	<i>Rivista di Diritto Internazionale</i>
Riv DIPP	<i>Rivista di Diritto Internazionale Privato e Processuale</i>
RIW	<i>Recht der Internationalen Wirtschaft</i>
RS	<i>(Nouveau) Recueil Systématique des Lois Fédérales (Switzerland)</i>
RSDIE	<i>Revue Suisse de Droit International et Européen</i>
RTD Civ	<i>Revue Trimestrielle de Droit Civil</i>
RTD Comm	<i>Revue Trimestrielle de Droit Commercial</i>
S	<i>Recueil Général des Lois et des Arrêts fondé par JB Sirey (merged into Dalloz)</i>
SA Merc LJ	<i>South African Mercantile Law Journal</i>

Tables

SALR	<i>South African Law Reports</i>
SC	Supreme Court
SCR	<i>Supreme Court Reports (Canada)</i>
SCt	<i>Supreme Court Reporter (US)</i>
SFS	<i>Svensk Författningssamling</i> (Official collection of Swedish statutes)
SJ	<i>La Semaine Judiciaire</i>
SJZ	<i>Schweizerische Juristen-Zeitung</i>
SLR	<i>Singapore Law Reports</i>
Southw Uni LR	<i>Southwestern University Law Review</i>
SR	Summary Record (in UN Documents)
Supp	Supplement
SZ	<i>Entscheidungen des Österreichischen Oberstes Gerichtshofes in Zivilsachen</i>
TAM	<i>Recueil des Décisions des Tribunaux Arbitraux Mixtes</i>
TC	Tribunal commercial or Tribunal civil or Tribunal cantonal
Tex ILJ	<i>Texas International Law Journal</i>
TF	Tribunal fédéral (Switzerland)
TGI	Tribunal de Grande Instance (France)
TGS	<i>Transactions of the Grotius Society</i>
TPI	Tribunal de Première Instance
Tr Com Fr DIP	<i>Travaux du Comité Français de Droit International Privé</i>
TS	Tribunal Supremo (Spain)
Tul J Int & Comp L	<i>Tulane Journal of International and Comparative Law</i>
Tul LR	<i>Tulane Law Review</i>
TvA	<i>Tijdschrift voor Arbitrage</i>
ULR	<i>Uniform Law Review</i>
UN	United Nations Organization
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL YB	<i>Yearbook of the United Nations Commission on International Trade Law</i>
UNJYB	<i>United Nations Juridical Yearbook</i>
UNTS	<i>United Nations Treaty Series</i>
US	<i>Supreme Court Reporter (United States)</i>
UST	<i>United States Treaties and other International Agreements</i>
Va JIL	<i>Virginia Journal of International Law</i>
WTAM	<i>World Trade and Arbitration Materials</i>
WLR	<i>Weekly Law Reports</i>
WM	<i>Wertpapier Mitteilungen</i>
Yale LJ	<i>Yale Law Journal</i>

Procedural Detachment in International Arbitration

YB	<i>Yearbook of the European Convention on Human Rights</i>
YB PrIL	<i>Yearbook of Private International Law</i>
YBILC	<i>Yearbook of the International Law Commission</i>
YCA	<i>Yearbook Commercial Arbitration</i>
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>
ZfRV	<i>Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht</i>
ZHR	<i>Zeitschrift für das Gesamte Handelsrecht und Wirtschaftsrecht</i>
ZSR	<i>Zeitschrift für Schweizerisches Recht</i>
ZZP	<i>Zeitschrift für Zivilprozess</i>

Αρμ	<i>Αρμενόπουλος [Armenopoulos]</i>
ΑρχΝ	<i>Αρχείο Νομολογίας [Archives of Jurisprudence]</i>
Δ	<i>Δίκη [Dike]</i>
ΔΕΕ	<i>Δελτίο Επιχειρήσεων και Εταιριών [Business and Company Law]</i>
Διαιτ	<i>Διαιτησία [Arbitration]</i>
ΔΦΝ	<i>Δελτίο Φορολογικής Νομοθεσίας [Tax Legislation Bulletin]</i>
ΕΔΔ	<i>Επιθεώρηση Δημοσίου Δικαίου [Public Law Review]</i>
ΕεμπΔ	<i>Επιθεώρηση Εμπορικού Δικαίου [Commercial Law Review]</i>
ΕΕΝ	<i>Εφημερίδα Ελλήνων Νομικών [Greek Jurists' Gazette]</i>
ΕΛΛΔ	<i>Ελληνική Δικαιοσύνη [Hellenic Justice]</i>
ΕΝΔ	<i>Επιθεώρηση Ναυτιλιακού Δικαίου [Maritime Law Review]</i>
Θ	<i>Θέμις [Themis]</i>
ΝοΒ	<i>Νομικό Βήμα [Juridical Tribune]</i>
ΠειρΝ	<i>Πειραιϊκή Νομολογία [Bulletin of the Piraeus Bar Association]</i>
ΤοΣ	<i>Το Σύνταγμα [The Constitution]</i>

LEGISLATION FREQUENTLY CITED BY ABBREVIATED NAME

CJ	Code Judiciaire (Belgium)
Concordat	Concordat sur l'Arbitrage (Switzerland)
CPR	Civil Procedure Rules 1998 (SI 1998/3132, as amended) (England)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, as amended)
European Arbitration Convention	European Convention on International Commercial Arbitration (Geneva, 21 April 1961)
Geneva Convention	Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September

Tables

	1927)
Geneva Protocol	Protocol on Arbitration Clauses (Geneva, 24 September 1923)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 18 March 1965)
Inter-American Convention	Inter-American Convention on International Commercial Arbitration (Panama, 30 January 1975)
LDIP	Loi fédéral sur le Droit International Privé (Switzerland)
Model Law	UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985), Annex I, <i>reproduced in</i> (1985) 24 ILM 1302*
NCPC	Nouveau Code de Procédure Civile (France)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
RSC	Rules of the Supreme Court (England)
ZPO	Zivilprozeßordnung (Germany)

* At the time of writing the Model Law had been enacted by 34 states. The UNCITRAL Status of Conventions and Model Laws (1 June 2000), <<http://www.uncitral.org>>, at 14, gives 33 states (including Scotland, Texas, and Florida), but to those should be added Greece. Croatia and Poland are in the process of preparing enacting legislation.

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- Convention for the Pacific Settlement of International Disputes (The Hague, 29 July 1899), (1898-1899) 189 CTS 410, (1898-1899) 91 BFSP 970, (1907) 1 AJIL Supp 107, 26 *Martens 2nd* 920
- Convention for the Pacific Settlement of International Disputes (The Hague, 18 October 1907), (1907) 205 CTS 234, (1906-1907) 100 BFSP 298, (1908) 2 AJIL Supp 43, 3 *Martens 3rd* 360
- Protocol on Arbitration Clauses (Geneva, 24 September 1923), (1924) 27 LNTS 157, (1923) 17 BFSP 446, (1923) 20 AJIL Supp 194
- Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927), (1929) 92 LNTS 301, (1927) 126 BFSP 433, (1930) 27 AJIL Supp 1
- Statute of the International Institute for the Unification of Private Law (Rome, 15 March 1940, as amended), 15 UST 2494
- Charter of the United Nations Organization (San Francisco, 26 June 1945)
- Statute of the International Court of Justice (San Francisco, 26 June 1945), *reprinted in ICJ, Acts and Documents concerning the Organization of the Court* (Sales No 575, 1989) 59
- Convention on Privileges and Immunities of the United Nations (Lake Success, 13 February 1946), UN Doc A/RES/22 A (I), (1946) 1 UNTS 15
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- Statute of the Administrative Tribunal of the ILO (1946, as amended), <<http://www.ilo.org>>
- Convention on Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), UN Doc A/RES/179 (II), (1949) 33 UNTS 261
- Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), (1955) 213 UNTS 221, as subsequently amended
- Convention on the Settlement of Matters arising out of the War and the Occupation (Bonn, 26 May 1952, as amended by Protocol signed at Paris, 23 October 1954), (1959) 332 UNTS 219 (UK-France-US-Germany)
- Treaty establishing the European Community (Rome, 25 March 1957, as amended), [1997] OJ C340/173 (consolidated version)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), (1959) 330 UNTS 3, Cmnd 3655, (1970) 21 UST 2517
- Convention relative à la création d'une Agence chargée de gérer les Installations et Services destinés à assurer la Sécurité de la Navigation Aérienne en Afrique et à Madagascar (Saint-Louis, 12 December 1959), [1960] JO 5416
- European Convention on International Commercial Arbitration (Geneva, 21 April 1961), (1964) 484 UNTS 349, [1961] Rev Arb 196, [1961] Unidroit YB 409
- Protocol on the Privileges and Immunities of the European Launcher Development Organization (London, 29 June 1964), (1967) 605 UNTS 370
- Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 18 March 1965), (1966) 575 UNTS 159
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- International Covenant on Civil and Political Rights, GA Res 2200A (XXI) (16 December 1966), (1976) 999 UNTS 171
- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968), [1998] OJ L27/1-27 (consolidated text)
- Convention on the Law of Treaties (Vienna, 22 May 1969), (1980) 1155 UNTS 331
- American Convention on Human Rights ('Pact of San José') (San José, 22 November 1969), (1979) 1144 UNTS 144
- Convention on Special Missions (New York, 8 December 1969), (1985) 1400 UNTS 231

Tables

- Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 18 March 1970), (1972) 847 UNTS 231
- Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (The Hague, 1 February 1971), (1979) 1144 UNTS 249
- European Convention on State Immunity (Basle, 16 May 1972), ETS No 74, (1972) 11 ILM 470
- Convention on the Settlement by Arbitration of Civil Law Disputes arising out of Economic, Scientific and Technical Co-operation Relationships (Moscow, 26 May 1972), (1973) UNTS 167, (1974) 13 ILM 5
- Inter-American Convention on the Taking of Evidence Abroad (Panama City, 30 January 1975), (1986) 1437 UNTS 385, OASTS No 44, *reprinted in* (1975) 14 ILM 336
- Convention for the Establishment of a European Space Agency (Paris, 30 May 1975), (1987) 1297 UNTS 161
- Agreement regarding the Status, the Privileges and Immunities of the Tribunal of Arbitration established pursuant to the *compromis* signed in Washington on 11 July 1978 (Berne, 6 December 1978), (1980) 1204 UNTS 53 (USA-France-Switzerland)
- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo, 8 May 1979), (1986) 1439 UNTS 87, OASTS No 51, *reprinted in* (1979) 18 ILM 1224
- United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), (1988) 1489 UNTS 3
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- Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (La Paz, 24 May 1984), OASTS No 64
- Exchange of Notes constituting an Agreement concerning the Status, the Privileges and Immunities of the Arbitration Tribunal in connection with the France-Canada Case of *La Bretagne* (Berne, 2 June 1986), (1987) 1484 UNTS 112 (France-Canada-Switzerland)
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- Treaty on European Union (Maastricht, 7 February 1992, as amended), [1997] OJ C340/145
- Traité relatif à l'Harmonisation du Droit des Affaires en Afrique (Port Louis, 17 October 1993), <http://www.refer.org/camer_ct/eco/ecohada/ohada0.htm>
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- Convention respecting Jurisdiction and the Execution of Civil Judgments (Paris, 15 June 1869), (1869) 139 CTS 329 (France-Switzerland)
- Treaty of Friendship, Commerce and Navigation (Washington, 29 October 1954), (1954) 253 UNTS 89 (US-Germany)

Procedural Detachment in International Arbitration

- Agreement concerning the Legal Status of the European Organization for Nuclear Research (Geneva, 11 June 1955), (1956) 249 UNTS 405 (Switzerland-CERN)
- Compromis in Diverted Cargoes*, 12 RIAA 51, 243 UNTS 74 (ad hoc, 1955)
- Agreement concerning the Status of the UN Emergency Force in Egypt (New York, 8 February 1957), (1958) 260 UNTS 261 (UN-Egypt)
- Convention concerning the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Authentic Acts in Civil and Commercial Matters (Vienna, 16 June 1959), (1962) 419 UNTS 45 (Belgium-Austria)
- Convention on the Reciprocal Recognition of Judicial Decisions (Athens, 4 November 1961) (Federal Republic of Germany-Greece), Act 4305/1963, [1963] Government Gazette No A78
- Declaration of Principles on Co-operation for the Exploration of the Wealth of the Saharan Subsoil, being part of the Exchange of Letters and Declarations adopted on 19 March 1962, constituting an Agreement between France and Algeria (Paris and Rocher Noir, 3 July 1962), (1964) 507 UNTS 25
- Accord en matière d'Arbitrage (26 June 1963) (France-Algeria), implemented by Decree No 63-889, [1963] JO 7964, [1963] S 287
- Agreement concerning the International Arbitral Tribunal on the Gut Dam Claims (Ottawa, 25 March 1965), (1967) 607 UNTS 141 (US-Canada)
- Agreement concerning the Settlement of Questions relating to Hydrocarbons and the Industrial Development of Algeria (Algiers, 29 July 1965), (1970) 739 UNTS 243, (1965) 4 ILM 809 (France-Algeria)
- Convention on the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Authentic Acts in Civil and Commercial Matters (Paris, 28 May 1969), (1970) 746 UNTS 183 (France-Spain)
- Treaty Concerning the Reciprocal Recognition and Enforcement of Judicial Decisions and other Executory Instruments (Oslo, 17 June 1977), (1983) 1320 UNTS 37, 61 (Germany-Norway)
- Declaration of the Government of the Democratic and Popular Republic of Algeria, (1981) 20 ILM 223, 1 Iran-US CTR 3, [1981] Dept St Bull 1 (February 1981)
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- Exchange of Notes (27 March 1983), (1984) 111 JDI 969, with annexed Rules of Arbitration (also in [1986] Rev Arb 311) (France-Algeria)
- Traité concernant la Construction et l'Exploitation par des Sociétés Privées Concessionnaires d'une Liaison Fixe Transmanche (Canterbury, 12 February 1986), (1987) RGDIP 1395 (UK-France)
- Agreement concerning a Scottish Trial in the Netherlands (18 September 1998) (Netherlands-UK), *reprinted in* (1999) 38 ILM 926

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- Australia-China BIT (Beijing, 11 July 1989), (1990) 7:1 News from ICSID 3
- Australia-Vietnam BIT (Canberra, 5 March 1991), (1991) 30 ILM 1064
- Belgium-Luxembourg Economic Union – China BIT (Protocol to) (Brussels, 4 June 1984), (1984) 24 ILM 538
- Denmark-China BIT (Beijing, 29 April 1985), (1986) 1443 UNTS 84
- France-China BIT (Paris, 30 May 1984), (1985) 24 ILM 550
- France-Jordan BIT (Paris, 23 February 1978), (1980) 1158 UNTS 312
- France-Liberia BIT (Paris, 23 March 1979), (1983) 1306 UNTS 306
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- France-Paraguay BIT (Asunción, 30 November 1978), (1981) 1214 UNTS 243
- France-Syria BIT (Damascus, 28 November 1978), (1981) 1214 UNTS 195
- Germany-China BIT (Protocol to) (Beijing, 7 October 1983), (1987) 1475 UNTS 262
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- Greece-Albania BIT (Tirana, 1 August 1991), [1992] Government Gazette No A121
- Netherlands-China BIT (The Hague, 17 June 1985), (1987) 1459 UNTS 29
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Tables

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Tables

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Procedural Detachment in International Arbitration

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Tables

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Greece

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AP (Full Bench) 899/1985, (1985) 33 ΝοΒ 1399, (1985) 26 ΕλλΔ 1124, (1985) 52 ΕΕΝ 869, (1987) 18 Δ 501, note Panagopoulos, (1986) 39 RHDI 511
AP 1466/1983, (1983) 31 ΝοΒ 840
AP 1502/1995, (1996) 2 ΔΕΕ 846
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AP 250/1990, (1990) 57 ΕΕΝ 717
AP 301/1992, (1993) 41 ΝοΒ 866
AP 310/1983 (unreported)
AP 356/1991, (1993) 44 ΕΕμπΔ 386
AP 565/1965, (1966) 33 ΕΕΝ 666
AP 71/1995, (1995) 1 ΔΕΕ 1098, note Dimolitsa
AP 830/1972, (1973) 21 ΝοΒ 202, (1973) 14 ΕλλΔ 461
AP 91/1993, (1996) 2 ΔΕΕ 781, noted by Foustoucos, *ibid* 779
AP 954/1984, (1985) 33 ΝοΒ 629, (1985) 26 ΕλλΔ 34, (1985) 52 ΕΕΝ 477
AP 981/1992, (1993) 60 ΕΕΝ 684
CA Athens 2712/1978, (1979) 27 ΝοΒ 421, note Verveniotis
CA Athens 3991/1983, (1983) 36 Αρμ 650
CA Athens 4168/1982, (1982) 13 Δ 689
CA Athens 4458/1984, (1984) 32 ΝοΒ 1130, (1984) 51 ΕΕΝ 461, (1989) 14 YCA 638
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CA Piraeus 635/1981, (1982) 10 ΕΝΔ 213
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Council of State (Full Bench) 1793/1991, (1992) 40 ΝοΒ 779, (1992) 33 ΕλλΔ 453, (1991) 35 ΕΕΔ 404, (1991) 42 ΑρχΝ 348
Council of State (Full Bench) 3132/1989, (1989) 38 ΝοΒ 167
Council of State 199/1995, (1995) 49 ΔΦΝ 1380
Extraordinary Supreme Court 24/1993, (1994) 2 Dike International 184, note Beys, (1994) 35 ΕλλΔ 314, (1994) 25 Δ 12
Multi-Member CFI Athens 121/1963, (1965) 13 RHDI 460
Multi-Member CFI Athens 13988/1984, (1985) 34 ΝοΒ 95
Multi-Member CFI Athens 1713/1971, (1971) 22 ΕΕμπΔ 350
Multi-Member CFI Athens 2283/1957, (1957) 5 ΝοΒ 891, (1958) 11 RHDI

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Procedural Detachment in International Arbitration

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 ICC 6401/1991, (1996) 126 JDI 1055, note Hascher

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ICC 8502/1997 (unreported)
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ICC 8878/1997, (2000) 11:1 ICC Bull 91
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ICC 8938/1996, (1999) 24a YCA 174
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ICC 9744/1999 (unreported)
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Procedural Detachment in International Arbitration

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Procedural Detachment in International Arbitration

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- UNIDROIT Draft of an International Law on Arbitration, LoN Doc SDN-UDP 1936-ETUDES:III-ARBITRAGE DOC.23 (1936)
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Introduction

I. THE AREA OF INQUIRY: INTERNATIONAL COMMERCIAL ARBITRATION

This thesis seeks to ascertain the rules of private international law determining the procedural law of international commercial arbitral proceedings.¹ Each one of the three components of ‘international commercial arbitration’ can be (and indeed has been) the object of a monograph in its own right.² Thus, the following conventions are proposed to the reader for the purposes of this work. First, arbitration will mean ‘the process [*institution*] whereby a third party determines a dispute between two or more parties in exercise of a jurisdictional function entrusted to that third party’.³ The jurisdictional function entrusted to the arbitrator, the binding force of his pronouncement, distinguishes arbitration from kindred alternative means of dispute settlement akin to arbitration: expert valuation, conciliation, ‘mini-arbitration’, and so forth. Secondly, the definition of internationality in the Model Law can be taken as commonly accepted. Article 1(3) defines international arbitration as one where:⁴

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Note that the Model Law uses objective criteria related to the parties to the dispute,⁵ presuming that in such cases the arbitration as a whole process will have links with a number of municipal laws. But it adds the purely voluntary criterion of submission to that law, in subparagraph (3)(c).⁶

¹ Thus, when reference is made to ‘arbitration’ or ‘international arbitration’, it is shorthand for ‘international commercial arbitration’.

² See further Gaillard & Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 1-61.

³ Jarrosson, *La Notion d'Arbitrage* (1987) 372.

⁴ Article 1(3)(a)-(b) is followed by, eg, CCP (Italy), Article 832(1).

⁵ Thus also LDIP, Article 176(1) (the domicile or habitual residual of at least one of the parties is not in Switzerland).

⁶ The historical antecedent of the provision was the 1936 UNIDROIT Draft International Law on Arbitration, Article 1(4).

French law and its followers employ a so called '*critère économique*' which results in a sometimes broader, sometimes narrower area of coverage. An arbitration is international if it 'implicates the interests of international commerce' (*qui met en cause des intérêts du commerce international*).⁷ Finally, the European Arbitration Convention requires the concurrence of both criteria, economic and subjective internationality, outlined above.⁸ It is important to bear in mind that not all laws provide for a discrete category of 'international' arbitration. Far more often, municipal law will distinguish between arbitrations whose entire life falls within the ambit of that law (hence domestic arbitrations) and foreign arbitrations in respect of which that law will apply only exceptionally, and essentially on the enforcement of awards. But the difference between these two distinctions is that an international arbitration is already an arbitration within the scope of a given law—and thus a domestic arbitration. In other words, 'international' denotes a specificity which warrants somewhat different treatment from wholly domestic proceedings.⁹

The definitions above draw in broad brushes the area of inquiry, and outline the fundamental conceptual difficulty in international arbitration. Namely, that the state in which the tribunal sits—the seat of the tribunal—has no predestined attachment with the arbitral process as a whole, that is, the underlying dispute, the substantive law applicable to that dispute, the parties, or the arbitrators. And by contrast with international litigation, that state has not invited the parties to its courts—in fact, the parties have by resorting to arbitration excluded the jurisdiction of any and all courts on the merits.

Finally, the commercial character of an arbitration is closely connected with questions of (objective) arbitrability, since it depends on the nature of the underlying dispute and the remedies requested. It is clear that the legal foundation of a claim, that is, whether it be framed in contract, tort or restitution law terms, is irrelevant to this inquiry; for the underlying dispute may well be of a commercial nature. It is equally clear, on the other hand, that only civil law remedies (that is, specific performance, rescission, or monetary compensation) may be awarded by arbitrators. The arbitrator has no *imperium*, and penal jurisdiction is the prerogative of states. But there is a substantial grey zone of disputes which, though arising from contractual arrangements, relate to the exercise of sovereign power—tax disputes and large-scale infrastructure projects being good examples. The matter resists generalization, in that the answers called for in terms of arbitrability and sovereign immunity depend on the law(s) applicable. But for present purposes suffice it to agree on the rule on arbitrability of the Swiss Federal Act on Private International Law, according to which 'any dispute involving property' (*de nature patrimoniale*) will be arbitrable.¹⁰ This should be read in the light of the note to Article 1(1) of the Model Law, drafted in the following terms:

The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of

⁷ NCPC, Article 1492. The following laws follow the French example: Act 31/1986 (Portugal), Article 32; CCP (Lebanon), Article 809; Code of International Arbitration (Djibouti), Article 1. For a critique see Lousouarn & Bredin, *Droit du Commerce International* (1969) 494-5.

⁸ See European Convention on International Commercial Arbitration (Geneva, 21 April 1961), (1964) 484 UNTS 349 (hereafter the 'European Arbitration Convention'), Article I(1)(a).

⁹ See Goldman, [1980] Rev Arb 341; Fouchard, [1970] Rev Arb 59; Schlosser, (1982) 28 RIW 857.

¹⁰ LDIP, Article 177(1).

works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

After that guideline, Article 1(5) of the Model Law goes on to permit each implementing state to exclude from its scope of application all disputes which are not, in that state, arbitrable, or arbitrable only subject to statutory conditions. This thesis therefore makes no pretension to a comparative overview of arbitrable matters, and applicable law restrictions to arbitrability are not meant to be swept away by the definitions accepted above.

Of course, this applies *mutatis mutandis* to all of the above conventions. The legal significance, if any, of 'internationality' is a matter for the relevant law(s), which must consequently set out definitions for such notions. But to establish a common ground in discussing which is, indeed, that relevant law, certain presuppositions must exist, which will naturally carry no normative value whatever.¹¹

II. THE OBJECT OF INQUIRY

A. The Elements of the *Lex Arbitri*

It has always been a vexed question which law supplies the *lex fori* of the arbitrator, or the *lex arbitri*. Anticipating the discussion in Chapter 1, there are three possible solutions (though with more than one foundation for each one): either the law of the seat, or the law chosen by the parties or the arbitrators (in its entirety or by way of *dépeçage*), or no law as such but only rules contractually made up by the parties. But what is the *lex fori* generally? Oversimplifying, the *lex fori* is the frame of reference for an adjudicator, providing:

- (i) rules of international jurisdiction and domestic competence;
- (ii) rules of admissibility of claims;
- (iii) rules of characterization;
- (iv) rules to determine the law applicable to the merits;
- (v) rules on the conduct of the proceedings and the co-ordination with other jurisdictions;
- (vi) rules on external supervision and related remedies, and thus indirectly rules on validity and finality of judgments; and
- (vii) rules on execution.

Most of the functions of the *lex fori* are directly 'decisional', in that they determine how a decision will be reached and its contents (see (i)-(v)), while a few others are indirectly decisional, in that they only indirectly contain a command or decisional rule (see (vi): 'For your judgment to be valid no ground of appeal must be found in your judgment'), and others still non-decisional, in that they only relate to implementation (see (vii)).

So the *lex fori* functions as the interface between facts and rules, and in such function it is of catholic and exclusive application: nothing may be decided outside the framework of the *lex fori*, and everything is regulated by the *lex fori* and that alone.¹² In a private international law context, where there are foreign elements extant, the *lex fori* is logically the only viable mechanism that

¹¹ Though the analogy may not be carried too far, this is similar to a preliminary characterization of given facts, say 'contract', as a necessary step towards determining the law which will finally determine whether there exists a contract at all.

¹² If authority were required for that elementary proposition see Kahn-Freund, (1974-II) 143 RdC 130, 167. See further Szászy, (1966) 15 ICLQ 436.

makes a case proper for consideration by the courts of a given state. Two observations follow. First, the *lex fori* is merely a convenient label for a number of inter-connected rules that form an organizing principle. However, although the composites of the *lex fori* are not immutable in any sense, the concept of a *lex fori* as such is one of fundamental juristic logic.¹³ Second, and as a result of the first observation, the *lex arbitri* does not have to originate in a single legal system. State courts of course have a *lex fori* carved in stone, for it is under that *lex fori* that they are empowered to decide with binding force. But that does not have to, though it may, be the same for private international tribunals.

That last proposition is impeccable from a logical standpoint, but attracts a policy objection. The benefit of having a *lex fori* is predictability. If the ground rules between the court and the parties are not known in advance, there is no code of communication and no legal certainty. This is certainly a valid point, but arbitration must be seen as a two-way process. The decisional framework is informed by the interaction between the parties and the tribunal, and to that extent the ground rules are created in advance, or at least they should be so to ensure a fair hearing to the parties.

However that may be, it must be clarified that the *lex arbitri* breaks down to three essential components: the law determining jurisdiction; the law of the merits; and the law applicable to procedure.¹⁴ Again, without a single overarching frame of reference, the characterization of each discrete issue becomes problematic. The principle was aptly stated by Toulson J in a very recent case:¹⁵

Arbitration law is all about a particular method of resolving disputes. Its substance and processes are closely intertwined. The Arbitration Act contains various provisions which could not readily be separated into boxes labelled substantive arbitration law or procedural law, because that would be an artificial division.

Suppose that the law applicable to the substance has been determined and the issue is whether the claim is time-barred. Is this a matter for that law, is it a procedural issue, or is it, finally, a matter which the law of the seat unilaterally determines to be within its own spatial field of application regardless of qualification? The example illustrates the difference between a court and an international arbitral tribunal. Characterization performs the function of delimiting the scope of operation of the various conflicts rules and operates at a prior level than conflicts rules. Without a *lex fori* in an all-embracing sense (which would contain characterization rules), some other measure for the application of the law would have to be devised. That measure would have to weigh the laws unilaterally seeking application; and it could be based on the policy each one of those laws serves and the objective links it has with the dispute. Arbitral practice is consistent in seek-

¹³ 'In order to decide in a principled way, an adjudicator requires ... an explanation of the source of his powers and a method of establishing the rules and principles in terms of which the tribunal will adjudicate': von Mehren & Jiménez de Aréchaga, (1989) 63i Ann IDI 191, 193.

¹⁴ See Redfern & Hunter, *Law and Practice* (3rd edn, 1999) ch 2 (who, however, concede that the law of the situs performs *lex arbitri* functions: *ibid* 83-4); Mustill & Boyd, *The Law and Practice* (2nd edn, 1989) 59-86 (who add to the list the proper law of the reference, which might encompass issues relating both to jurisdiction and procedure: *ibid* 63-4). Cf from another perspective *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446, 454-5.

¹⁵ *XL Insurance Ltd v Owens Corning* (28 July 1999).

ing to ascertain the protective purpose and scope of the provision in question, and whether it has a sufficient appropriate connection with the dispute.¹⁶

This is a glaringly inexact science, but the uncertainty should not be exaggerated. Municipal law does not contain rules of characterization as such. It is more often the judge who ascertains them, by reference to the policy objectives behind the substantive rule seeking application. Thus, it is a matter of appreciation whether the civil or religious form of celebration is a condition of form subject to the *lex celebrationis* or a material law condition subject to the personal law of each spouse. Sometimes the conflicts rule will be accompanied by a rule delimiting that rule's scope, thereby indirectly characterizing the subject-matter. Such is the rule contained in Article 10(1)(d) of the 1980 Rome Convention, which makes limitation a matter subject to the law of the contract.¹⁷ Still another way is through a unilateral rule of spatial application, such as under the now abrogated Limitation Act 1980.¹⁸ Now all this shows that the conflictual technique in private international law is not the sole means of reasoning. The judge will sometimes have to apply rules unilaterally seeking application.¹⁹ Such rules operate outside the conflictual methodology and, instead, apply by virtue of a unilaterally defined field of application and the imperative purpose that they serve (*lois de police* or *lois d'application immédiate*, though the terminology fluctuates).²⁰

The difference between the judge and the arbitrator is this. The unilaterally applicable rules (substantive or of characterization) that the judge is called upon to apply are the ones applicable in virtue of his own law: the only standard is whether his law obliges him to apply any given rule. By contrast (and lest it be accepted that he does indeed have a global *lex arbitri*), the arbitrator must devise some other standard for choice-of-law. There are three perspectives here: that of the parties and the arbitrator; that of the law of the seat; and that of the enforcement forum(-a). But all this can be encapsulated in two criteria, which may conflict with each other: the legitimate expectations of the parties and the effectiveness of the arbitral award.

What has been said above also demonstrates that the exigencies of arbitral practice may make the normal *lex fori* conception irrelevant. The purpose behind any arbitration agreement is to avoid litigating in (and the procedural and other particularities of) the courts. On the other hand, the parties seek an effective dispute resolution mechanism coupled with certain procedural guarantees, essentially an equal hearing, impartiality, and prompt liquidation of the dispute. It follows that the parties cannot be presumed to have intended to import wholesale the law of any particular state as the *lex arbitri*, not even that of the seat. It also follows that a state that does impose its law in an unadulterated form to international arbitral proceedings has no appropriate sufficient connection, as a matter of international law, to do so. If one examines that proposition from the point of view of legitimate expectations and effectiveness, the same result is yielded. Suppose that a dispute between a Greek football club and a player is brought before the Court of Arbitration for Sport in Lausanne. An objection of inarbitrability is thrown out, on the grounds that Swiss law

¹⁶ The methodology applies both to arbitrability (see ICC 6320/1992, (1995) 6:1 ICC Bull 59, 61) and the merits (see Amsterdam Grain Association Award of 11 January 1982, (1983) 8 YCA 158, sub [3]).

¹⁷ See Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980, as amended), Article 10(1)(d).

¹⁸ See Limitation Act 1980, ss 1(1), 5, 34(1); Arbitration Act 1954 (Ireland), s 42. Cf now Foreign Limitation Periods Act 1984, s 1(1); Arbitration Act 1996, s 13.

¹⁹ See Rome Convention, above, note 17, Article 7; Code Civil (France), Article 3(1).

²⁰ Francescakis, who re-discovered the concepts, initially insisted on the first criterion (Francescakis, *La Théorie du Renvoi* (1958) 11-6; and de Nova, (1966) 54 Cal L Rev 1569), but then added the second ((1966) 55 RCDIP 1).

permits the agreement, and by its own terms it is the only relevant law.²¹ However, Greek courts may take the view that this is a labour dispute, non-arbitrable by Greek law, and refuse enforcement.²² If on the other hand the tribunal declines jurisdiction, the award will certainly be annulled on jurisdictional grounds (*infra petita*).²³

These remarks illustrate the point that the validity of an award is a relative matter. Saying that an award has been ‘correct’ always begs the question: by what standards? The better test is perhaps whether an award is *proper*, taking account of the desiderata of legitimate expectations and effectiveness. Determining propriety in those terms is a careful balancing exercise between all the legal systems that may have an interest in, and a legal basis for, for intervening. To take an example from jurisdiction again, suppose an arbitral tribunal sitting in Urbania, in a dispute between a Ruritanian private party and a Utopian state enterprise. A Utopian national sits on the tribunal. If the Utopian party disputes the validity of the clause in Utopian courts (say, because the agreement to arbitrate required the assent of the government, which was not obtained) and wins, it may also obtain a restraining order against the members of the tribunal. The Utopian arbitrator is subject to the jurisdiction of those courts, and may be liable for contempt of court if he proceeds. Now, even if the tribunal finds that the agreement to arbitrate was proper as a matter of the law applicable to it (say, because it was governed by another law) or that the Utopian party is estopped from asserting the invalidity of the agreement, this will not resolve the problem for the Utopian arbitrator.²⁴ If the arbitrator can be replaced by a non-national, the award will still be unenforceable in Utopia (because the judgment on invalidity will be *res judicata* there).

To carry the discussion further: suppose that an arbitrator sitting in England in a dispute between a US and a Finnish party on a contract governed by New York law is requested to award treble damages for breach of US antitrust law.²⁵ Is the arbitrator bound by English law precedents according to which the reach of the US legislation is purely territorial²⁶—or is he to follow the command implicit in the *Mitsubishi* judgment, that an arbitral tribunal sitting abroad must afford the protection of US law whenever that protection is due under *that law*?²⁷

The point to make therefore is that admitting of a single, global *lex arbitri* can be simplistic. It makes life easier and more predictable, but it may result in an award falling short of party expectations and unenforceable where enforcement would matter. The international arbitrator should be conscious of the complex conflicts of jurisdictions that may arise. Resolving such conflicts becomes a very complex exercise when the issue goes to the jurisdiction of the arbitrator, but it is perhaps more straightforward in procedural matters and certainly so in substantive law matters. The balancing of various potentially applicable laws by a non-conflictual test, that is, by a test which is purpose- and efficiency-oriented, seems even more appropriate in arbitration than it would be in other areas of private international law. For the particularity of municipal arbitration laws is that they (a) define their field of application unilaterally; (b) only exceptionally do they

²¹ See above, text to note 10.

²² See CCP (Greece), Article 663(4) *juncto* New York Convention, Article V(2)(a). And, similarly, *quære* if a finding by Greek courts is *res judicata* for the arbitral tribunal.

²³ LDIP, Article 190(2)(b).

²⁴ For dramatic examples see *Himpurna California Energy Ltd (Bermuda) v Indonesia*, (2000) 12:2 WTAM 183, 252-66 (interim, ad hoc, 1999); Kerr, (1997) 13 Arb Int 121, sub X(b).

²⁵ See 15 USC § 15(a).

²⁶ *British Airways Board v Laker Airways Ltd* [1985] AC 58 (HL).

²⁷ See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

permit the application of another law,²⁸ and certainly not in procedural matters; and (c) put in place courts to enforce that law. In other words, court jurisdiction is concurrent with legislative jurisdiction. Unlike other areas of private international law where the law applicable is only one consideration for the creation of the conflicts rule (jurisdiction *in rem* and tort being examples of that), arbitration statutes run the two concepts, court jurisdiction and law applicable, together—the functions of the courts being to police the application of their own law. So the problem can be restated thus: are the courts of state X in a position to influence the proceedings and to what extent, if at all, should that be taken into account? The answer to that question would automatically solve any issues of characterization too, for the applicability *vel non* of the candidate rule would not depend on any characterization by the arbitral tribunal or the law concerned, but on two questions: is the question before the arbitral tribunal within the scope of application of a national law rule and, if so, what weight should be given to that rule?

Now the wider point is that it is simplistic to distinguish between issues going to jurisdiction, the merits, and procedure. For these are in effect *groups* encompassing issues properly falling to be determined by different laws. Thus, within jurisdiction come questions to be determined by the proper law of the contract, but also questions of objective arbitrability which may involve the application, or at least the consideration, of other laws. However, it is good to bear the distinction in mind for pedagogical purposes and also because issues going to the jurisdiction of the arbitrator are subject to a different methodology than procedural and choice-of-law issues. Moreover, on that distinction are premised basic principles, such as that a choice-of-law clause (eg: This agreement is governed by and construed in accordance with Urbanian law') will be presumed to cover the arbitration agreement too (which remains, however, ancillary and conceptually separate from the main contract), but will have no impact on procedure. In real life, though, the arbitrator is obliged to look at unilateral conflicts rules (eg: 'Urbanian law applies to all arbitrations in Urbanian territory') and international unilateral substantive rules (eg: 'No Urbanian entity may arbitrate in a foreign state') and find a measure for their application. In fact, the arbitrator may apply any domestic rule or legal system upon recognizing and evaluating its title, unilaterally proclaimed, to apply. In that light, the *lex arbitri* is by definition non-unitary or fragmented, not only by subject-matter (jurisdiction, merits, procedure) but also by provenance.

Of course, the appropriate solution to all these problems would be to unify the law, thereby making jurisdictional conflicts redundant. The Model Law, which had at the time of writing been adopted in one form or another by 34 states, is a significant attempt in that direction. Moreover, in the last two decades a number of municipal laws have been amended to take account of modern arbitral practice (and attract more of it, one would add). However, particularities persist, and for the time being the only way to by-pass them is through a careful juggling of the legal systems having a stake in the arbitral process.

B. *Lex Arbitri* Considerations in the Laws Applicable to Substance and Procedure

International arbitration is in a very physical sense peripatetic and in a conceptual sense not necessarily attached to the law of the state in which the proceedings take place. Admitting a certain law as the exclusive (ie, both unique and global) *lex arbitri* cannot be based on any suppositions relevant to municipal courts. To complicate matters further, breaking down the *lex arbitri* to substantive choice-of-law rules, rules of jurisdiction, and procedural rules shows that the dynamics of each branch are quite different. Substantive law has to a great extent ceased to be a contentious

²⁸ eg, to determine the essential validity of the agreement to arbitrate, but not arbitrability.

matter in international arbitration. This is because the finding on the merits is only exceptionally reviewable as an annulment ground, an immunity which covers the process of selection of that law too. Moreover, the conflicts rules in commercial matters (contracts in general, important nominate contracts, and tort) are to a great extent unified. Further still, the law of sales of goods is unified in the Convention for the International Sale of Goods.²⁹ The two remaining areas of dispute are, first, the applicability of the so-called *lex mercatoria* and, second, the limits of party autonomy. (The former issue is arbitration-specific, the latter of general private international law too.)

The considerations affecting the law(s) applicable to arbitral jurisdiction are very different in nature, in that they are expressive of so-called ‘positive conflicts of jurisdictions’—that is, conflicts arising out of the overlapping coverage of a number of laws. Jurisdictional issues comprise for instance the validity of the arbitration agreement as a matter of contract law; objective and subjective arbitrability; the form and content of the agreement to arbitrate; the competence of the arbitrator to rule on his own competence (*compétence de la compétence* or *Kompetenz-Kompetenz*); the separability of the arbitration clause; multiple parties and joinder; and the propriety of hearing the case.

It is not suggested that any distinction between substance, jurisdiction and procedure can be water-tight. Again, that would be a characterization for the law applicable, and in the model proposed in this thesis irrelevant. Merely to illustrate the point, the composition of the tribunal and the powers of arbitrators do have a procedural flavour and have occasionally been characterized as procedural.³⁰ However, legitimate expectations and effectiveness are considerations relevant both to jurisdiction and substance, although the specific circumstances influencing their application differ. Dr Grigera-Naón has demonstrated with particular vigour the veracity of the general proposition for the choice-of-law system created by arbitrators to determine the law applicable to the merits.³¹

The purpose of this thesis is to determine the limits of procedural autonomy, that is, the freedom of the parties and/or the tribunal to shape the procedural régime of arbitral proceedings. As will be seen in Chapters 1 and 2, such procedural autonomy can be expressed as an antithesis: the law of the parties or the law of the seat of the arbitration?

Let it be clarified at the outset that the issue must, from the point of view of the arbitral tribunal, be formulated in one, and only one, way: is the tribunal obliged to apply the procedural rules having peremptory force in any one legal system? One is *not* concerned with the possibility of derogating from dispositive rules (by applying the law of a third state, or mere contractual stipulations) or, which is the same, with the limits to such freedom under a given law. For if the mandatory provisions of a given law are respected, that law has applied. In other words, we are here examining the possibility of a sovereign choice of law, which in consequence displaces all other law. (And the same applies *mutatis mutandis* to the possibility to submit the procedural régime to a procedural *lex mercatoria*.)

²⁹ United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), (1988) 1489 UNTS 3. See further this author, (1999) 52 RHDI 191.

³⁰ See New York Convention, Article V(1)(d): ‘composition or arbitral procedure’; TF, 102 Ia ATF 574, 577-8: jurisdiction of arbitrator directly results in making a person party to the proceedings, the latter being a procedural question.

³¹ See Grigera Naón, *Choice-of-Law Problems* (1992) 39-113. See also Lalive, [1976] Rev Arb 155; Derains, [1972] Rev Arb 99; Zhilsov, (1995) 42 Neth ILR 81, 107-9.

The final point to be made here is an illustration of the questions falling under the head of 'procedure'. A broad definition would encompass the powers of the arbitrator in the course of conducting the proceedings, excluding the power to decide the merits and the source of its powers. To go further than that without a precise frame of reference would beg the question, for it is part of the inquiry to determine how the arbitrator determines what falls within 'procedure'. A number of issues will be in the grey area between competence and procedure, especially as these two notions are inextricably bound together in Codes of Civil Procedure. For instance, an objection of lack of jurisdiction materializes through procedural rules defining the precise stage of the process in which it must be raised. Still, it is useful to give a non-exhaustive list.

The following questions would be procedural for the purposes of determining the area of inquiry:

- (1) Capacity to be a party and *locus standi* (though that is affected by substantive law too).
- (2) The composition of the tribunal.
- (3) Evidential matters (discovery and related rules; power of tribunal to order the production of evidence; admissibility of evidence; burden of proof; power to determine the probative value of evidence; formalities in the presentation of evidence; etc).
- (4) The effects of non-appearance of a party.
- (5) Representation of the parties.
- (6) Interim relief: whether the arbitrator has competence to grant such relief; if so the form of relief to be granted; and limits of court intervention (though these are questions of jurisdiction too).
- (7) The mode of deliberations.
- (8) Making of the award (time limits; formalities; minimum content; admissibility of dissenting and concurring opinions).
- (9) Publicity and registration or deposit of the award.

That the list is not exhaustive is demonstrated by the fact that the two main themes along which procedural matters should be discussed, namely the rules on the actual conduct of the proceedings (above) and the jurisdiction of the courts over them, are interconnected. These two themes can never be regarded independently the from one another, not only from the point of the technique of the law, but also conceptually. Thus, English law considered the availability of court assistance and supervision a central justification for making English law the law of arbitration for proceedings taking place within the jurisdiction.³² This is also apparent from a list of reasons that explain the relevance of municipal law, and in particular the law of the seat.

Rules on the actual conduct of the proceedings are important because:

- (a) they often require the assistance and co-operation of the local courts, which operate only in accordance with local procedural rules;
- (b) in judicial proceedings, this is the area of the law where the *lex fori* will point always and exclusively back to the *lex fori*;
- (c) they are often mandatory in nature;
- (d) such rules exist for domestic arbitration; and
- (e) importantly, the liberal attitude of municipal laws and international treaties *vis-à-vis* the findings on the substance make procedure an essential yardstick of validity of arbitral awards.

The extent of possible court intervention is relevant because:

³² See, eg, Schmitthoff in *Liber Amicorum Domke* (1967) 289.

- (a) rules of local competence on domestic arbitration usually (and sensibly) point to the court of the place where the arbitral award was made (in symmetry with appeal competence in respect of court judgments);
- (b) of the general territorial competence of courts;
- (c) the local courts are the most conveniently placed and/or the most neutral and/or the best placed to administer the local law which has presumptively applied in the arbitral proceedings; and
- (d) crucially, the field of application of the law is symmetrical with the competence of the courts.

III. THE METHOD AND PURPOSE OF THE INQUIRY

The purpose is, on the one hand, to formulate conflicts rules reconciling the field of application of municipal law with the choice-of-law rules prevailing in arbitral practice and, on the other, to determine the limits, in terms of substantive law and jurisdiction, of the interference of municipal legal systems.

The method is comparative but the purpose is over and above comparison. It is to find patterns, jurisdictional and substantive, in municipal law, international conventions, and arbitral practice, consistent and precise enough to have universal validity as rules of general (that is, non-codified) international law, or international arbitration law properly-so-called. Although international arbitration is an activity essentially developing through the interplay of laws and courts whose competence is unilaterally defined, this does not at all preclude the development of universally acknowledged conflicts rules. This is because there is always a principle of allocation of competences underpinning any given conflicts rule, and allocation of competences is a matter of international law.

Comparative analysis must always make choices. The municipal legal systems principally, but not exclusively, examined in this thesis are those which are both recent and well acquainted with arbitral practice: England, France, Switzerland, the United States, Germany, the Netherlands. Greek law (in which the author has been trained) is not equally developed, but has been mentioned where interesting and useful. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards³³ is the single most important international instrument in the field. The sheer fact that the great majority of states is party to the Convention³⁴ entails that any meaningful discussion on enforcement must primarily be couched in the terms of that Convention. These states provide a large and representative geographical, legal-cultural, and economic sample of the international community. Therefore, the New York Convention is evidence of the international community's consensus on some fundamental rules on the recognition and enforcement of foreign arbitral awards.³⁵ So the analysis under the Convention provides a yardstick of evaluation of the relevant rules of other important multilateral Conventions, as well as some domestic laws.

To recapitulate: To speak of 'the law governing arbitration' nowadays would mean something substantially qualified, in that the *lex arbitri* does not necessarily come from a single legal system.

³³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), (1959) 330 UNTS 3, 38, hereafter the 'New York Convention' or sometimes simply the 'Convention'.

³⁴ At the time of writing there were 121 parties to the Convention; see Status of Conventions and Model Laws (1 June 2000), <<http://www.uncitral.org>>, at 12.

³⁵ In the following chapters, the term 'enforcement' will be used to denote both recognition and enforcement, unless it is otherwise stated.

Introduction

Previous research has shown that the principles informing the construction of a *lex arbitri* in substantive choice-of-law are effectiveness and legitimate expectations of the parties. There is nothing *a priori* against the relevance of those principles in the areas of procedural law and jurisdiction, because they encapsulate the two essential characteristics of international arbitration; namely its ambulatory (or transient) character and the private origin of the process. It may well be that these two principles manifest themselves in different ways in procedural choice-of-law, but are still there.

On the other hand, it cannot be denied that any private process must come within the four corners of some law (in principle municipal, but perhaps international law too) in order to become legally binding. The law giving validity to the arbitral procedure may possibly intervene at different stages. It is therefore important to remember that there are two distinct questions: first, to which law should the arbitral procedure obey, and to what extent, and second the stage at which compliance matters. This thesis will examine first the theoretical considerations influencing the assumption of jurisdiction over arbitral proceedings, and suggest a model of legislative and court jurisdiction (Chapters 1 and 2). In a second part, the thesis will elaborate on the title and extent of permissible municipal law interference; test the validity of those propositions against arbitral practice; provide some concrete choice-of-law rules for arbitrators; and examine the particular case of arbitrations with states and similar entities (Chapters 3-5). The third part (Chapters 6 and 7) discusses the relevance of compliance with the law of the seat at the stage of enforcement of an award. Chapter 6 deals with the technical issue of whether annulment at the place of making precludes enforcement in other fora. That chapter gives the opportunity to discuss models of separation of international jurisdiction and co-operation between different jurisdictions from a practical perspective. It thus serves as a convenient introduction to Chapter 7, which discusses the more abstract question of the nexus required between an arbitral award and the municipal law of the state of rendition in order for the award to enter, *in limine*, the scope of application of the international instruments in the field.

From the perspective of party autonomy, the line of discussion takes the reader through all possible facets of detachment from municipal law, and that of the seat in particular. The fundamental findings of the thesis are formulated in model law provisions and arbitration rules.

Chapter 1

Theories on the *Lex Arbitri*

This introductory chapter discusses the theoretical constructions which have been advanced to ascertain, explain or justify the law from which an international arbitration draws its binding force and efficacy—the *lex arbitri*. It is clarified at the outset that this largely theoretical discussion will have no direct bearing on the rest of this thesis, since no theory adequately explains arbitral and legislative practice. For such failure the following reasons may be cited. First, a number of theories are deductive, proceeding from a theoretical postulate (‘What is the true nature of arbitration?’ or ‘Which are the jurisdictional titles justifying the application of law X?’) to determine the *lex arbitri*; whereas a more flexible theory of jurisdiction would take account of functional necessities. Secondly (and to a great extent this is due to the first deficiency), most authors reason in terms of the *law applicable*, whereas it is much more relevant to speak in terms of the *court competent*. Nevertheless, a theoretical discussion is not necessarily theological. From a historical perspective, the academic debate has informed both arbitral and legislative practice. Thus, the very relaxed rules on choice of law,¹ appeal on the merits, availability of *amiable composition*, and most importantly the technique of unilateral but spatially unlimited *règles matérielles*, directly result from academic battles which were fought on much wider fields.² In other words, party autonomy in those matters was a compromise solution, as it were, resulting from wider claims entirely to detach arbitration from the law. So to put this chapter into perspective and anticipating Chapter 2, it must be said that the current position, and one that seems to be here to stay, is that the legal concept of ‘seat’ is determinative of the *lex arbitri*; this is particularly the case in procedural matters. On the other hand, how we arrived there is best explained by looking at the academic battlefield.³

I. INTRODUCTION TO THE NOTIONS

The traditional view has been that there must exist one *lex arbitri*, that is, a unique law which globally governs an arbitration and by the standards of which the validity of any given arbitral proceedings and the ensuing award are evaluated. The proceedings and the award would accordingly have the ‘nationality’ of the state of that law; and the award would be ‘foreign’ anywhere else. The traditional view does not prejudge which law will apply to each discrete issue. It merely creates an umbrella law, a *lex fori*, which determines whether it would refer the matter back to

¹ See, eg, Model Law, Article 28(1)-(2).

² Note that conflicts rules were considered mandatory by a strong part of the doctrine: Mezger, (1948) 1 RTD Comm 611, 619-21.

³ For a historical *tour d’horizon* see Craig, (1995) 30 Tex ILJ 1.

itself (by a unilateral conflicts rule) or to another law (by a bilateral conflicts rule) or, finally, impose a specific legal standard with universal spatial application (a *règle matérielle de droit international privé*). Though not conceptually necessary, that school of thought invariably invests the courts of the *lex arbitri* with exclusive jurisdiction to control, and eventually validate or otherwise, an award.

The various branches of the school described above may be conveniently shelved under the head 'localization', since they seek to localize the arbitral process in a single state, principally where arbitral proceedings take place. Opposed to that is the 'delocalization' school, regrouping the jurisdictional or substantive law devices through which the *lex arbitri* can become independent of municipal law. The variants of the theory are almost as many as its proponents, but it is a fair generalization that in the delocalization theory international arbitration is not necessarily anchored to any particular legal order, except to the extent so provided by the parties. Arbitration thus becomes 'anational', 'delocalized', or 'floating'. A variant of that theory would subject arbitration to a 'truly international' law of arbitration, being the distilled product of arbitral practice and municipal laws. The purpose is in either event to eliminate the need to respect the mandatory rules (that is, the rules whose violation would lead to annulment) of any given municipal law, and the jurisdiction of municipal courts. Inescapably, the emphasis now shifts to the enforcement forum, so that the concept of nationality becomes redundant and the courts of all states are effectively relegated to the status of potential enforcement courts.

There are two inter-connected objectives behind that trend. First, to take out of the equation municipal law rules and judicial decisions now parochial by standards of arbitral practice evidenced in modern municipal laws and institutional rules. Second, to create an internationally accepted *corpus* of arbitration law. The objectives are doubtless laudable, only the means are disputable. Lord Mustill encapsulated the premise of delocalization as follows:⁴

[Transnational arbitration] is founded on the premise that it is contrary to the interests of the trading community to tolerate a regime in which international arbitrations have to be submitted to the differing arbitration laws of different countries, according to where the arbitrations happen to be conducted. This premise, which is certainly defensible, is seen as leading to the conclusion, which to the present author at least seems altogether more open to debate, that the local arbitration laws are by definition inapplicable to international arbitrations, which are visualised as occupying a juristic universe of their own, detached altogether from the mundane preoccupations of any single national system of arbitration law.

It is emphasized that neither of those two larger schools of thought is confined to the procedural law of arbitration. A discussion on them is, however, a necessary precursor to a monograph on procedural law. The reason is twofold: arbitration is often conceived as a procedural discipline in itself,⁵ and in ordinary court procedure the *lex fori* refers back to the *lex fori: lex fori regit processum*.⁶ In symmetry with court procedure, therefore, the procedural law was always considered as giving colour of 'nationality' to an award. On that premise, determining the *lex arbitri* almost automatically determines the procedural law, it being the substantive procedural rules of the *lex*

⁴ Mustill, (1989) 6:2 J Int Arb 43, 51.

⁵ Wetter, *The International Arbitral Process* IV (1979) 288: 'arbitration as a subject *is* procedure' (emphasis in the original).

⁶ eg: *Dicey & Morris* (2000) Rule 17; Restatement (Second) of Conflict of Laws, s 122; ALI Transnational Rules of Procedure (Discussion Draft, 1999), Rule 6.

arbitri. There is another (but similar) perspective: party autonomy in substantive choice-of-law being a principle universally admitted (albeit subject to different limitations),⁷ any mandatory requirement of the *lex fori* which does not relate to substantive law would instinctively be classified as procedural.

II. SEAT THEORIES

A. The Territorialists

The seat theory has been most convincingly and comprehensively expounded by the late Francis Mann. In a seminal paper, Dr Mann developed the view that ‘international arbitration’ is a misnomer, because every arbitration is ‘subject to a specific system of national law’.⁸ The fundamental argument cannot be put better than originally formulated:

Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri* or, in French, *la loi de l'arbitrage*.

Thus, an overarching system of *municipal* law imposes itself irrespectively of the will of the parties. The *lex arbitri* cannot but be the law of the arbitral tribunal’s seat, that is, where the tribunal actually renders or intends to render its decision.⁹ In other words, the *lex arbitri* is the *lex loci arbitri*.

The assertion is founded on four propositions, each of an apparently different nature. First, convenience: no other state’s courts may exercise ‘complete and effective’ control over a tribunal’s ‘existence, composition and activities’.¹⁰ Secondly, respect for the local sovereign: ‘every activity occurring on the territory of a State [is] necessarily subject to its jurisdiction.’¹¹ Thirdly, the law of the seat is the law most closely connected with an arbitration; the seat is the Savignian natural seat of the juridical act that an arbitration is.¹² Fourthly, the law of the seat is the only one which can provide conflicts rules for arbitrators.¹³

Those propositions may be reduced to a single chain of arguments. Private parties (and arbitrators as their agents) acquire rights only through and because of an objectively superimposed municipal legal order, the *lex fori*. This premise, however, would not lead to the application of the law of the seat, but rather to the law(s) governing the capacity of the parties (and perhaps the arbitrators). There is therefore another assumption, which is not spelt out: once a private forum has been created, a conflict-of-laws link of a non-contractual order is created with the *situs* of the arbitration. The real argument is therefore that the contractual root of an international arbitral tribunal

⁷ See further Nygh, *Autonomy in International Contracts* (1999); Lando, (1984-VI) 189 RdC 225; IDI Resolution on The Autonomy of the Parties in International Contracts between Private Persons or Entities, (1992) 64ii Ann IDI 383, Preamble and Article 2.

⁸ Mann, (1986) 2 Arb Int 241, 246; (1969) 18 ICLQ 997; in *FS Flume* (1978) 598; in *Liber Amicorum Schnitzer* (1979) 325, 327-8. It would be an abuse of citation to name the followers of Mann, but some of the principal arguments made will be specifically cited below.

⁹ Mann, (1986) 2 Arb Int at 245.

¹⁰ *ibid* 246.

¹¹ *ibid* 246.

¹² *ibid* 247. Cf von Savigny, *Treatise on Conflict of Laws* (2nd edn of the translation by Guthrie, 1880) 70-2.

¹³ *ibid* 253.

is a façade which conceals the legally crucial, adjudicatory character of the tribunal. The law of the *situs* is superimposed because the parties have set up, after all, a *tribunal*. So Mann's argument is simply this: private parties creating a private jurisdiction cannot hoist themselves up by their own bootstraps.

Mann was obviously influenced by the jurisdictional theory of arbitration, but he was less attached to the idea of arbitration as a delegation by the local sovereign of his prerogative to mete out justice.¹⁴ Professor Niboyet's reasoning is representative of the latter line of thought:¹⁵

L'arbitre rend la justice; or rendre la justice est toujours une émanation de la souveraineté locale. Chaque pays décide à quelles conditions la justice arbitrale peut être rendue sur son territoire et faire échec à la compétence de ces tribunaux. Les arbitres rendent alors la justice par délégation du souverain territorial

The theory places too much emphasis on the territorial connection between an international arbitration and the seat of the proceedings, in asserting that the local sovereign must have the competence to regulate all activities taking place within the realm.¹⁶ For a number of reasons a purely territorial connection is wholly irrelevant. Arbitration does not, or at least does not have to, physically take place within a single state from beginning to end. This is the case for example when hearings take place outside that state or when the award is signed by circulation of drafts by post.¹⁷ In those circumstances, where is the legally relevant seat? If one supposes that it is in the state designated by the parties or their agents, a proposition now current in state and arbitral practice and first articulated by Mann,¹⁸ territoriality becomes a legal fiction.

But even in respect of an arbitration that does take place within one state, the connections between the arbitration and the forum are tenuous. This is not to say that the connections are always tenuous, but that the territorial underpinning does not, in and of itself, create any significant connection. By extension, arbitral proceedings within the territory do not *ipso facto* implicate the interests of the forum. Suppose an arbitration in Urbania between a Ruritanian citizen and a Utopian corporation, on a dispute arising from the performance of a contract governed by Neverlandian law, and where the arbitrators are citizens of third states. What interests does Urbania have to defend? Even if its substantive law is found applicable, application of the law of a third state by a forum is normal in the course of practice and has never been considered as creating a ground of jurisdiction for the courts of that third state. Moreover, arbitration law has no particular characteristic that would allow one to infer that a state should be allowed to supervise its application whenever factually possible. In the oft-encountered case where the seat is chosen for its neutrality,¹⁹ practical convenience, or even by sheer fortuitousness, it is almost natural to think that the enforcement forum has a stronger title to control the proceedings. Although it is almost impossible

¹⁴ cf Pillet, *Traité Pratique* II (1923) 533.

¹⁵ Niboyet, *Traité* VI (1949) 135; cf Arets, (1962) 7 AFDL 173, 196-201.

¹⁶ See Mann, (1986) 2 Arb Int at 246; cf Wengler, *Internationales Privatrecht* I (1981) 343-9. This is perhaps an echo of the eloquent dictum in *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, 488 (CA), *per* Scrutton LJ: 'There must be no Alsatia in England where the King's writ does not run.' (*Czarnikow* was a wholly domestic case).

¹⁷ See below, Chapter 2, text to note 211.

¹⁸ Mann, (1986) 2 Arb Int at 248 (the arbitrator determines seat in doubt); (1985) 1 Arb Int 107.

¹⁹ On neutrality and its attributes as crucial elements for the choice of seat see Lalive in *Recueil de Travaux suisses* (1984) 23, 30-1.

meaningfully to define when an *international* arbitration is sufficiently connected to the seat,²⁰ for the time being one is only pointing out that the territorial connection is feeble. Finally, territoriality cannot account for arbitration-related jurisdiction which is not premised on, or confined to, a territorial connection. Such is the case, for instance, for rules prohibiting, with universal effect, the ouster of court jurisdiction by arbitration agreements²¹ and rules permitting court assistance before the constitution of the arbitral tribunal.²²

Territoriality is simply inappropriate in respect of an activity which is inherently mobile. One must then either admit that the foundation of jurisdiction is not to be found in a territorial connection, or to accept a fragmentation of jurisdiction, each fragment of jurisdiction being based on a territorial connection. It is submitted that there is no *a priori* juridical logic to justify a preponderance of the law of the seat. The United States Supreme Court has pronounced itself in more general terms:²³

[T]he international arbitral tribunal owes no *prior* allegiance to the legal norms of particular states; hence, it has no *direct* obligation to vindicate their statutory dictates. The tribunal ... is bound to effectuate the interests of the parties

And it is no answer to that argument to suggest that an award must draw its legal force from the law of the seat: first, because that is a *petitio principii* and, secondly, because there is no conceptual difficulty in ascribing that role to the enforcement forum, as in fact is the case for all contracts. The concept of 'nationality' for awards, if indeed there be any, is one peculiar to arbitration, but no territorial title can justify it.

It is submitted that Mann's writings should be read not as a defence of territoriality but as an appeal for legal certainty, as conceived by that author. He was anxious to ensure that arbitration would remain an essentially judicial exercise, without certain formalities but still accompanied by the certainties and guarantees available in court. He was instinctively hostile to giving wide discretion to arbitrators under cover of such indeterminate concepts as the *lex mercatoria*, the *voie directe*, and *amiable composition*; and he did favour appeal on the merits from an arbitral award.²⁴ One can discern in his writings that the most effective way to ensure compliance with strict law by arbitrators was to subject their authority to the law of the seat, probably because it is easy to create there a universal basis of jurisdiction over the award and all parties involved.

Propositions premised on an alleged omnipotence of the local sovereign to regulate in respect of the realm²⁵ (and their natural companions, propositions based on comity²⁶) should be read in that light. It flows neither from the nature of international arbitration nor from the notion of international jurisdiction that jurisdiction should be exercised over all arbitrations whose seat is within the territory; neither does it follow, conversely, that jurisdiction should be confined to those. Such

²⁰ See, eg, below, note 97.

²¹ See, eg, Act on Private International Law (Venezuela), Article 47.

²² See NCPC, Article 1493(2); CCP (Netherlands), Article 1073(2).

²³ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 636 (1985) (emphasis added).

²⁴ See Mann, (1985) 4 CJQ 253; (1978) 94 LQR 486. See similarly Lionnet, (1991) 8:2 J Int Arb 5: application of the law of the seat enhances predictability.

²⁵ See *American Diagnostica, Inc v Gradipore Ltd et al* (1998) 44 New South Wales Law Reports 312 (SC, NSW) (parties cannot by adopting arbitration rules exclude remedy of appeal); *BWV Investments Ltd v Saksferco Products Inc* (1994), 119 DLR (4th) 577 (CA).

²⁶ See *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670: 'Comity of nations and reciprocity require that a foreign country's own substantive laws and procedures governing the conduct of arbitration within their own territory must be respected' (para 131).

propositions are to a certain extent normative rather than expressive of the law; their premise is that effective control of arbitral proceedings would be achieved *if* jurisdiction is concentrated in the seat *and* other states respect the title of the courts of the seat. There is nothing inherently ‘judicial’ or ‘contractual’ in assigning control functions either to the seat or to the enforcement forum. There are reasons of practicality, which a territorial argument sought to deify and render immutable. Here too ‘[t]he common law has not hidden in its bosom a logical set of rules which can be derived from territoriality’.²⁷ The state of the seat has no stronger title to ensure the essential fairness of arbitral proceedings than other fora,²⁸ except if it is seen as the most practical forum; in which case it is not really defending its own interests but the rights of the arbitrating parties and, as a consequence, performing a duty assigned to it by international law. Effectiveness and practicality are therefore the essential points one must retain from the territorial thesis, as a standard of comparison with other theories.

B. Imputed Choice of Forum: The 1957 Resolution of the *Institut de Droit International*

The *Institut* adopted a Resolution on ‘Arbitration in Private International Law’ in 1957.²⁹ Although the Resolution had limited impact on national legislation³⁰ and arbitral practice,³¹ it is significant for its conceptual consistency and influence on the shaping of academic opinion.

The Resolution was based on a Report by Professor Sauser-Hall.³² His premise was that the answers to all the conflict-of-laws issues pertaining to arbitration were a function or reflection of the juridical nature of arbitration. He espoused and developed a mixed or hybrid theory, which he called ‘*théorie juridictionnelle atténuée*’, and which theory acknowledged the contractual pedigree of arbitration but emphasized the fact that an arbitration agreement ousted the jurisdiction of ordinary courts.³³ The stated intention was to localize international arbitration ‘*conformément à la théorie des indices*’ to the state with which it had the closest connection. Whilst this is in principle a very sound and conventional approach, it was heavily influenced by the very limited margin of autonomy which Sauser-Hall accorded to private parties. An agreement to arbitrate was equated to, and produced the same effects as, a forum election clause (*clause d’attribution de juridiction*), which is an over-generalization.

First, a forum-election clause is conceivable only in respect of a pre-existing court, whose competence the clause enlarges but does not create for the first time (as is the case for arbitration agreements). Secondly, when parties elect a forum they are conscious that they import the baggage of the *lex fori* of that court; they will at a minimum tolerate that law and at a maximum actively seek advantages under it,³⁴ but they are in either event making a choice. Thirdly, while an arbitration agreement ousts the jurisdiction of the courts, replacing an adjudicatory activity by

²⁷ Lorenzen, (1923) Yale LJ 736, 743.

²⁸ But seemingly *contra*, Iwasaki, (1986) 2 Arb Int 57, 62-3.

²⁹ Resolution on Arbitration in Private International Law, (1957) 47ii Ann IDI 491. A related Resolution on International Recognition and Enforcement of Arbitral Awards was adopted in 1959; see the consolidated texts of both Resolutions in (1959) 48ii Ann IDI 394.

³⁰ Except for the Concordat, Articles 1-2: Samuel, (1991) 7 Arb Int 319, 324-5; See further Bucher in *Recueil de Travaux suisses* (1984) 127; Poudret *et al*, (1981) 129 JdT III 65, 70. And TF, 102 Ia ATF 493, 501; TF, 111 Ia ATF 125.

³¹ See however ICC 1446/1966 (unreported), as quoted by Lew, below, note 44, 258-9.

³² See Sauser-Hall, (1952) 44i Ann IDI 469.

³³ *ibid* 516-528.

³⁴ See Bell, (1995) 69 ALJ 124, 126-33.

another, it ousts the jurisdiction of all courts which could be seised on the merits, and it is fallacious to assume that the parties would litigate in a given state simply because they chose to arbitrate there.³⁵ A prorogation clause may at a maximum achieve neutrality of the forum, while an arbitration clause is about creating a private forum. Thus, an arbitration clause can only loosely be called a forum-election clause, and never has it been called thus in judicial practice, with legal consequences intended to attach to such name-calling.³⁶ In truth, an arbitration agreement is exclusively a derogation clause (excluding the jurisdiction of all courts in the world), whereas a forum clause is primarily a prorogation clause. From that follows that while certain rules could apply equally to arbitration and adjudication (eg, anti-suit injunctions), no identity of subject-matter should be assumed in the abstract. The choice-of-forum thesis is therefore circular: in effect, it says that because arbitrators *should* apply the law of the seat, an arbitration agreement is tantamount to, and no more than, a forum-election clause. But the normative 'should' is nowhere proven.

From that false equation follows that what parties really elect when they make a choice of venue is a '*siège*' of the arbitration, which (choice of) *siège* in turn triggers the application of the law of that state.³⁷ The seat thus acquires a normative function through, and because of, that (imputed) choice. The law of the seat does not apply independently of any stipulation by the parties, as in Mann's theory. As a result, a choice of applicable law rather than venue would signify, under that theory, that the seat must be fixed within the state of the chosen law.³⁸

The net result of the construction here discussed is that it conceives, ill-advisedly, arbitrators as substitutes for the judges of the state of the seat. By no stretch of the imagination may arbitrators be regarded as rendering justice in the name of the local sovereign.³⁹ Arbitral tribunals constitute no more and no less than *private* adjudicatory bodies,⁴⁰ whose decisions become executory only if vested with *exequatur*. And no state, including the state of the seat, incurs international responsibility because of their acts, unless of course it has espoused them in some way.⁴¹ An arbitrator carries the jurisdictional authority of no particular state.⁴² Moreover, arbitration operates as a contract, in that when a court refers the parties to arbitration, it is merely giving effect to their agreement; an agreement which the parties may waive at any reasonable point before the conclusion of the proceedings.

For all these reasons Sauser-Hall's theory may lead to entirely unwarranted results, in that it gives the 'chosen' forum too wide a title to treat arbitral proceedings as it pleases. For example, constructive choice would legitimize a state in providing for consolidation of arbitral proceedings, a minority position among various municipal laws.⁴³ It would also justify the exclusion of any other law; so that a subjective arbitrability rule originating in another state would never apply. By contrast, Mann's theory was based on the connections between the proceedings and the law called

³⁵ cf *Bremer Vulkan Schiffbau v South India Shipping Corp Ltd* [1981] AC 909, 976 (HL).

³⁶ Thus Paris, 14 May 1959, [1959] D 189; *Scherk v Alberto-Culver Co*, 417 US 506, 519 (1974).

³⁷ Thus, Articles 8, 9, and 10 of the Resolution (above, note 29) subject the issues of composition, internal procedure, and jurisdiction of the tribunal entirely to the law of the seat of the arbitration.

³⁸ Sauser-Hall, above, note 32, at 532. See also the 1957 Resolution (above, note 29), Article I.

³⁹ See, eg, Batiffol, [1957] Rev Arb 110, 111; Lalive, [1976] Rev Arb 155, 159.

⁴⁰ See, eg, Mayer, (1989-V) 217 RdC 319, 390.

⁴¹ See below, Chapter 3, text to note 12.

⁴² See Jarosson in *Études Bellet* (1991) 245, 260-79.

⁴³ See the debate between Jarvin, (1987) 3 Arb Int 254; and van den Berg, *ibid* 257.

upon to regulate them, which does leave a greater margin for other connected laws (a discussion Mann did not enter).

The discussion here also shows that an analysis of the juridical nature of arbitration provides no help in determining the *lex arbitri*. The now current theory, which conceives arbitration as a hybrid between contract and adjudication, is descriptive rather than normative.⁴⁴ And so it should be, especially in the field of international arbitration, for only functional necessities—and no *a priori* thinking—are considerations crucial to conflicts issues. A more honest variation of the imputed choice rationale would therefore directly ascribe to the parties the intention to localize their arbitration (ie, their contract) to the state of the proceedings, without resorting to an analogy with *pro rogatio fori*.⁴⁵ A more elaborate construction has been offered by Professor Schlosser, who argued that the place of characteristic performance of the agreement to arbitrage is the state of the seat.⁴⁶ (This is an argument for the *law* not the courts of the seat.) Some of the arguments made in support of the place of performance are at first blush transposable to arbitration,⁴⁷ but if that conception is followed to its logical conclusion an explicit choice of law would defeat the presumption for the law of the seat, for it is only a presumption in general conflicts of laws.

The choice-of-forum construction is also significantly weakened in all those cases where the arbitration agreement leaves the seat to be determined by the party who initiates the proceedings or by the arbitrator or by the supervising institution. There would be no legal objection to a construction that the arbitrator's choice emanates from an explicit or implicit power conferred by the parties, but it would be entirely artificial to consider this a true choice by the parties.⁴⁸ And such situations occur in practice so often that it would not be cogent to brush them aside as peripheral or 'pathological'.

The two seat theories differ little in practice. Their conceptual fundamentals diverge, in that Mann stressed the imperative character of the *lex loci* regardless of party expectation, while Sauser-Hall imputed an intention to prorogate the jurisdiction of the courts of the seat, and the application of the law of that state followed from that imputation. Both theories sought to create a true *lex arbitri*, an organizing principle. Further, both theories sought to concentrate jurisdiction in one forum. The problem is that both theories are carved in stone and give too loose a rein to the seat to apply its own substantive law; in other words, neither theory recognizes that there are substantive limits to that jurisdiction even within subject-matters that it keeps for itself (such as procedural organization of arbitral proceedings). In other words, both theories pay insignificant attention to the contractual origin of arbitration, and the multiple contacts of an international arbitration in

⁴⁴ See notably Grigera Naón, *Choice-of-Law Problems* (1992) ch I; Jarrosson, *La Notion d'Arbitrage* (1987); Lew, *Applicable Law* (1978) ch II; Rubellin-Devichi, *L'Arbitrage* (1965).

⁴⁵ Thus Mustill, (1992) 58 JCI Arb 159, 166; Hirsch, (1979) 34 Arb J 43, 46; Lew in *The Place of Arbitration* (1992) 78, 83; Schnitzer, *Handbuch II* (4th edn, 1958) 881-5. Similarly, it has been argued that the law applicable is that of the seat of the arbitral institution: Schottelius, *Die internationale Schiedsgerichtsbarkeit* (1957) 70-2.

⁴⁶ Schlosser, (1991) 7 Arb Int 227, 235-8. He later argued however that the place of performance is generally an inappropriate jurisdictional basis: (1991) 74 Riv DI 5, 28-31.

⁴⁷ See notably Batiffol, *Les Conflits des Lois* (1938) 74-80.

⁴⁸ Klein, (1958) 37 RCDIP 256 and 479, at 283 sees there an 'unacceptable retroactivity'. In ICC 3916/1982, (1984) 111 JDI 930, the tribunal noted the '*faible connexe*' between the dispute and the seat, which was chosen by the ICC '*uniquement par convenance et indépendamment de tout choix des parties*'.

tractual origin of arbitration, and the multiple contacts of an international arbitration in particular.⁴⁹

III. LEGAL LOCALIZATION

Although the seat theory in its various forms has dominated legal thought, certain other criteria of attachment (or, which is the same, nationality of awards) have also been proposed in academic writings. Because of their limited importance in theory and practice, they will be outlined very briefly.

A. The Procedural Law Criterion

This criterion was first proposed by Professors Brachet and Riezler,⁵⁰ and its main contemporary proponents were Ernst Mezger and Professor Habscheid.⁵¹ The difference between this theory and the seat theories is essentially one of perspective. According to the former theory, the law applicable to arbitration as a whole is the law whose procedural provisions were chosen by the parties; according to the latter, procedural law follows the choice of seat.

Though the premise—autonomy in the choice of law⁵²—is sound, the criterion itself is conceptually flawed, in that it makes an impermissible extrapolation from domestic arbitration. It proceeds on the basis that arbitration law is essentially procedural in nature, which is largely true in a domestic context where no conflicts issues arise and one is already within a given system of law, but not true in an international context, where the conflicts-of-laws issues span a wider range.⁵³ Even if it be accepted that the procedural law applicable or applied is the characteristic trait of the arbitral process, in the sense that it would carry with it the whole arbitration law of a given state⁵⁴ (which is a tenable but strained construction), the criterion is fraught with practical problems. As will be seen in Chapter 4, parties rarely make a choice of procedural law. In those circumstances, the theory would say that the seat of the tribunal should be considered as the primary, if not irrefutable, indication of a tacit choice of procedural law.⁵⁵ This construction is in all material respects identical to the forum-clause construction criticized above. It furthermore practically means that in the vast majority of cases the law of the seat will in fact control. In any event, certain proponents of the procedural law criterion seemed to concede that the public policy rules of the seat

⁴⁹ Historically, both the sovereignty of the realm (see Vischer in *Liber Amicorum Droz* (1996) 499, 501, with references) and an implicit choice (Batiffol, below, note 100, 64) have been used in support of the application of the *lex loci contractus* to the validity of the contract, a theory now abandoned.

⁵⁰ See Brachet, *De l'Execution* (1928) 12; Riezler, *IZPR* (1949) 616. Professor Morelli was probably referring to procedural law when he referred to the law from which an award draws its legal effect or efficacy ('*desume la sua efficacia*'): Morelli, *Diritto Processuale* (2nd edn, 1954) 348-9.

⁵¹ See Mezger in *Mélanges Maury I* (1960) 273, 286-91; (1970) 59 RCDIP 171, 177; in *International Trade Arbitration* (1958) 229; Habscheid, (1957) 20 ZZP 25, 35-43. See also Τσικρικά, (1989) 20 Δ 718, 735-43; Kokkini-Iatridou, (1959) 12 RHDI 119, 119-21.

⁵² Thus Rubino-Sammartano, *International Arbitration Law* (1990) 21-4 and ch 14; (1988) 5:3 J Int Arb 85.

⁵³ Thus, in Swiss common law (ie, prior to the introduction of the Concordat and later the LDIP), arbitration was a procedural discipline, subject to cantonal law: TF, 41 II ATF 534; and this included the arbitration agreement too: TF, 101 II ATF 168, 171.

⁵⁴ In ICC 4604/1984, (1985) 112 JDI 973, 976 the tribunal exclusively applied Swiss law to arbitrability, *inter alia* because Swiss law, as the law of the seat, applied to procedure and arbitration as a whole of procedural nature.

⁵⁵ See, eg, Loussouarn & Bredin, *Droit du Commerce International* (1969) 99-100; Batiffol, above, note 39; Motulsky, *Écrits II* (1974) 381, 384.

should always be respected.⁵⁶ It would thus be more coherent to argue that the law of the *situs* is indeed relevant in the absence of party choice, supplying procedural (and other) rules, *à titre supplétif*.⁵⁷ Taking that proposition to its logical conclusion would mean that there does not need to exist a ‘law of the arbitration’ as such, but only a fall-back legal system. From that perspective, municipal law intervenes merely by way of assistance, and the concept of ‘nationality’ of awards becomes redundant.

The criterion is subject to criticism from a practical viewpoint too, and a pair of hardly reconcilable decisions of the US Supreme Court demonstrates that. In the first decision the court held that the parties may by agreement subject their arbitration to state law requirements (*in casu* more stringent).⁵⁸ This was justified not as a waiver of the Federal Arbitration Act but as a permissible derogation from its provisions, within the (unwritten) limits of that act. The crucial clause provided that the ‘agreement to arbitrate ... shall be specifically enforceable under the prevailing arbitration law’, which had been construed by the state courts as submission to their state’s law. The Supreme Court’s ruling on the validity of such submission rests on the construction laid on the arbitration clause, because that finding was considered non-reviewable.⁵⁹ In a later case, the matter before the court was what sort of choice-of-law clause would effect submission to state law.⁶⁰ An award was made in Illinois under certain arbitration rules, on a contract containing a New York law clause. The arbitrators awarded punitive damages to the appellants before the Supreme Court, and the award was annulled by the District Court, upheld by the Court of Appeals, on the ground that New York law did not authorize arbitrators to award punitive damages. The Supreme Court sensibly held that the choice-of-law clause ‘encompass[ed] substantive principles that New York courts would apply, but [did not] include special rules limiting the authority of arbitrators’.⁶¹ The reasoning of the court is in many ways roundabout, but in a distilled form it is authority for the proposition that a choice-of-law clause must be presumed *not* to include arbitration law.⁶² If that is correct, as would be confirmed by arbitral and judicial practice around the world, it is a proposition that cannot easily sit with *Volt*.⁶³ Those two judgments show that choice-of-law clauses can be misinterpreted—or, worse, manipulated—to produce surprising results. There is more evidence of that in the next subsection, but the point is that except in the rare case of unequivocal choice of procedural (or arbitration) law, criteria and theories relying on choice-of-law are unworkable.

⁵⁶ Mezger went even further to accept a choice of (procedural) law only to the extent that the law of the seat would sanction it: *Mélanges Maury*, above, note 51, 291. The question which is posed then is whether those public policy provisions would be enforced by the courts of the procedural law chosen or whether the courts of the state of the seat would have concurrent jurisdiction, at least to enforce those provisions.

⁵⁷ cf Comité Français de l’Arbitrage, [1957] Rev Arb 34, 49; and ICC Rules (1955), Article 16.

⁵⁸ *Volt Information Sciences, Inc v Board of Trustees of Leland Stanford Junior University*, 489 US 468 (1989); followed by *Flight Systems v Paul A Lawrence Co*, 715 FSupp 1125, 1127 (DDC 1989).

⁵⁹ *Volt*, 489 US at 479. Indeed, the whole case may be distinguished on that ground alone: *Diamond*, (1997) 39 Ariz LR 35.

⁶⁰ See *Mastrobuono v Shearson Lehman Hutton, Inc*, 514 US 52 (1995).

⁶¹ See *Mastrobuono*, 514 US at 64.

⁶² Meaning, provisions that impact on the arbitral procedure and competence (styled ‘decisional’ law in the judgment discussed). For the rule see, eg, Cass Civ I re, [1989] Rev Arb 51; and the authorities cited below, Chapter 2, text to notes 36 and 53.

⁶³ Thus *Mastrobuono*, 514 US at 64-72 (Diss Op Thomas J). Further on those two cases see Rau, (1995) 6 Am Rev Int Arb 223.

These and other difficulties led to the abandonment of the criterion in the states where it was adopted.⁶⁴ Nonetheless, the procedural law criterion still has some currency, in the context of Article I(1) of the New York Convention.⁶⁵

B. The Legal Continuum Theory

The theory's starting point is that arbitration as a process stems from the agreement to arbitrate, whose proper law should therefore govern in all respects.⁶⁶ The veracity of the premise is indisputable: an arbitration agreement is a discrete (collateral) agreement, even when it assumes the form of a clause in a contract (as is so often the case).⁶⁷ Support for the thesis here discussed may be drawn from dicta such as the following: '*[L]es sentences arbitrales ... ont pour base un compromis [et] font corps avec lui et participent de son caractère conventionnel.*'⁶⁸ There is, however, a powerful objection. The proper law of the agreement to arbitrate will, absent countervailing circumstances, follow the proper law of the (main) contract.⁶⁹ (A specific choice in respect of the arbitration agreement will of course defeat the presumption, but it is of note that in the English common law the choice of seat is also a circumstance infirming the presumption for the proper law of the contract.⁷⁰) It follows that the connections are practically indefensible, and there is no better demonstration of that than the case-law under the now abrogated Indian Foreign Awards Act, s 9(b), which withheld the application of the Act from 'any award made on an arbitration agreement governed by the law of India'.⁷¹

When in force, the provision was interpreted as circumscribing, indirectly, the scope of application of the then-in-force Indian law (which did not define its scope of application).⁷² The Indian Supreme Court consistently held that Indian courts could retain 'overriding jurisdiction and control' over proceedings taking place abroad, if the law of the agreement was found to be Indian law. A choice of Indian law was not difficult constructively to ascertain from the proper law of

⁶⁴ See below, Chapter 2.I.

⁶⁵ See below, Chapter 7.

⁶⁶ See notably Klein, (1958) 37 RCDIP 256 and 479; in *Festgabe Schweizerischen Juristentag 1963* (1963) 145; (1963) 20 ASDI 41 (arguing that arbitration is a chain of juridical acts that must be subject to a single law, that chosen by the parties). He follows in that respect Ballardore Pallieri, (1935-I) 51 RdC 287, 334-55. See also Coing in *FS Schmitthoff* (1973) 19; Rubellin-Devichi, *L'Arbitrage* (1965) 98-103; Holleaux, (1956) 35 RCDIP 177; Κρίσπη-Νικολετοπούλου, (1958) 25 EEN 505.

⁶⁷ A practical consequence of this conceptual 'separability' is that the invalidity of the main agreement does not of itself divest the arbitrator of jurisdiction; see, eg, Model Law, Article 16(1); Arbitration Act 1996, s 7.

⁶⁸ Cass Civ I re, 27 July 1937, [1938] D I 25.

⁶⁹ See, eg, *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission* [1994] 2 Lloyd's Rep 45, 57.

⁷⁰ See below, Chapter 2, text to notes 67-72.

⁷¹ Foreign Awards (Recognition and Enforcement) Act, 1961, s 9(b). The Act gave effect to the New York Convention. The crucial provision has now been abrogated by the Arbitration and Conciliation Act, 1996, Part II. The corresponding provision of Pakistani law is Arbitration (Protocol and Convention) Act (VI/1937), s 9(b). Those provisions originate in the English Arbitration (Foreign Awards) Act 1930, s 6(b), re-enacted as Arbitration Act 1950, s 40(b) and kept in force by Arbitration Act 1996, s 99, which provisions enact the 1927 Geneva Convention. For an analysis and a critique of the original provision see Kerr, (1997) 13 Arb Int 121.

⁷² See Arbitration Act, 1940.

the main contract.⁷³ Theoretical arguments were made to sustain the provision and the practice under it,⁷⁴ but it is clear that no legal construction can create a nexus where there is plainly none.⁷⁵

A related approach, based again on a choice of law governing arbitration as a whole, would avoid such pitfalls by deducing such choice from the procedural law chosen.⁷⁶ The practical result would be to apply the law of the seat as the prime indication of the procedural law chosen—which attracts the objections made above in respect of that construct. In fact, a branch of the continuum theory would localize the proceedings in the law of the state in which arbitration is held, that being the state of performance of the particular arbitration agreement.⁷⁷ In conclusion, the legal continuum approach practically leads to results which are either untenable or indistinguishable from those under other theories.

C. The Displacement of Jurisdiction Criterion

It has been proposed that the *lex arbitri* should be the law of the court which would have jurisdiction on the merits in the absence of an arbitration agreement.⁷⁸ The premise seems to be that arbitral proceedings will result in a judgment which excludes, and thus assumes the place of, a judgment of a certain domestic forum.⁷⁹ Whilst such a conception may be tenable for purely domestic arbitration, transposed to the international plane it proves analytically and practically flawed. The theory's starting point is a hypothesis which the parties have explicitly excluded, namely the competence of any and all courts. Further, international jurisdiction may rest on a multitude of connecting factors. Thus, in disputes containing numerous foreign elements, a number of states would be able to assume jurisdiction over the related proceedings and awards—an obviously unattractive prospect. Similarly, the criterion here discussed could take account of traditional connecting factors only, and yet international jurisdiction in contractual disputes is in the majority of cases based on prorogation clauses. Finally, the theory could not apply to disputes which are not cognizable by courts because the parties opted for *ex aequo et bono* settlement.

A number of other possible laws have been proposed in academic writings, such as that of the state of the court with which the award was lodged, the state where service of process was made, and the domicile or nationality of arbitrators.⁸⁰ Those theories failed to muster support in either

⁷³ See *Oil & Natural Gas Commission v Western Co of North America* 1987 AIR (SC) 674; *National Thermal Power Corp v The Singer Co* 1993 AIR (SC) 998. *Sumitomo Heavy Industries Ltd v ONGC Ltd* 1998 AIR (SC) 825 is based on a more roundabout, but equally specious, construction. And for Pakistan see *Rupali Polyester Ltd v Bunni* 1994 PID (Lahore) 525.

⁷⁴ See Deshpande, (1992) 9:4 J Int Arb 51; (1991) 8:3 J Int Arb 77; (1991) 7 Arb Int 123, 126-7 (arguing that the law of the arbitration agreement gives an award its binding force); and *contra*, eg, Ebb, (1990) 1 Am Rev Int Arb 364, 375-7.

⁷⁵ See *International Standard Electric Corp v Bidas Sociedad Anonima Petrolera*, 745 FSupp 172, 175 (SDNY 1990).

⁷⁶ See Καλαβρό, *Η Έννοια της Αλλοδαπής Διαιτητικής Απόφασης* (1982) 107-8.

⁷⁷ See Szászy, *International Civil Procedure* (1967) 588-603, in particular at 602-3; cf above, note 45.

⁷⁸ See Anzilotti, (1906) 1 Riv DI 467; Kohler, *Gesamelte Beiträge* (1898) 118, 189; cf recently Koussoulis, (1996) 49 RHDI 479 (arguing that international arbitration is that which excludes the international jurisdiction of courts). Lalive, in *International Arbitration 60 Years on* (ICC Publication No 412, 1984) 317, 320 more cautiously accepts concurrent jurisdiction of those courts. *Contra*, eg, Guldener, *Schweizerisches Zivilprozessrecht* (2nd edn, 1979) 599-600.

⁷⁹ cf *Meacham v Jamestown, F & CR Co*, 211 NY 346, 352 (NY 1914): 'An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum.'

⁸⁰ See on such theories generally Szászy, (1966) 14 AJCL 659, 662-5.

literature or practice, and can here be given short shrift. However, many of the observations made in the preceding sections would apply *mutatis mutandis* to such theories too.

IV. APPROACHES TO DELOCALIZATION

Within the broader doctrinal school of delocalization one may discern two distinct trends. The first would be that arbitration is a contractual animal, whose validity is a relative matter, as for any other contract. Thus, no single municipal legal order has exclusive title to validate an arbitral award; conversely, no conclusive determination of the validity of an award is necessary. Its binding force depends on the *leges* of the *fora* whose assistance is sought for enforcement. The second trend would proceed on the premise that the validity of international arbitration may be determined by reference to a ‘transnational’—that is, neither national or international, but in the margin of either—law.

A. Transnational Arbitration

It seems that the first academic writer to have made such a suggestion was Professor Fragistas.⁸¹ That author argued that in international arbitration (as defined by conventional foreign connections, such as nationality) the parties are not only free to make a choice of applicable procedural and substantive law for their dispute, but also to entirely detach the arbitration from national law, and directly subject it to international law.⁸² The novelty consisted in allowing exclusively private parties to arbitrate in accordance with international law. The view remained rather isolated, but it did stimulate a discussion on whether an arbitration can ‘*échappe[r] à l’emprise de tout droit national*’ and be directly submitted to a legal order other than a domestic one.⁸³ One does now know that international law leaves the regulation of international arbitration to individual states, and this concerns in particular the remedies to be exercised against arbitral awards.⁸⁴ As an inescapable consequence, international law cannot permit private parties to escape the jurisdiction of municipal courts. (This does not apply to states, international organizations, and state entities; on which see Chapter 5 below).

A more contemporary approach would see international arbitration as potentially subject to the aggregation of general principles of commercial law and the usages and customs of the mercantile community collectively called *lex mercatoria*.⁸⁵ The debate over the *lex mercatoria* has been rag-

⁸¹ Fragistas, (1960) 39 RCDIP 1; elaborating on Goldman, [1956] Rev Arb 115 (arguing that international arbitration is necessarily detached from any and all national laws). See also Kitagawa in *Liber Amicorum Domke* (1967) 133 (arguing that the law of the seat is inapplicable, but the fundamental principles of procedure are necessarily applicable); Tallon in *The Sources* (1964) 154, 155-8 (for the reserved position that national arbitration is acceptable so long as the award is enforceable).

⁸² Fragistas, above, note 81, (1960) 39 RCDIP at 14-7. A milder version of that position was offered by the same author, sitting as sole arbitrator in ICC 1040/1959, where he held that the submission to ‘the arbitration of an International Institution such as the ICC expresses the will of the parties to place their litigation on the international level and to allow a truly international arbitration taking place beyond all national jurisdictions ...’ (quoted by Lew, above, note 44, 82).

⁸³ Supporting the proposition: Gentinetta, (1965) 84 ZSR 139, 162-75; (1969) 15 RIW 46 (conceding however the public policy provisions of the seat); *Die Lex Fori* (1973) 141-236; Renggli, *Die Grenzen* (1955) 25; Carabiber in *Erarium Maridakis III* (1964) 3, 16-8; Böckstiegel, (1997) 54:2 DRJ 24 (tentatively).

⁸⁴ See below, Chapter 3.V.

⁸⁵ For such a wide conception see Lando, (1985) 34 ICLQ 747.

ing for at least three decades and is not settled yet.⁸⁶ Arbitral practice would seem to admit of it, typically to temper the application of the law applicable by normal conflict-of-laws rules. Practice would also support the existence of generally accepted rules of conflicts of laws. But the view according to which the *lex mercatoria* can be the *lex arbitri* remains isolated.⁸⁷ This should remain so for a number of reasons. The substantive *lex mercatoria* rules derive their efficacy from arbitral awards applying such rules and from court judgments permitting enforcement of such awards. By contrast, when court intervention is requested, it is requested precisely because the court will apply its law and exercise its authority on the parties; in other words, because it has *imperium*. The force of this observation is not really lessened by the fact that in only a small minority of cases do parties request enforcement from courts,⁸⁸ for the law should cater for all cases. Perhaps the premise of a mercatorist is that international arbitrators should not be constrained by national law in shaping the proceedings, but always be constrained by principles of law universally accepted as imperative (truly international public policy). If that is so, the *lex mercatoria* is the wrong device. Procedural freedom should certainly be established, but the *lex mercatoria* is neither the foundation of such freedom⁸⁹ nor does it contain rules sufficiently detailed to regulate the proceedings. (Even if the latter proposition is wrong, the former is decisive.) Further, truly international public policy *is* public policy not through the intervention of the mercantile community but because it reflects the fundamental notions of morality and legality of the community of nations. The mercantile community itself has very little regulatory force. Its interests are doubtless to be taken into account by the legislator, but it has no separate legislative status.

It is a question of taste, perception and, above all, empirical observation that this thesis cannot undertake, whether an arbitrator should be obliged to construct his procedural framework from scratch. It is of course a fact that most arbitration laws do not contain specific procedural rules, even by way of guideline. But it is not an enviable position for the arbitrator to start with a blank sheet, without even the benefit of fundamental procedural principles such as impartiality and equality. This is to a certain extent the situation in inter-state arbitration,⁹⁰ but the analogy is misplaced.⁹¹ First, procedural flexibility is essentially due to state sovereignty: procedural rules may be imposed on states no more than the competence of a tribunal.⁹² Secondly, if in inter-state arbitration the resources, skills, and necessary co-operation between the parties are readily available,

⁸⁶ From the abundant literature see notably Carbonneau, *Lex Mercatoria and Arbitration* (1990); Dasser, *Internationale Schiedsgerichte und Lex Mercatoria* (1989); De Ly, *International Business Law and Lex Mercatoria* (1992); Fouchard, [1973-1975] Tr Com Fr DIP 71; *id* in *Études Goldman* (1982) 67; Gaillard, (1995) 122 JDI 5; Goldman, (1964) 9 APD 177; *id*, (1979) 106 JDI 475; Goode, (1997) 47 ICLQ 1; Kassis, *Théorie Générale des Usages* (1984); Lagarde in *Études Goldman* (1982) 125; Mustill in *Liber Amicorum Lord Wilberforce* (1987) 149, 172-183; Osman, *Les Principes Généraux* (1992); Schmitthoff, *Select Essays* (1988) ch 3.

⁸⁷ See Smit, (1989) 63 Tul LR 629, 632; (1991) 65 Tul LR 1309; Derains, [1973] Rev Arb 122, 146-9 (who seems, however, to regard this as a theoretical possibility).

⁸⁸ According to Lew, *The Financial Times*, 16 February 1989, only 10% of ICC awards end up being enforced by court order.

⁸⁹ But see, eg, David in *FS Ficker* (1967) 121, 124-5; *Arbitration in International Trade* (1985) 304-7. *Contra*, eg, Wilner, (1965) 19 Rutgers LR 646, 649; and more generally Batiffol, (1957) 3 APD 71 (will may localize a legal relationship but not in itself be the governing law).

⁹⁰ See below, Chapter 5.II.2(a).

⁹¹ The analogy is used by Gentinetta, above, note 83 and Eisemann, [1973-1975] Tr Com Fr DIP 189 (the *lex arbitri* should be composed from general principles of law). See also Lalive in *The Internationalisation of International Arbitration* (1995) 49, 51; and more generally Wengler in *FS Rheinsteil* 1 (1969) 299, 319. Schlesinger & Gündisch, (1964) 28 RabelsZ 4, 33-44 suggest a comparative method for choice-of-law in particular, subject however to the law of the controlling court(s).

⁹² von Mangoldt, (1980) 40 ZaöRV 554, 557.

no such assumption should be made in respect of run-of-the-mill commercial proceedings. Finally, centuries of inter-state arbitration have given us very few backbone rules (again, impartiality and procedural equality), but it is uncertain whether those rules are international both in origin and function, or international merely by borrowing from municipal law.⁹³ Thus, while practice can hammer out a customary procedural law,⁹⁴ one does not see why the wheel must be reinvented. Why should laborious comparative research be undertaken to demonstrate, for example, that limitation of actions is a principle of law universally accepted?⁹⁵ And, further, how much do such statements advance the resolution of a case? In the submission of this author, creating an *ad hoc* procedural code, while to a certain extent always necessary, should in principle be a solution of last resort. Thus, a municipal law which contained dispositive but detailed procedural rules for arbitration would be entirely welcome.⁹⁶

Similar observations would counter the proposition that an arbitrator should create his *lex arbitri* from the aggregate of the laws having a 'significant relationship' with the dispute, including the *lex causæ*.⁹⁷ Resources permitting, such *dépeçage* would be of course entirely acceptable. In fact, it is almost standard practice for arbitrators to create their choice-of-law rules in that way, even before municipal law adopted a disinterested attitude in respect of choice of law.⁹⁸ However, conflicts rules are general and abstract propositions which have to a great extent become uniform through international conventions and practice. Procedure, on the other hand, is contained in substantive rules, which may considerably differ from state to state. This is to say that the comparative process is in the latter case a significantly more extensive enterprise. More importantly, the proposition does not answer the crucial question, namely which law must prevail if the connected laws conflict with each other. Single-jurisdiction constructions, and the seat theories in particular, are unambiguous and practical in that respect: the law of the jurisdiction having annulment authority. On that ground alone, they are more satisfactory.

These remarks are a convenient introduction to a similar but more sophisticated theory. An essential objection to any home-brew law is that it lacks the authorities to enforce it, and this is a very powerful point in procedural law.⁹⁹ This is the practical aspect of the legal principle that private parties cannot arrogate themselves the role of the legislator: they can of course as a matter of contract agree as they wish, but no stipulation will be backed up by state authority unless recognized as legal under the law of that authority.¹⁰⁰ Similarly, there is no pre-existing autonomy to

⁹³ *ibid* 557-61. See also Favoreu, [1965] 11 AFDI 233 (describing the development of procedural practices); cf Wühler, (1999) 2 JIEL 249, 267.

⁹⁴ Some general principles of arbitral procedure are listed in Chapter 4.III, of which most were known in municipal law and the practice of international tribunals.

⁹⁵ See *Sarropoulos v Bulgaria* (1927) 7 TAM 47, 51.

⁹⁶ Lew, above, note 44, 253 argues however that such considerations are insufficient to attach arbitration to a national law when the parties have opted for anational arbitration. This does not weaken the proposition of this thesis on this point; see further below, text to notes 122-127.

⁹⁷ Danilowicz, (1986) 9 Hastings Int & Comp L Rev 235, 254. The jurisdictions having a 'significant relationship' are those of the domiciles of the parties, the *situs* of the property or performance of the contract: *ibid*.

⁹⁸ See notably Derains, [1972] Rev Arb 99.

⁹⁹ For arguments on effectiveness see Berger, (1993) 4 Am Rev Int Arb 1; *International Economic Arbitration* (1993) 480-9; De Ly, (1991) 12 Nw J Int L & Bus 48. Lord Mustill derives from that thesis the inevitability of the application of the law of the seat: Mustill, (1989) 17 IBL 161, 162.

¹⁰⁰ *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 65 (HL); Cass Civ 1re, 21 June 1950, [1952] S I 1; *E Gerli & Co v Cunard SS Co*, 48 F2d 115, 117 (2d Cir 1931); Heuzé, *La Réglementation* (1990) 71-4; Batiffol, *Les Aspects Philosophiques* (1956) 75.

choose the law of a contractual relationship; choice is simply given effect to retroactively.¹⁰¹ Thus, arbitration subject exclusively to party will *qua* law would exist only *under* a law that delegates regulatory power to the parties.¹⁰²

Arguments to that effect have been made by Professors Goldman, Fouchard, and Lalive. Their thesis is in effect that international law, as evidenced in municipal law, international treaties, and arbitration rules, affords parties the freedom to shape their arbitral proceedings subject only to truly international public policy.¹⁰³ The thesis relies heavily on Article V(1)(d) of the New York Convention, which does rank party autonomy higher than the law of the seat. However, Article V(1)(d) cannot be read in isolation: as Chapter 7 of this thesis argues, it has the limited effect of excluding compliance with municipal law as a threshold requirement for the application of the Convention and gives priority to party agreement to a limited extent. Article V(1)(e) operates independently of Article V(1)(d), recognizing the international title of the state of the seat to assume control over arbitral proceedings. This is stronger evidence, against detachment from the law of the seat. Indeed, on one pragmatic view, this wholly resolves the issue. Recognition of the title of the state of the seat means that international law subjects arbitration to the law of the seat, insofar as that legal order would assert its title.¹⁰⁴

Finally, similar observations apply to the suggestion that Article I(1) of the New York Convention, on non-domestic awards, supplies the parties with the freedom to choose the arbitration law of a state other than the seat.¹⁰⁵ Chapter 7, section II, discusses the provision in detail, but suffice it here to observe that the concept of non-domestic awards in the Convention purports to enlarge the scope of application of the Convention, over and beyond awards made outside the territory of the enforcement forum. It is a blanket reference to the law of that forum, and in no way can it be construed as directly giving any authority to the parties to choose a law.

B. Delocalization by Contract Theory

A more conventional, and plausible, conception of detachment is by concentrating jurisdiction at the enforcement forum. One approach would be based on notions akin to *forum non conveniens*. The courts of the seat (which would apply their *lex fori* if they exercised jurisdiction) should provide a reserve forum, which should remain inert if the parties have provided for the application of another law and the courts of that state would assume jurisdiction,¹⁰⁶ or when the parties have

¹⁰¹ Wolff, (1950) 35 TGS 143, 150-2; Lando, (1984-VI) 189 RdC 225, 285-6.

¹⁰² That would be the case under French law, which now considers the legal existence of an arbitration agreement a matter independent of any law; see Cass Civ I re, 20 December 1993, (1994) 121 JDI 432. See already Paris, 25 January 1972, [1973] Rev Arb 158; Paris, 13 December 1975, (1976) 55 RCDIP 907.

¹⁰³ See respectively: Goldman, (1963-I) 109 RdC 347, Ch I; Fouchard, *L'Arbitrage Commercial International* (1965) 103-4; [1965] Rev Arb 99; Lalive, (1967-I) 120 RdC 569, 610-59, especially at 649. Professor Lalive adopted the same view judicially in ICC 1512/1970, quoted below, Chapter 7, text to note 73. Support may be drawn from two US cases cited below, Chapter 2, note 124.

¹⁰⁴ Thus Redfern & Hunter, *Law and Practice* (3rd edn, 1999) 78-93; Nygh, *Choice of Forum and Laws* (Forum Internationale No 24, 1997) 3-7, 23-4; Böckstiegel in *FS Oppenhoff* (1985) 1; Sandrock, (1992) 3 Am Rev Int Arb 30, 45-6; Craig, above, note 3; (1985) 1 Arb Int 49, 69-78; Jarvin in *Contemporary Problems* (1987) 50, 61; Wetter, above, note 5, 285-6; Moura Vicente, *Da Arbitragem* (1990) 73-97; van Houtte, (1980) 57 RDIC 285, 291; Arnaldez, (1993) 120 JDI 858, 868-9; Bond, (1992) 8 Arb Int 83, 84; Melis in *Planning Efficient Arbitration Proceedings* (1996) 355, 361; Van Niekerk, (1990) 2 SA Merc LJ 117, 134-49. The pragmatic argument is not *de lege lata* denied by the proponents of delocalization: Paulsson in *Handbook of Arbitration Practice* (1998) Part 10, at 557; Mayer, above, note 40; van Compernelle, (1989) 66 RDIC 101, 101-9.

¹⁰⁵ Lalive, above, note 78, 320.

¹⁰⁶ That latter proviso aims to avoid denial of justice.

simply made a forum agreement.¹⁰⁷ This is plausible, but it never caught on. The problems associated with it are threefold. First, if the courts whose law the parties or arbitrators designated as applicable are better placed to apply that law, the courts of the seat are more conveniently situated effectively to supervise and assist the proceedings as a whole, and adjudicate ancillary claims arising out of the proceedings.¹⁰⁸ Secondly, it requires an expensive and time-consuming inquiry to the other candidate court. Often, no safe prediction of whether the courts of another state will assume jurisdiction is possible. Moreover, courts do not answer questions, they resolve disputes. So an annulment action there will be necessary, while the court first seised would have merely stayed the action. Such alternatives were mooted, and rejected, during the preparation of the Model Law, and there is no reason to accept them here.¹⁰⁹ Similarly, the courts of the seat could decline jurisdiction on general *forum non conveniens* grounds when the award is intended not to be made under their law, or any law at all for that matter.

That suggestion would lead to an impermissible denial of justice when no other forum would be available, so one is back to step one, namely determining that forum. Moreover, the enforcement court could (erroneously, but it still could) in such cases consider the award as anational and not enforceable under the New York Convention. Finally, supervisory jurisdiction was never considered discretionary or excludable by agreement without specific provision in the law, no doubt because it was never regarded as ordinary jurisdiction over a contract. This notwithstanding, the point is *de lege lata* valid, and exclusion of court jurisdiction is now available in a number of jurisdictions, as will be seen in the next chapter.

Another approach would shift the decisive role from the annulment forum to the enforcement forum.¹¹⁰ The theoretical foundations of such construct have been fully expounded by Paulsson. In his view, arbitration is a contractual species, which *a priori* has no nationality at all; indeed it can have no such label.¹¹¹ The validity of the arbitration is taken from what may be called a *jurisdiction de reception*, that is, a legal order from which recognition is requested.¹¹² This would inevitably lead to a 'multilocalization' of arbitral awards, a position conceptually tenable, but practically unattractive,¹¹³ since it obliges a party feeling aggrieved to defend recognition or enforcement potentially all over the world.¹¹⁴ (No particular legal interest is required for the admissibility of an application to enforce an award.) Moreover, the aggrieved party will have to *follow* the award creditor, not being able to initiate the process itself. And, finally, when that party ob-

¹⁰⁷ See Hjerner in *Hommage Eisemann* (ICC Publication No 321, 1974(3)) 61, 71-3; Bajons in *FS Kralik* (1986) 3, 19-22.

¹⁰⁸ This is fully discussed below, Chapter 2.III; cf on concentration of persons involved in one jurisdiction as a factor of *forum conveniens* *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 485-6 (HL).

¹⁰⁹ See Chapter 2, text to note 113.

¹¹⁰ See already Robert in *Liber Amicorum Domke* (1967) 226. Dicta in support in, eg, Paris, 9 December 1955, [1955] Rev Arb 101.

¹¹¹ A number of authors have stressed that 'nationality', implying an exclusivity of the law granting such nationality, is inappropriate for arbitral awards, as it is for contracts: Fragistas, above, note 81, 2; Smit, (1989) 63 Tul LR at 644-5; Aubert, (1958) 37 RCDIP 367 (arguing that the notion of 'seat' is inappropriate); Bartin, *Principes I* (1930) 603.

¹¹² See Paulsson, (1981) 30 ICLQ 358; (1983) 32 ICLQ 53; in *Contemporary Problems* (1987) 141; [1980] Rev Arb 441, 484-7.

¹¹³ See Mayer in *The Internationalisation of International Arbitration* (1995) 37, 46; but see Toope, *Mixed International Arbitration* (1990) 41-4.

¹¹⁴ Similarly Derains, [1986] RDAI 109, 114 argues that the challenging party should have the benefit of the choice of forum.

jects to the case having been dismissed by the tribunal for want of jurisdiction, the proposition would lead to a denial of justice.¹¹⁵

A more limited claim is also made by certain authors, namely that in certain circumstances annulment should be discarded by the enforcement forum. Legal certainty over the validity of an award is perhaps not sacrosanct, and this author's suggestions in later chapters reflect that view. But the practical interests of the business community surely lie with a legal construction offering as much as possible one-stop litigation and effective protection. There is no evidence to suggest that businesspeople treat awards as contracts, valid here and invalid there; on the contrary, contracts tend to be either valid or invalid everywhere, because of the universally admitted principle of autonomy in the choice of law. And, in any event, proving an arbitration invalid imposes quite a different evidentiary burden than doing the same for a contract.

Professor Park's views should be mentioned at this point. Park concedes both the holistic concept of the *lex arbitri* and the territorial pretensions of the law of the seat.¹¹⁶ He argues, however, that the functions of the local law are limited: 'Control by the *lex loci arbitri* ... should be limited to ensuring respect for the traditional standards of fairness, the limits of the arbitral mission and the rights of third parties.'¹¹⁷ This would be delocalization by way of exception or delocalization *à l'envers*. This author concurs, but would suggest that it is important to (a) explain why the title of the law of the seat is so circumscribed; (b) define the content of that postulate; and (c) examine how a breach thereof can be sanctioned by other fora. The following chapters attempt just that. Meanwhile, the precise mechanics and rationale of delocalization through enforcement are discussed extensively in Chapter 6, which deals with certain recent developments which have blown life in the construct.

V. CONCLUDING REMARKS: DESIDERATA

It has thus far been demonstrated that it is not axiomatic that an arbitration should be exclusively attached to the legal order of the place of the proceedings. The only municipal legal order which would be entirely justified in assuming jurisdiction over international arbitration would be that to which the parties submitted their proceedings in an unequivocal fashion. On the other hand, to determine whether the parties 'have expressed in an unequivocal way their wish to obtain an arbitral award subject to the judicial sovereignty'¹¹⁸ of a certain state an award, will in most cases lead nowhere. From a mere designation of seat it is impossible to conclude whether the parties intended submission to the law of the agreed seat, at least in the ordinary case where the arbitral rules are international by vocation rather than attached to a particular state,¹¹⁹ such as certain East European rules (see Chapter 4). Even if it would be possible empirically to establish that, as a

¹¹⁵ Park, (1989) 5 Arb Int 230, 234.

¹¹⁶ See Park, (1983) 32 ICLQ 21; (1988) 82 AJIL 616, 627-31. See already Carabiber, (1960-I) 99 RdC 119, 158-60.

¹¹⁷ Park, (1983) 32 ICLQ at 51. Park and Paulsson agree that in other circumstances the law of the seat ceases to control; see Park & Paulsson, (1983) 23 Va JIL 253, 259.

¹¹⁸ TC Vaud, (1958) 106 JdT III 107.

¹¹⁹ For that exception see Mustill & Boyd, *The Law and Practice* (2nd edn, 1989) 64.

general practice, seat implies choice of law,¹²⁰ that would neither answer whether it should be possible to opt out of that law nor would it say much about the proper functions of that law.

The preceding sections have shown that while a territorial argumentation is inappropriate, all other constructs are either lacking in cogency or impractical or, finally, producing results indistinguishable from the territorial theory. It is much more appropriate, it is submitted, to construct a jurisdictional theory, as opposed to a theory based on the law applicable, which will apportion jurisdiction in a practical and effective way.¹²¹ The point is that while the law of the state in which the proceedings exclusively, predominantly, or nominally take place can make no absolute claim to regulate those proceedings, discarding that place as a forum takes away from the parties the natural forum in which to seek legal protection. The seat of the arbitration lends itself for such purposes, but as will be shown in the next chapter the notion of 'seat' is entirely legal and may in certain circumstances be devoid of factual foundation. That would leave us with the task of defining the concept and determining the limitations attendant to its nature (in Chapter 2).

This observation does not detract from the fundamental proposition that the parties are the masters of the arbitral process and not *a priori* subject to any law. The recent Resolution of the *Institut* on mixed arbitration¹²² fortifies this conclusion. The rapporteurs accept the premise that there can be no legally relevant connection created upon a geographical link, because there is no 'permanent geographical or governmental relationship with a given national legal system'.¹²³ From this point on this author would beg to differ, for the rapporteurs envisage that the legal force of an award is drawn from the legal order called upon to enforce it and that, quite independently of that, the international merchant community gives international arbitration a binding character.¹²⁴ However that may be, the substantive content of the Resolution is, it is respectfully submitted, entirely sound. It is premised on the principle that 'an arbitral tribunal's duty to act pursuant to the agreement from which its authority derives sets the limits within which concern for the award's enforceability in a given jurisdiction can appropriately influence the result to be reached'.¹²⁵ This principle is elaborated upon in the following provisions:

Article 1

Arbitrators derive their authority and powers from the parties' agreement

Article 6

The Parties have full autonomy [subject to Article 2] to determine the procedural and substantive rules and principles that are to apply in the arbitration. In particular, (1) a different source may be chosen for the rules and principles applicable to each issue that arises and (2) these rules and principles may be derived from different national legal

¹²⁰ There is sharp disagreement on that point; contrast the authorities cited above, note 45, with von Mehren & Jiménez de Aréchaga, (1989) 63i Ann IDI at 194-5. Furthermore, the ICC Court of Arbitration shows a marked preference for certain countries (notably France) when determining the seat in absence of party agreement, but there is no evidence that this is prompted by legal considerations, at least exclusively. England has a modern arbitration law but in 1999 it was designated by the ICC only in 2 cases, whereas the parties chose it in 46 cases: (2000) 11:1 ICC Bull at 9.

¹²¹ See similarly Samuel, *Jurisdictional Problems* (1989) 64-6; Derains in *Hommage Eisemann* (ICC Publication No 321, 1974(3)) 9, 13-4.

¹²² Resolution on Arbitration between States, State Enterprises, or State Entities, and foreign Enterprises, (1990) 63ii Ann IDI 324-31. The basic principles of the Resolution apply to international arbitration in general: *id*, Preamble, para 4.

¹²³ von Mehren & Jiménez de Aréchaga, (1989) 63i Ann IDI 191, 194; *id*, (1989) 63i Ann IDI 31, 44.

¹²⁴ See von Mehren, (1990) 5 ICSID Rev-FILJ 54, 57.

¹²⁵ IDI Resolution, above, note 122, Preamble, para 5.

systems as well as from non-national sources such as principles of international law, general principles of law, and the usages of international commerce.

It is suggested that the Resolution should *not* be read as a jurisdictional guideline. It says nothing on the jurisdiction competent to control international arbitration. What it does say is that arbitration is a matter of contract and need not rely on initial licence by any particular legal order.¹²⁶ Party arrangements are valid as a matter of general freedom of contract, not arbitration law. In turn, an arbitrator is bound to effectuate party instructions¹²⁷ even if they will lead to an unenforceable arbitration; his duty to arrive at an award, enforceable at law, is conditioned upon the will of the parties. Judge Noori of the Iran – US Claims Tribunal has stated the principle succinctly:¹²⁸

There can be no doubt that arbitrations, whether international or between subjects of private law, derive their mandate and competence from the consent and agreement of the parties to the arbitral agreement; therefore, it is the parties' consent that determines the scope, limits and area of certitude of an arbitrator's authority and jurisdiction.

If that be correct, then an arbitrator is (a) not defending the interests of any particular legal order but only offering his services to the parties; and (b) liable as a matter of contract, rather than arbitration law, if he does not follow clear party instructions in order to conform to the law applicable. This further explains why an arbitrator must look for mandatory rules outside the *lex contractus*, even without specific authorization from the *lex arbitri*, when such rules may impact on enforcement and/or implement truly international public policy.¹²⁹ A similar cumulative approach has been proposed in regard to the procedural rules to be applied: the arbitrator should have an eye on the enforcement *fora* as well as the controlling jurisdiction.¹³⁰ This is doubtless correct, but does not answer which law should prevail. Therefore, in no way should the Resolution be read as a statement that international arbitration should not be subject to control by any legal order.¹³¹ Rather, it is a statement on the limits of the title of the competent municipal law and on the stage at which it becomes relevant.

One must never lose sight of the needs of the international mercantile community. It is believed that ideally that community would wish arbitration to be a truly universal practice, where the rules would not fluctuate from one state to another and where parties would not be taken by surprise by the law that asserts its application and by the substantive content of such law(s). Ideally, the substantive and jurisdiction rules would be uniform, so that a choice of venue would depend entirely on practical circumstances relating to the proceedings: location of the goods in dispute; support and legal services available at the venue; political neutrality; convenience of the parties, arbitra-

¹²⁶ von Mehren & Jiménez de Aréchaga, (1989) 63i Ann IDI 100, 108; Goldman, [1981] Rev Arb 469; Oppetit in *Études Bellet* (1991) 415; Mayer, above, note 40.

¹²⁷ See, eg, ICC 1581/1971, (1974) 101 JDI 887; cf the ICC award in *Markenwaren v Riccadonna* [1967] CMLR 141, 144: 'the jurisdiction of arbitral tribunals [is] a jurisdiction of pure private interest [*sic*] and of a contractual nature founded as it is upon the sole voluntary agreement of the litigating parties.'

¹²⁸ *Watkins-Johnson Company et al v Iran et al*, 22 Iran-US CTR 218, 296, para 56 (Diss Op Noori).

¹²⁹ This is an issue of some complexity; see Lazareff, (1995) 11 Arb Int 137; von Hoffman in *Acts of State and Arbitration* (1997) 3.

¹³⁰ Derains, (1979) 106 JDI 991, 993.

¹³¹ Such an argumentation by Oppetit, *Théorie de l'Arbitrage* (1998) 30-2, 84-7.

tors, and witnesses and so forth.¹³² Regardless of the precise venue, the arbitrating parties would be certain that certain minimum protection would be granted to ensure due process, but otherwise their agreement would be respected. Empirical research has shown that the business community considers the following as primordial features of the controlling forum's law: (i) that state is party to the New York Convention; (ii) no appeal on the merits; (iii) limited discovery; (iv) swift court proceedings.¹³³ Moreover, it is clear that an arbitrating party must be presumed to wish for a controlling forum to exist, at least as an option to be excluded by agreement.¹³⁴ Meanwhile, however, the 'suitability' of the law of the seat remains a primordial consideration,¹³⁵ and a legal market for the 'best' arbitral forum does exist. The remaining chapters attempt to reconcile the desiderata of a practical, effective, and suitable forum with the reality in state and arbitral practice.

¹³² Enumeration of such factors in UN Doc E/CN.11/TRADE/L.92 (1965) Annex, (1966) 5 ILM 547, 551; and see the clause in *Remy Amerique, Inc v Touzet Distribution, SARL*, 816 FSupp 213, 215 (SDNY 1993).

¹³³ Bühring-Uhle, *Arbitration and Mediation in International Business* (1996) 136-7.

¹³⁴ This is explored in Chapter 3 below. For the proposition that avoidance of denial of justice is in itself a basis of (reserve) jurisdiction see Inter-American Convention on the Extraterritorial Validity of Foreign Judgments, Article 1(D).

¹³⁵ See UNCITRAL Notes, para 22(a).

Chapter 2

Representative Municipal Laws and Suggested Model of Arbitration Regulation

The first two sections outline the fundamental characteristics of international arbitration law as a matter of comparative state practice. The exposition is not intended to be exhaustive; rather, the aim is to explain the essential trends in the delimitation of competence under, and the substance of, representative arbitration laws. The third section proposes a comprehensive theory of jurisdiction over arbitral proceedings.

I. LOCALIZATION BY CHOICE OF LAW: ITS SHORTCOMINGS AND ABANDONMENT

One proceeds in an unorthodox order of presentation, to demonstrate the practical weaknesses of the method.

A. Greece, pre-1999: Half-hearted and Uncertain

Greek law before the adoption of the Model Law¹ is instructive as to the necessary assortments of a concept of jurisdiction premised on choice of law. Because the Code of Civil Procedure contains no definition of ‘foreign’ and ‘domestic’ arbitrations and awards, this was a task for the courts. The most authoritative part of the doctrine, on the other hand, asserted that an arbitration derived its nationality from the law governing the proceedings as a whole, which law was for the parties to choose.² On that view, Greek law and jurisdiction would attach only to arbitrations submitted by the parties to Greek law.

Initially, the courts adopted a geographical criterion of sorts, whereby the law controlling was that of the state in which the proceedings took place, the award was rendered, or in which the seat was designated.³ They later took a nuanced position. It was accepted that the parties were free to submit the arbitration agreement and procedure to the law(s) of their choice,⁴ in exercise of their

¹ See Act 2735/1999. The analysis below is still relevant to non-international arbitrations falling outside the ambit of Article 1(1)-(2) of the Act.

² See Μαριδάκη, *Η Εκτέλεσις Αλλοδαπών Αποφάσεων* (3rd edn, 1970) 112-7; Economopoulos in *World Handbook I* (1957) 271, 317.

³ CA Patras 80/1934, (1934) 45 Θ 608; Multi-Member CFI Athens 2283/1957, (1957) 5 NoB 891; Multi-Member CFI Athens 121/1963, (1965) 13 RHDI 460.

⁴ Multi-Member CFI Athens 1713/1971, (1971) 22 ΕΕμπΔ 350; *affirmed*, AP 830/1972, (1973) 21 NoB 202.

autonomy in contract choice-of-law.⁵ It was more problematic, however, to determine the sort of choice that qualified as a choice of arbitration law. Outside the rare hypothesis of explicit choice,⁶ the courts seemed to ascribe weight to the place agreed as the seat of the tribunal.⁷ Furthermore, a strong presumption seemed to exist in favour of the law of the seat of the arbitral institution under whose rules the proceedings were agreed to take place.⁸ In fact, in a number of cases the law chosen by the parties and the place of rendition of the award are used interchangeably, it being presumed, apparently, that a choice of law resulted clearly from the place chosen as the seat of the tribunal (and where the award was rendered).⁹

A choice of Greek law as the *lex arbitri* would import control jurisdiction for the Greek courts.¹⁰ Thus, if the court determined that a tribunal sitting abroad *should have* applied Greek law, the award would not produce *res judicata* effect as a foreign arbitral award, and would be subject to annulment in Greece.¹¹ This construction would pose formidable problems where the tribunal would have applied another law, which would assert its application unilaterally but that law would be contrary to Greek law. Though no such problems arose in practice, it is important to signpost the issue. Moreover, because an explicit choice of arbitration law is a rarity, the choice-of-law criterion can effectively determine only which awards are non-domestic (ie, foreign),¹² but cannot in the vast majority of cases point to the competent jurisdiction. In other words, it is good for enforcement purposes, but will lead to a lack of forum in other cases.¹³

It is arguable that *Areios Pagos*, the supreme court in civil cases, was alive to those problems. A case was brought before its full bench on the admissibility of a declaration of invalidity of an arbitration agreement, after an award had been made in London. The court below found that if no challenge lay in the state where the award had been made, the validity of the arbitration agreement could not be challenged in Greece, not even as an incidental matter.¹⁴ A section of the supreme court reversed the judgment,¹⁵ but the section of the same court to which the case was remanded for judgment on the merits reached the same result as the judgment reversed.¹⁶ The full bench resolved the disagreement in somewhat ambiguous and laconic terms. It held that the validity of an arbitral award fell to be determined by the procedural law that had in fact applied in and to the proceedings—but at the same time it inferred submission to English law from the fact that the award had been rendered in London.¹⁷ The judgment refers to the ‘procedural’ law (rather than

⁵ Civil Code, Article 25 (corresponding to Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980), Article 2): AP 1466/1983, (1983) 31 NoB 840, 842; CA Athens 2712/1978, (1979) 27 NoB 421, 422 (that latter decision erroneously requires some connection between the law chosen and the parties and/or the dispute).

⁶ See Multi-Member CFI Athens 1713/1971 (above, note 4); CA Athens 5227/1974, (1977) 31 Αρμ 650.

⁷ See AP 1466/1983, above, note 5.

⁸ See CA Athens 3991/1983, (1983) 36 Αρμ 650.

⁹ See, eg, AP 219/1973, (1973) 21 NoB 1140, (1973) 40 EEN 704. The only reported judgment making explicit recourse to the notion of ‘seat’ is Multi-Member CFI Athens 13988/1984, (1985) 34 NoB 95.

¹⁰ In particular, an action to set aside, a declaratory action on nullity, and an action for rectification or interpretation (CCP (Greece), Articles 897, 901, 904 respectively).

¹¹ See, eg, CA Athens 2712/1978, above, note 5 (arbitration in Geneva). *Contra*, Κεραμεύς, *Νομικές Μελέτες* I (1980) 469, 477.

¹² Thus Foustoucos, (1973-1974) 26-27 RHDI 52, 100-102.

¹³ See below, text to notes 42-45.

¹⁴ CA Piraeus 635/1981, (1982) 10 ENΔ 213; *followed by*, eg, CA Athens 3991/1983, above, note 8.

¹⁵ AP 310/1983 (unreported).

¹⁶ AP 954/1984, (1985) 33 NoB 629.

¹⁷ See AP (Full Bench) 899/1985, (1985) 33 NoB 1399.

the arbitration law) applied, as the criterion triggering the application of Greek law and the attendant jurisdiction of Greek courts. (No legal consequences follow from that label; simply, the court conceives arbitration law as procedural in nature.) The effect of the judgment was that the arbitration law applicable carries with it the proper law of the arbitration agreement, and a choice of arbitration law results from a choice of seat.¹⁸ From which follows that the proper law of the arbitration agreement was no independent basis of jurisdiction (unlike in English law for instance). The other observation is that the court seemed prepared only notionally to apply the choice-of-law criterion. As subsequent case-law of that court seems to confirm, the place of rendition of the award was determinative of the law applicable, as an almost irrebuttable presumption of choice of law.¹⁹ Such deference to the legal order of the seat is commendable, as enhancing co-ordination of international jurisdiction and legal certainty.²⁰

Despite that practice, Greek legal doctrine remained almost unanimously for the choice-of-law criterion.²¹ However, the courts never seemed to accept it in its totality,²² and suggestions were made to do away with it and its impracticalities.²³ The best construction to that effect was based on Articles 898(1) and 901(2)(a) of the CCP, which invest the Court of Appeal of the district in which an award is rendered with competence to control that award. Since the rules on domestic court competence are at the same time heads of international jurisdiction (CCP, Article 3(1)), it was suggested that a threshold distinction between domestic and foreign awards is superfluous.²⁴ However, until the passing of the international arbitration act in 1999, the position formally was that the point of contact for Greek law and jurisdiction was a choice of Greek (procedural) law; subject however to the proviso that, at least when no explicit choice of Greek law had been made, Greek law would succumb to the territorial title of another jurisdiction, if that other jurisdiction was prepared to assert it.

B. Germany, pre-1998: All About Being Roundabout

German law pre-1998 was of similar geometry. Here, the scope of application of the law was more explicitly, if still indirectly, set out. Indirectly, in the sense that it was deduced *a contrario*, from the definition of 'foreign award'. The crucial provisions were § 1044 paragraphs (1) and (2)(1) of the Act on Civil Procedure (*Zivilprozeßordnung* or ZPO), on foreign arbitral awards. The natural meaning of those provisions was that the nationality of awards depended on the procedural law which had *in fact* applied.²⁵ From a semantic point of view, the authentic characterization of

¹⁸ See also CA Athens 4458/1984, (1984) 32 NoB 1130. Cf BGH, (1999) 24a YCA 928, sub [4].

¹⁹ cf AP 250/1990, (1990) 57 EEN 717; AP 91/1993, (1996) 2 ΔΕΕ 781 (a decision criticized on other grounds).

²⁰ Similarly, there is no reported judgment on non-domestic awards under the New York Convention, Article I(1); as there is no reported judgment enforcing an award annulled at the state of rendition on the grounds that annulment should be discarded by the forum whose law was chosen to apply (see Article V(1)(e)).

²¹ See Μπέη, ΚΕ, *Πολιτική Δικονομία*, τ 20: Διαιτησία (1994) 502-3; Κουσουύλη, *Θεμελιώδη Προβλήματα Β* (1996) 221-2 and the references.

²² See AP 830/1972, above, note 6: arbitration in Greece submitted to English law, basic procedural principles of equality of parties and fair hearing apply.

²³ See Φουστούκο, (1992) 40 NoB 253, 262-4 (suggesting the admission of international awards, along the lines of French law, which should be treated always as foreign); Μαντάκου, *Η Κατάρτιση της Συμφωνίας Διαιτησίας* (1998) 97-8 (same).

²⁴ See Κεραμέα, (1994) 3 Διαιτ 21, 23-4; *id*, [1987] Rev Arb 35, 37-8.

²⁵ BGH, 21 BGHZ 365. Cf BGH, 96 BGHZ 40; BGH, 104 BGHZ 178. The previous position was that the validity of an award was a matter for the law of the state of rendition: RG, 30 RGZ 368. See further Maier in *Münchener Kommentar* 3 (1992) 1026-8.

arbitration law as procedural²⁶ is interesting, but of limited practical relevance. German law considered domestic those awards rendered pursuant to German law, which was in turn a matter for the parties to decide. Theoretically, the parties could submit their proceedings to German law even if they took place abroad; conversely, German courts would not interfere with proceedings taking place within the realm under foreign law. But the rule could in real life apply only insofar as German law was the only player.

Giving effect to the latter proposition was entirely a matter for the German legal order, for it was entirely up to it to decline its application. The former proposition, control over awards rendered abroad under German law, depended on how other legal orders responded to party stipulations submitting their proceedings to German law. As a matter of German law, the statute implementing the New York Convention reserved the competence of German courts over awards made abroad but resulting from proceedings submitted to German law.²⁷ The courts were seemingly uneasy with the provision, perhaps because they were conscious of the risk of offending the sovereignty of a state possessing or having already exercised control over an award rendered on its soil.²⁸ There are thus no examples of annulment actions on awards rendered abroad. To the contrary, German courts were paying deference—or, more technically, were making a *renvoi*—to the territorial or quasi-territorial jurisdictional title that other legal orders would assert, thus aligning the scope of application of German law with other laws. Courts consistently considered an award foreign, irrespective of any choice by the parties, if the law of the state of rendition was by its own terms applicable.²⁹ And if the arbitral rules under which the award was made contained even the possibility that the law of the state of the proceedings would have applied, the award would be considered subject to that law.³⁰

The conclusion to draw must therefore be that any notion of jurisdiction based on the law chosen will be effective only between states sharing the same notion. German law would apply extra-territorially only if the territorially or similarly competent law would also allow freedom of choice.³¹ This is not to criticize the notion of freedom of choice; it is only to say that in the present state of arbitration law, co-ordination of jurisdictions requires discarding it or only nominally adopting it as the delimiting factor of the scope of the law. This was the crux of the criticism made on German law³² and one of the basic features of the revamping of the Tenth Book of the ZPO,

²⁶ See Mann in *FS Oppenhoff* (1985) 215, 216.

²⁷ The German implementing legislation ([1961] BGBI II 121) reads in pertinent part:

Article 2

- (1) If an award to which the Convention is applicable is made in another contracting state in accordance with German procedural law, then an action for annulment can be brought in Germany.

²⁸ cf RG, 116 RGZ 193.

²⁹ See BGH, 21 BGHZ 365; BGH, (1984) 37 NJW 2763 (award open to remedies at rendition state not valid for enforcement purposes); BGH, III ZR 90/90 (unreported) (same); OLG Hamburg, [1996] Gutachten 600, 606.

³⁰ See BGH, 96 BGHZ 41 (award under the ICC Rules (1975), Article 11).

³¹ As a side-effect, there would be no *lacunae* in respect of awards intended to be subject to no law, for some law (say, the law of the seat) would apply of its own motion, and they would thus be foreign awards. Erne-mann, *Zur Anerkennung und Vollstreckung* (1979) 99-109 concurs in the result, but on the basis that party autonomy is unlimited. His construction seems to be based on a strained interpretation of German law; see *ibid* 42-56.

³² See, eg, von Beringe, (1959) 12 NJW 77, 79-81; Sandrock, (1987) 33 (Beilage 2) RIW 1, 18-9. For a defence see, eg, Schwab in *Recht und Praxis* (1986) 53, 59.

whose application is now predicated, essentially but not exclusively, upon the legal notion of seat.³³

C. France, pre-1981: *Déni de Justice*?

French law was modelled on similar lines, again on considerations of party autonomy and an apportionment of legislative and judicial competences aligned to such autonomy.³⁴ French courts would thus exercise control jurisdiction only over awards submitted by the parties to French law.³⁵ French courts never dithered on how to ascertain such choice. The first principle was that the law applicable to the substantive agreement should be distinguished from the law applicable to the arbitration.³⁶ The second principle was that an explicit agreement as to the law governing the proceedings should be given effect to. Lacking clear language to that effect, constructive submission resulted from reference to a foreign law's material procedural rules, for instance the ones relating to the constitution of the tribunal and deposit of the award.³⁷ In the absence of such indications, the case-law seemed crystallized in favour of the place of rendition of the award³⁸ and/or the seat of the administering institution³⁹ either as indications of implicit subjection to that state's law or as elements of an objective localization of the process. (The place designated as seat did not seem to have any separate legal existence, but, in cases relating to on-going or to-be-commenced proceedings, it was presumed that the award would be rendered there.) In that sense, the rule that geographical indications were not decisive and that the circumstances as a whole should be taken account of, was only formally observed.

In that template of thought, proceedings under the auspices of the ICC should never pose problems. In addition to the strong indications of the state of rendition, seat of the proceedings, and of the arbitral institution, the 1955 ICC Rules, Article 16, added the procedural law of the place in which the proceedings took place. Thus, an award rendered in Paris would be considered to have been submitted to French law.⁴⁰ Article 11 of the 1975 ICC Rules, which neither allowed nor prohibited recourse to the procedural law of the place of the proceedings, was initially held suffi-

³³ See ZPO, as amended by Gesetz zur Neuregelung des Schiedsverfahrensrechts, [1997] BGBI I 3224, (1998) 37 ILM 790, §§ 1025(1), 1043(1). On the Act see, eg, Habscheid, WJ, 'Das neue Recht der Schiedsgerichtsbarkeit', (1998) 53 JZ 445; and the contributions in (1998) 14:1 Arb Int.

³⁴ Paris, 5 July 1955, (1956) 35 RCDIP 79 (award made in France not subject to appel-nullité when parties submitted proceedings to foreign law); Paris, 27 March 1962, [1962] Rev Arb 45 (the procedural and substantive law applicable are for the parties to determine).

³⁵ See, eg, Cass req, 9 July 1928, [1928] D 173; Toulouse, 29 January 1957, [1957] Rev Arb 96 (appel-nullité against award made in London inadmissible); Cass Civ Ire, 14 June 1960, [1961] JCP II 12273 (parties deemed to have elected English law by arbitrating in London); Cass Civ Ire, 25 May 1983, [1985] Rev Arb 415 (award made in Belgium by foreign arbitrators; no indication of election of French law despite provisions mandating deposit of the award in France and designating a French court as appointing authority).

³⁶ See, eg, Paris, 18 June 1974, [1975] Rev Arb 179; Paris, 28 April 1976, [1977] Rev Arb 151; *affirmed on other grounds*, Cass Civ Ire, [1980] Rev Arb 496; and recently (in another context) TGI Paris, 15 February 1995, [1996] Rev Arb 503, 510-11; *affirmed*, Paris, 19 December 1995, [1996] Rev Arb 110.

³⁷ See Cass req, 17 July 1899, [1900] S I 339. But these indications were rebuttable, chiefly by the state of rendition: Cass Civ Ire, 25 May 1983, [1985] Rev Arb 415.

³⁸ See Cass req, 8 December 1914, [1916] DP I 194; Monaco, 17 January 1957, [1957] Rev Arb 106; TC Seine, 7 June 1958, [1956] JCP II 9460; Paris, 30 May 1963, [1963] Rev Arb 93; Paris, 20 January 1972, [1974] Rev Arb 105; Paris, 18 June 1974, [1975] Rev Arb 179; Paris, 25 November 1977, (1979) 106 JDI 126.

³⁹ See, eg, Aix, 25 February 1958, [1958] Rev Arb 94.

⁴⁰ See, eg, Paris, 15 December 1972, [1973] Rev Arb 98, 101; *affirmed*, Cass Civ Ire, 22 January 1975, [1975] Rev Arb 309, 310.

ciently to point to French law for proceedings taking place in France.⁴¹ Two decisions of the Paris Court of Appeal reversed that position. In the *causes célèbres* of *Götaverken*⁴² and *Aksa*⁴³ the question was whether *appel-nullité* (equivalent to *recours en annulation* now) was admissible in regard to awards made in France between foreign parties and where the dispute was international. The court felt unable to find any indication that the awards were subject to French law—or any law at all. The court further held that the reference to the law of the seat in Article 11 of the ICC Rules was only subsidiary and that in the circumstances the parties had excluded that law, since it could deduce no indication of choice of procedural law from the actual procedural acts.⁴⁴ The court implied that France was not the appropriate forum in stating that the awards were ‘not connected in any manner whatever with the French legal system’ since both parties were foreign and the substantive contracts were wholly executable abroad. It thus dismissed the appeals as inadmissible.

It must be realized that the court’s motivation was merely to consecrate some sort of special régime for arbitral proceedings and awards implicating the interests of international commerce, that is, international arbitrations.⁴⁵ Although the motivation is not objectionable, the means are. The premise is that an international award does not sufficiently implicate the interests of the rendition forum, which thus lacks any *natural* title to exercise conclusive authority thereupon. But the countervailing proposition, that some forum must do that, is also correct. As will be seen in subsection II.C below, modern arbitration practice shows that if control of the regularity of an award should be excluded at all, that should be by written express agreement. Meanwhile, French arbitration law was amended shortly after the judgments discussed. Special rules in respect of international awards now apply, but even such awards are subject to annulment in French courts, on limited but non-excludable grounds.⁴⁶ While French law did away with the concept of nationality of arbitral awards, the *recours en annulation* against international awards is intended to remedy any possibility of denial of justice that would arise under the case-law.⁴⁷

D. England, pre-1996: Presumptions Canonized

Before the advent of the Arbitration Act 1996, it was an unfortunate feature of English law that the scope of application of its various provisions was neither set out by statute nor judicially ascertained with sufficient clarity and consistency. Absent statutory determination, the rule would apply here too that common law conflicts rules determine the scope of application of each provision of the Arbitration Acts 1950 and 1979.⁴⁸ However, a clear indication of the coverage of English law was contained in RSC O 73 r 7(1)(a), allowing service out of the jurisdiction of any

⁴¹ Paris, 22 December 1978, [1979] Rev Arb 266.

⁴² Paris, 21 February 1980, (1980) 107 JDI 660.

⁴³ Paris, 9 December 1980, (1981) 70 RCDIP 545. The result would have been the same today, for the designated seat was Vienna, whereas only hearings were supposed to take place in Paris.

⁴⁴ Note, however, that the tribunal did apply French conflicts rules, being those of the ‘place’ of arbitration: ICC 2977-2978-3035/1978 (*AB Gotaverken v LGMTO*), reprinted in Wetter, *The International Arbitral Process II* (1979) 209, 218.

⁴⁵ See Paris, 20 December 1984, [1985] Rev Arb 415, 421 (which follows *Götaverken* and *Aksa*). Previous case-law did not admit of any such special category; see Cass Civ 1re, 22 January 1975.

⁴⁶ See NCPC, Articles 1492, 1504, first indent.

⁴⁷ See Report to the Prime Minister accompanying the *Projet de Décret*, extracted in Fouchard *et al*, *Traité* (1996) 1033, 1034-5.

⁴⁸ The general rule was recently stated in *Irish Shipping Ltd v Commercial Union Association Co Plc* [1991] 2 QB 206, 220 (CA).

originating summons or notice of originating motion 'provided that the arbitration to which the summons ... relates is governed by English law or has been, is being or is to be held within the jurisdiction'.⁴⁹ It is arguable that the latter, territorial, connection adopted by O 73 was dispositive of the issue. There is scant support for that proposition⁵⁰ and the matter was never really considered. The courts were seemingly unwilling to exercise their jurisdiction unless English law could be found to apply independently of any territorial connection.⁵¹ When and to which matters English law applied was a matter of some complexity. The law could be summarized under the following principles (some of which would be relevant, *mutatis mutandis*, under the Arbitration Act 1996).

First, under English law any arbitration would be subject to some law and jurisdiction: 'our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.'⁵² Secondly, the courts distinguished between the law applicable to the agreement to arbitrate and the procedural (often styled 'curial') law of the arbitration.⁵³ (The jurisprudence was never absolutely clear which matters fell under which law, but in the end, and as will be seen presently, this was not crucial.) Curial law determined, chiefly, the conduct of the arbitral proceedings, that is, the rights and duties of the parties and the arbitrators (but not the extent of the arbitrators' jurisdiction), and the remedies available. In the light of a correspondence between rights and remedies, the English courts would be competent only insofar as English law applied. This, in turn, was a matter of choice for the parties. The principle was stated in the *Whitworth Street Estates* case. Strictly, the case is authority for the proposition that in the absence of an express choice of procedural law, implicit choice results from the choice of the *locus* of the proceedings,⁵⁴ on the premise that this is the place of performance of the agreement to arbitrate and thus the jurisdiction most closely connected to it.⁵⁵ Lord Wilberforce was the only member clearly to admit that it was possible for the parties to divorce the curial law from the law of the place of the proceedings.⁵⁶

The courts gradually turned the presumption into a real rule. In the *Black Clawson* case the clause provided for ICC arbitration in Switzerland (and the parties supplemented that in the Terms of Reference by fully submitting to the Zurich ZPO), but it also added that the clause should be deemed 'submission within the meaning of [English law]'.⁵⁷ The question for the court was

⁴⁹ The text quoted is that of RSC O 73 r 29(1) (introduced by The Rules of the Supreme Court (Amendment) Order 1996 (SI 1996/3219)), restating and retaining in force the former O 73 r 7(1) for a transitional period under the Arbitration Act 1996, s 109(2).

⁵⁰ See *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission* [1994] 2 Lloyd's Rep 45, 56.

⁵¹ See now Practice Direction 49G, para 8.1, aligning the heads of service with the scope of the Arbitration Act 1996.

⁵² *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, 301.

⁵³ The principle is stated in *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583.

⁵⁴ See *Whitworth Street Estates*, [1970] AC at 584 (Lord Reid), 596 (Lord Wilberforce), 609 (Lord Diplock); and, eg, *President of India v La Pintada Cia de Navigacion* [1985] 1 AC 104, 119 (HL); and see already *Hudson Strumpffabrik GmbH v Bentley Engineering Co, Ltd* [1962] 2 QB 587, 591-2. The court only slightly deviated from the strong presumption in favour of the seat admitted in *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co* [1927] AC 604 (HL).

⁵⁵ See *Don v Lippmann* 7 ER 303 (HL(Sc)); *Bank Mellat*, [1984] QB at 301 (referring to the 'forum' of arbitration).

⁵⁶ See *Whitworth Street Estates*, [1970] AC at 616. His Lordship further implied that a choice merely due to convenience, ascertainable perhaps by the adoption of international arbitration rules, would not localize the proceedings.

⁵⁷ See *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446.

whether it had competence to grant injunctive and/or declaratory relief on the ground that the arbitration agreement had been frustrated. The application was therefore framed in terms of O 11 r 1(d)(iii) (now CPR 6.20(5)(c)), service out of jurisdiction in claims arising out of contracts governed by English law. The court, Mustill J (as he then was), in the result dismissed the application but found the basis of jurisdiction admissible and pertinent; that this was, in other words, a remedy flowing from, and determined by the proper law of, the arbitration agreement. The learned judge reasoned that the reference to English law was simply a circuitous way of allowing English courts to stay actions in breach of the clause. He went on to find that by stipulating that the proceedings would take place in Zurich, and actually holding them there and conforming to local law, the parties had evidenced their intention to submit the arbitration agreement to that law. The court was in a sense fortunate that the proper law clause of the main contract did not decisively point to English law, but there is all the reason to believe that even if the clause were unambiguous, any presumption flowing from it would have been defeated. And this because, as the court stated, any interference by the English courts would be 'in potential conflict with the powers exercisable by the local courts'.⁵⁸ In fact, the court dithered between any jurisdictional title it might harness from the proper law of the arbitration agreement and what in effect was requested, namely interference with the conduct of the proceedings.⁵⁹ The result was correct, if one is permitted to say so, but the ambiguity was damaging. And it was due to the incomplete regulation of arbitration law in the statutes, which left room for framing remedies in general contract law and its companion, O 11. But the case also shows the extraordinary difficulty in distinguishing between remedies flowing from and pertaining to the various laws applicable to different aspects of arbitration,⁶⁰ in other words, it militates for the exclusive jurisdiction of the courts of one state only.

This perhaps explains the clear tendency to shield arbitrations abroad from English law but, inversely, to extend its application to all arbitrations within the territory. First, the presumption in favour of importing English law on a territorial indication was always followed.⁶¹ Circumstances such as an exclusive jurisdiction clause alongside the clause providing for arbitration in England

⁵⁸ [1981] 2 Lloyd's Rep at 453. Although the possibility of exercising extraterritorial jurisdiction was theoretically admitted in *Shuwaikh Trading & Construction Materials Co v Price & Pierce Timber Ltd* (27 July 1984), it was refuted in almost categorical terms in *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9, 21.

⁵⁹ See [1981] 2 Lloyd's Rep at 454. In *Gola Sports Ltd v General Sportcraft Co Ltd* [1982] Com LR 51 (CA) the court accepted that O 11 conferred jurisdiction to appoint an arbitrator in an arbitration scheduled to take place in New Jersey but refused to exercise its discretion, because the courts there were already seised of an application. O 11 (now CPR 6.20) still serves as basis for anti-suit injunctions (below, note 237), despite s 1(c) of the Arbitration Act 1996; see *Bankers Trust Co v Jakarta International Hotels & Development* [1999] 1 Lloyd's Rep 910.

⁶⁰ Such distinctions troubled courts and commentators. It was held that the proper law of the arbitration agreement was determinative of, for example, jurisdiction to extend the time for commencement of the proceedings (Arbitration Act 1950, s 27): *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224, 232-3. But if the case permitted the court would not take a stance; see *Astro Venturoso Cia Naviera v Hellenic Shipyards SA (The Mariannina)* [1983] 1 Lloyd's Rep 12 (appointment of arbitrator; explicit choice of English curial law and English proper law). For an attempt to systematize see Collins in *Contemporary Problems* (1987) 126, 126-34. It is inaccurate, however, to cumulate the criteria as in Cohn, (1962) 25 MLR 448, 449.

⁶¹ Sometimes the agreement and/or the terms of reference were clearly importing English law: *Marine Contractors Inc v Shell Petroleum Development Co of Nigeria Ltd* [1984] 2 Lloyd's Rep 77, 79 (CA); *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 1 Lloyd's Rep 260, 262; *Regia Autonoma de Electricitate Renel v Gulf Petroleum International Ltd* [1996] 2 All ER 319, 323. But in those cases the proceedings were taking, or to take, place in the jurisdiction.

would corroborate the inference.⁶² Similarly, it would be an English award if rendered in the jurisdiction and the arbitration agreement invested a private institution incorporated in the jurisdiction with appointing functions, even if the seat had not been chosen by the parties.⁶³ Further, whenever the agreement stipulated arbitration with its 'seat', or to take place in, England, English law was considered applicable if the parties did not dispute the inference.⁶⁴ And it was presumed that English curial law would have applied to arbitrations on foot, or awards made, in England.⁶⁵ Finally—and this is of course a weakness of any sort of territorial connection and a connection based on choice—an almost irrebuttable presumption for the law of the state of the proceedings entailed that the curial law would be indeterminate when that place was yet to be fixed.⁶⁶

It is of note how the presumption on curial law had a spill-over effect to the whole agreement. The two competing presumptions were that, on the one hand, a proper law clause would in the absence of contrary indications carry with it the arbitration agreement too⁶⁷ but, on the other, an agreement to arbitrate in the jurisdiction was a strong indication of submission of the whole contract to English law.⁶⁸ The latter presumption was premised on the understanding (for lack of a better word) that an arbitrator sitting in the territory would 'administer' English law, meaning English conflicts rules.⁶⁹ And it would be corroborated by other indications of attachment, such as a clause investing English courts with appointing authority.⁷⁰ Generally, a designation of seat would be a circumstance infirming the presumption flowing from a proper law clause.⁷¹ That would especially be the case if the arbitration was already proceeding in another jurisdiction, on considerations that have been outlined above.⁷²

Secondly, judicial competence and the scope of the law were gradually made to lean on (a presumption of) English law being or having been the curial law. In other words, English arbitration law *qua* curial law became the primary foundation of jurisdiction. Thus, inherent jurisdiction to dismiss claims for want of prosecution was founded on the application of English law as the procedural law of the arbitration.⁷³ Lord Denning MR stated that he regarded ICC arbitration in London 'as virtually equivalent to an ordinary English arbitration'.⁷⁴ In the result, the progressive ex-

⁶² See *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 127, 129-30; *McNicholas plc v AEI Cables Ltd* (25 May 1999).

⁶³ See *Hern Deureslberg v Malaysian International Shipping Corp* (19 July 1991); cf *Federal Insurance Co et al v Transamerica Occidental Life Insurance Co* [1999] 2 Lloyd's Rep 286, 288.

⁶⁴ See, eg, *Union International Insurance Co Ltd v Jubilee Insurance Co Ltd* [1991] 1 WLR 415.

⁶⁵ See, eg, *Bank Mellat v GAA Development & Construction Co* [1988] 2 Lloyd's Rep 44, 54.

⁶⁶ See *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd's Rep 445.

⁶⁷ See *Hamlyn v Tallisker Distillery* [1894] AC 202 (HL(Sc)); *Spurrier v La Cloche* [1902] AC 446 (PC).

⁶⁸ *Cie Tunisienne de Navigation SA v Cie d'Armement Maritime SA* [1971] AC 572.

⁶⁹ See *Kwik Hoo Tong*, above, note 54.

⁷⁰ See *Tzortzis & Sykias v Monark Line, A/B* [1968] 1 WLR 406 (CA). Such indications would be of course easy to find in a jurisdiction which allowed extensive interference with the arbitral process.

⁷¹ The authorities are split; compare *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep 236 (CA); with *Cia Maritima Zorroza SA v Sesostris SAE (The Marquess de Bolarque)* [1984] 1 Lloyd's Rep 652, 655.

⁷² cf *Atlantic Underwriting Agencies Ltd et al v Cia di Assicurazione di Milano SpA* [1979] 2 Lloyd's Rep 240; *Black Clawson*, above, note 57.

⁷³ See *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909 (CA). The proposition was refuted by *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909 (HL); see now Arbitration Act 1996, s 41(1)-(3).

⁷⁴ See *Bremer Vulkan*, [1981] AC at 941.

pansion of the scope of the curial law was an altogether happy development, for two reasons. First, since the powers and duties of the arbitral tribunal stem from the arbitration agreement, a case might always be made for founding jurisdiction on that connection, while it is clear that, on the whole, the common law required a stronger connection.⁷⁵ Secondly, it concentrated jurisdiction.

That construction was taken to its limits, effectively to impose English law on all proceedings with a territorial connection with England. To be sure, English law was unclear on whether the crucial connection, and for what purpose, was a 'seat' selected by the parties or their agents (ie, the arbitral tribunal or the supervising institution), or the fact that proceedings were actually taking place, predominantly or exclusively, within the jurisdiction, or, finally, the actual place of making of the award. In fact, a very controversial judgment of the House of Lords ruled in favour of the second criterion as an indication of submission to English law for the purposes of exercising post-award remedies,⁷⁶ but eccentrically founded its jurisdiction on the statute enacting the New York Convention.⁷⁷ This was eccentric because in respect of awards the Convention applies to recognition and enforcement only.

Returning to the main point, the technique for imposing English law was to introduce a third overarching law. This started with dicta distinguishing between the *lex fori* of an arbitration, that is, the law of the *courts* territorially competent and in fact in control of an arbitration, on the one hand, and arbitral procedural law on the other.⁷⁸ It was clarified that the 'law of arbitration' *ab extra* imposed its substantive rules of validity and, in particular, the supervisory jurisdiction of its courts.⁷⁹ Now couple that with a territorial presumption of some sort and a reach of the curial law that includes even the conflicts rules to be adopted,⁸⁰ and the net result is a complete *lex arbitri*. The consequences of that construct were twofold. One was that in an arbitration where the clause provided that the 'seat' would be in the jurisdiction but that the arbitration would be 'conducted in accordance with' a foreign arbitration law the stipulation of 'seat' would be regarded as a stronger indication than the express submission to another state's arbitration law; so that the arbitration would be subject to English law and jurisdiction, the chosen foreign law operating within the limits of English law.⁸¹ Now Saville J (as he then was) was conscious that the construction was paying only lip-service to party autonomy, for he stated:⁸²

[T]he jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country, or indeed by any other means unless such agreement is sanctioned by those Acts themselves.

⁷⁵ Is there a fundamental difference between the remedies and the connecting factors relevant in *Bremer Vulkan* (above, note 73) and *International Tank & Pipe* (above, note 60)? See further *Dicey & Morris* (2000) 579.

⁷⁶ *Hiscox v Outhwaite (No 1)* [1992] 1 AC 562 (HL).

⁷⁷ See Arbitration Act 1975, s 5(2)(f) and (5).

⁷⁸ See *Black Clawson*, [1981] 2 Lloyd's Rep at 453.

⁷⁹ See *Paul Smith*, [1991] 2 Lloyd's Rep at 130.

⁸⁰ See *Sumitomo*, [1994] 2 Lloyd's Rep at 57.

⁸¹ See *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48. The judgment closely follows Mann, (1970) 17 ICLQ 694; and it was anticipated by Thomas, [1984] LMCLQ 491. See also Mustill & Boyd, *The Law and Practice* (2nd edn, 1989) 65-6, 90-1, 284. For a good example see below, text to note 269.

⁸² [1993] 2 Lloyd's Rep at 51 (holding the chosen law as governing the 'internal' conduct, and not the intrinsic validity of the proceedings). The judgment closely follows a suggestion by Collins, above, note 60, 133, and was espoused by the first DAC report on arbitration law, chaired by Lord Mustill: (1990) 6 Arb Int 3, 30-1.

The development of the case-law is hardly reconcilable with the authority of *Whitworth Street Estates*, presumably still controlling under the old law, but entirely acceptable as a step towards a sensible co-ordination of jurisdictions. It is all the more acceptable because the courts stated their readiness to pay due regard to the fact that the proceedings were not firmly attached to English law and, on that ground, make their support or control jurisdiction discretionary.⁸³ It did however produce an unhappy by-product. In a case where the parties had agreed that the proceedings would take place abroad but under English law it was held that the agreement should be construed as providing for arbitration in England.⁸⁴ That cannot be correct. If there is any value, as is suggested here, in the construction that the place of the proceedings and/or the designated seat should take precedence on considerations of reality and harmonization of judicial competence, it should be up to the courts of that state to determine the effect of the foreign law stipulation. The same applies to the ground adduced in the same case that the jurisdiction of the English courts, *ex hypothesi* imported through a choice of English law, is spatially limited. If jurisdiction cannot be totally ousted in respect of proceedings with some sort of territorial connection with England, it is more natural to regard the parties as having opted for the jurisdiction of the courts of the seat, (which would on the same premise have interests arising from that connection to defend) rather than the courts of the designated law (which would not).⁸⁵ The result is even more startling if contrasted with previous authority, which presumed that proceedings⁸⁶ and awards made⁸⁷ abroad subject to the law of the seat.

Similar concerns are raised by a recent decision of the Court of Appeal. The court was *inter alia* confronted with an objection to the recognition of an award made abroad. The objection was that England was both the enforcement and the controlling forum, and objections to recognition were inadmissible insofar as they had not been raised by remedies seeking to set aside the award within the prescribed time-limits. The court correctly rejected the objection but admitted its duplicate jurisdiction nonetheless.⁸⁸ The court seemed prepared to accept jurisdiction under the pre-existing law where the parties concede such jurisdiction and no other court asserts jurisdiction over the proceedings. For there was no indication that the arbitral proceedings had any connection with the jurisdiction save that the claimant (and respondent in the English proceedings) was domiciled in England. This does not seem to be a reserve forum case; it rather looks like a forum-election case, where the choice of forum would be tempered by the disturbance of the jurisdiction of a court territorially competent. Even thus put, the judgment clashes with the fundamental assumption that

⁸³ *Union of India*, above, note 82. The discretion proposition was first admitted in *Bank Mellat*, [1984] QB at 307-8 and confirmed in *Coppée-Lavalin SA/NV v Ken-REN Chemicals and Fertilizers Ltd (in liq)* [1995] 1 AC 38, in respect of ICC proceedings wholly unconnected with England and security for costs. For more straightforward constructions on similar facts see *Badger Chiyoda v CBI NZ Ltd* [1986] 2 NZLR 599; *reversed*, *Badger Chiyoda v CBI NZ Ltd* [1989] 2 NZLR 669 (CA). And note that the exceptions stated to follow from the lack of connection (exclusion of appeal on the merits and refusal to make orders for security for costs respectively) result from the agreement of the parties and not any lack of connection; see *Arab African Energy Corp Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419; and *Mavani v Ralli Bros Ltd* [1973] 1 WLR 468.

⁸⁴ *Naviera Amazonica Peruana SA v Cia Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 (CA).

⁸⁵ *Hiscox*, above, note 76, is based on similar considerations, but in the circumstances the result was justified.

⁸⁶ See *Channel Tunnel*, [1993] AC at 357-8; *The Marquess de Bolarque*, [1984] 1 Lloyd's Rep at 655.

⁸⁷ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 concerned an ICC award made in Geneva under a clause submitting 'all questions arising from or pertaining to' the arbitration to Indian law and jurisdiction. Though the terminology fluctuates, the court treated the clause as importing Indian law only as the proper law of the agreement: *ibid* 228, 232, 238, 247. The Court of Appeal affirmed on similar lines: *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, 277 (CA).

⁸⁸ See *Irvani v Irvani* The Times, 10 February 2000 (CA), paras 169-172 of the transcript.

arbitration-related jurisdiction should be predicated upon an objective connection of the proceedings with the jurisdiction, because the jurisdiction of the English courts is always asserted by the application of English law. This should be contrasted with the situation under Austrian law, which does establish jurisdiction on the basis of a forum agreement but does not seem to link such jurisdiction with the application of Austrian law.⁸⁹

E. Conclusions

This section has explored four legal systems as representative examples of a now almost obsolete legislative technique.⁹⁰ The conclusion offered is that any criterion of legal localization, and indeed a criterion based not on some super-imposed territorial or quasi territorial connection but on freedom of choice of law, is destined either to apply only nominally or to lead to unwarranted results. This for four reasons: first, in the few jurisdictions that had adopted it the courts considered the jurisdictional title of the law of the state of rendition (or seat) more natural than theirs, and made concessions to that law and courts; secondly, the choice of the parties was in the vast majority of cases ascertained from a territorial connection; thirdly, it is practical and expedient to gather the substantive rules and remedies pertaining to arbitration under one law and jurisdiction as much as possible; and fourthly, inequities ensue if the territorial connection is discounted and there exists no reserve controlling forum. The approach of the German and English courts was the happiest of the four examined but, in the case of English law, an apportionment of the respective domains of the law of the arbitration agreement and procedure for jurisdictional purposes was intrinsically unsound or, at any rate, practically indefensible. Yet, it has been proposed in the previous chapter that party autonomy in matters procedural, and perhaps more generally as well, should be given effect to. The next section explores how modern arbitration statutes achieve that aim.

II. THE BASIC TENETS OF MODERN ARBITRATION LAW

A. The Concept of Seat as the Basis of Functional Jurisdiction

It is useful to pick up the thread where it was left, England. The uncertainty over the scope of application of English law was an essential mischief of the common law that the Arbitration Act 1996 purported to remedy. The Bill which preceded the Arbitration Act 1996 attempted to clarify the situation outlined in subsection I.D above, but accepted a dispersion of the connecting factors. Thus, certain rules applied upon English law being the proper law of the agreement, while others depended on the arbitration's seat being in England, and others still on no such connection (nota-

⁸⁹ See öZPO, § 582(1).

⁹⁰ Yugoslav law still treats awards made in the territory under a foreign law as foreign, on the eccentric threshold condition that 'this is not contrary to the mandatory provisions of the Republic': Act on the Settlement of Conflicts between Yugoslav Laws and Provisions of other Countries concerning Specific Matters (1983), Article 97(3). On one view, Japanese law, which is in the process of being revamped, allows arbitrations under foreign law: Doi, National Report Japan (1995) in *Handbook*, ch IV.2, citing *The Oriental Hotel Ltd v AD Larande* (Osaka Appeal Chamber, 24 July 1917). Polish law (in the process of adopting the Model Law), allows the parties to exclude the CCP, but even then obliges the tribunal 'thoroughly' to examine the facts: CCP (Poland), Article 705. On one view, awards under foreign law would be foreign: Zedler, (1992) 3 Comparative Law Review 97.

bly jurisdiction to stay claims falling under the arbitration agreement and support jurisdiction).⁹¹ Crucially, the bill did not list the provisions falling under each category, except that it did set out the provisions applying independently of connection. Eventually the distinction was found unworkable and dismissed.⁹² Section 2(1) of the Act now provides that the provisions of Part I, which are relevant here, apply ‘where the seat of the arbitration is in England and Wales or Northern Ireland’—subject to exceptions contained in subsections 2(2)-(5) and which follow the philosophy of the bill.

The concentration of connecting factors is welcome, and none of the refinement of the original Bill is lost, for the notion of ‘seat’ is a juridical one. A fundamental purpose of the Bill was to prevent English law applying on a mechanical geographical test regardless of the intentions of the parties.⁹³ Section 3 of the Act is both sophisticated and practical:

In this Part ‘the seat of the arbitration’ means the juridical seat of the arbitration designated—

- (a) by the parties to the arbitration agreement, or
- (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
- (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances.

The legislative intent is clear in two respects. That procedural acts, such as evidential hearings, take place within the jurisdiction will not of its own be sufficient to make the whole arbitration fall under the Act.⁹⁴ One is looking for a positive intent of the parties or their agents juridically to localize the proceedings in the jurisdiction. It would of course be unrealistic to expect provisions stating that the ‘juridical seat will be London’ or that ‘the arbitration will take place in London in the sense of s 3 of the Arbitration Act 1996’. An express agreement that the proceedings will take place, or have their ‘seat’, in England should be sufficient indication of party intent,⁹⁵ in the sense that it should not be rendered nugatory by provision for another state’s arbitration law. Further, an agreement specifying that the proceedings will be conducted under English law but not where they will be held, will have the same effect;⁹⁶ but that inference should atrophy, it is suggested, when the parties provide at the same time that the proceedings shall be held abroad.

There is an intermediate case, falling between two basic pillars of the geometry of the Act, namely freedom of choice and concentration of actions at a convenient forum. Does English law apply when the parties provide that the place of arbitration will be in the jurisdiction but that the

⁹¹ See Arbitration Bill (1995), clause 2(2)-(4). Clause 2(2), which distinguished between matters of the arbitration agreement and arbitral procedure, was indicative, and subject to the common law conflicts rules: clause 2(1).

⁹² See Departmental Advisory Committee, Supplementary Report on the Arbitration Act 1996 (1997) (hereafter ‘DAC Supplementary Report’) paras 6-12 (where clause 2 is reproduced).

⁹³ See Departmental Advisory Committee, Report on the Arbitration Bill (1996) (hereafter ‘DAC Report’) para 23.

⁹⁴ See Arbitration Act 1996, ss 2(3)(a), 43(3)(b).

⁹⁵ cf *Caparo Ltd v Fagor Sociedad Cooperativa* (CA, 7 August 1998). *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd’s Rep 24 is methodologically commendable in actively seeking to ascertain the parties’ intention to choose a seat as a legislative requirement.

⁹⁶ Accord: Veeder, VV, National Report England (1997) in *Handbook*, at 34. The same should apply when the submission is only indirect; see the clause in *Cass Civ Ire*, 6 June 1978, [1979] Rev Arb 230 (no seat, arbitrators appointed ‘shall be deemed to have been appointed within the meaning of the Arbitration Act 1950’).

‘curial’ law will be foreign? The philosophy and terms of the Act (in particular the command to have ‘regard to the parties’ agreement) would suggest that the Act should not apply. Admittedly, the result would be different if the parties had chosen a foreign law for the ‘conduct of the proceedings’ or as the one ‘under which’ the arbitration would take place. Those are choices subordinate to the Act. It is readily conceded that in real life fine linguistic nuances hardly ever find their way into the ‘midnight clauses’ that dispute resolution clauses tend to be. The proper and realistic approach would seem to be to construe a choice of place as the predominant indication, to be defeated only by an express choice of a foreign law as ‘curial’ or ‘the law of the arbitration’, which would mean that the parties did apply their minds to the problem and consciously chose (physically) to arbitrate in England outside the cover and protection of English law, and incurring the risk that the courts of the law so chosen would decline jurisdiction. English law could then apply as the reserve law, based on the proviso in the final sentence of s 3 of the Act that ‘all the relevant circumstances’ should be had regard to.

The hypothesis where the parties choose a foreign law but not the place of arbitration has really nothing to do with the Act: it does not apply because no seat has been chosen and not because the seat is in the state of the law chosen. This is something for other fora to determine. When the seat is determined, the arbitration will fall within the cases contemplated in the preceding paragraph.

Thus, the criteria of application of the Act could be tabulated as follows:

Table: Indices of Choice of Juridical Seat (Arbitration Act 1996, s 3)

‘Place’ of Arbitration	Choice of Arbitration (or Procedural) Law	
England	No Choice	Act applies
England	Foreign Law as ‘Procedural’	Act applies
No Choice	English Law	Act applies
England	Foreign Law as ‘Curial’	Act does not apply
Foreign State	No Choice	Act does not apply
No Choice	Foreign Law	Act does not apply

The scheme is complemented by s 53, providing that ‘unless otherwise agreed by the parties, ... any award ... shall be treated as made’ at the seat determined in accordance with s 3. The provision is admirable both from a practical and a conceptual point of view. The proviso allowing for contrary party agreement operates only to a limited extent: an award resulting from an arbitration whose seat is within the jurisdiction will always be subject to English law and jurisdiction (and in particular control jurisdiction, ss 67-71). Note, further, that Part III of the Act, implementing the New York Convention, contains a provision equivalent to s 53 without the reservation of party

agreement of that latter section.⁹⁷ The effect is to supply a useful gloss to Article I(1) of the New York Convention—‘made in the territory’—, which should, it is submitted, prevail universally.⁹⁸ Thus ‘made’ should be read as commensurate to the seat of the proceedings: a territorial notion would apply only as a fall-back position, for the rare cases where neither the arbitration agreement designates the seat nor have the parties agreed on arbitration rules that oblige the tribunal to do so.

The Arbitration Act 1996 creates a sophisticated framework for its scope of application, and it is of interest to note an earlier legislative attempt predicated upon similar ideas. Articles 1 and 2 of the Swiss *Concordat sur l'arbitrage* of 1969 were in essence identical to ss 2(1) and 3 of the Arbitration Act 1996. Article 2(2), however, betrayed that the Concordat was not designed for international arbitration; in the absence of a determination of the ‘seat’ as provided in Article 2(1), it fixed the seat within the jurisdiction of the court which would have jurisdiction on the merits had there been no arbitration agreement. The inappropriateness of the provision for international arbitration results from the fact that the assumption underlying the provision (namely, that one court would have jurisdiction in any event) is tenable only in domestic arbitration. In international, and in particular contractual, disputes an arbitration agreement in fact substitutes a forum election clause. So Article 176(1) and (3) of the LDIP are a restatement of Articles 1(1) and 2(1), but not 2(2), of the Concordat.⁹⁹

The proposition that it is party autonomy which creates a connection with the law of the seat, and precisely because that state has been chosen as the seat, is further illustrated by the Swedish Arbitration Act. Section 46 states the principle that the Act will apply to ‘arbitral proceedings which take place in Sweden even if the dispute has an international connection’. The scope is refined in § 47, reading as follows:¹⁰⁰

Arbitral proceedings in accordance with this Act may be commenced in Sweden, where the arbitration agreement provides that the proceedings shall take place in Sweden, or where the arbitrators or an arbitration institution pursuant to the agreement have determined that the proceedings shall take place in Sweden, or the opposing party otherwise consents thereto. *Arbitral proceedings in accordance with this Act may also be commenced in Sweden against a party which is domiciled in Sweden or is otherwise subject to the jurisdiction of the Swedish courts with regard to the matter in dispute, unless the arbitration agreement provides that the proceedings shall take place abroad.* In other cases, arbitral proceedings in accordance with this Act may not take place in Sweden.

The italicized third sentence intends to create a *for de nécessité*, relevant in cases where there is no agreement on the seat and no person within the enumeration of § 47 has been authorized by the parties to designate it. The point is that unless the parties themselves have created a link with Sweden, such link may be established only if it would otherwise exist for ordinary judicial pro-

⁹⁷ See Arbitration Act 1996, s 100(2)(b). Even if Part III contained a mere cross-reference to ‘seat’ as defined in Part I (ie, including s 53), the result would be that English law and jurisdiction would still apply, but Part III would also apply. Either option would reverse the *ratio* of *Hiscox*, above, note 76, but maintain its holding.

⁹⁸ See DAC Report, paras 253, 349-354; DAC Supplementary Report, para 58; and van den Berg in *The Place of Arbitration* (1992) 113, 119 but on the more general ground that any arbitration is subject to the law of the seat. That would require amendment or purposeful interpretation of the laws of certain states which define ‘made’ as ‘rendered’; eg, Decree 9131-XI (1988) of the Supreme Soviet of the USSR, Articles 5(1), 11.

⁹⁹ See further Jolidon, *Commentaire du Concordat* (1984) 79-81; Lalive *et al*, *Le Droit de l'Arbitrage* (1989) 295-99. Swiss law always applied on a seat connection, not only to the arbitral procedure and jurisdiction, but also to arbitrability: TF, 57 I ATF 295; 76 I ATF 338; 93 I ATF 49, 54.

¹⁰⁰ Arbitration Act 1999 (Sweden), § 47 (emphasis added); cf s 52, second sentence. See also Arbitration Bill (Sweden) (1994), § 48.

ceedings. This clearly flows from the provision that in no case does an arbitration fall under the Act if there is an agreement to arbitrate abroad. A violation of that rule will not only exclude the proceedings from the coverage of the Act and the protection of Swedish courts but result in an award subject to setting aside.¹⁰¹

It is believed that the premises of English, Swiss, and Swedish law¹⁰² are sound and should be adopted by appropriate construction of the relevant provisions of municipal laws and international conventions.¹⁰³ The territorial scope of French law, for instance, ensues indirectly from the jurisdictional rule on annulment: 'An annulment action under Article 1504 shall be brought in the court of appeal for the district in which the award has been made.'¹⁰⁴ It is reasonable to suppose that the French legal order should have title to control by annulment only awards resulting from *arbitrations* which have, on the whole, taken place in France; in turn, there is no surer guide to that determination than party intention as defined in s 3 of the Arbitration Act 1996. The same conclusion will be reached by examining the technical question what 'making' an award means. The natural meaning is to take account of the actual time and place of perfection of an award by the signature of the arbitrator(s). It can always be ascertained where and when an award has been perfected by signing: when the arbitrators signed by circulation of drafts the last signature is the one completing the award. But this would be unnatural in all those cases where signing is a mere formality entirely divorced, geographically speaking, from the process which it completes. And in this sense, 'making' should be made coterminous with the seat of the proceedings.¹⁰⁵ These are doubtless the considerations that prompted French courts to consider admissible recourse against an award stated to be made in Brussels but where the parties had stipulated that the seat would be in Paris¹⁰⁶ and, conversely, to decline jurisdiction over an award resulting from an arbitration whose seat was abroad. In that latter case the court stated that 'the seat of arbitration is a purely legal notion carrying with it important consequences, and notably ... annulment jurisdiction'.¹⁰⁷

The same interpretation can comfortably be laid on the Model Law, by converse reasoning. The scope of the Model Law, and the provisions in which it should be stated, was a matter left undecided until the eleventh hour before its adoption. Article 1(2) states that in principle the provisions of the Model Law 'apply only if the place of arbitration is in the territory of the [enacting] State'. It is nowhere stated that 'place of arbitration' is a legal term of art. But this ensues from Article 34 on annulment. It is unreasonable to expect a tribunal to conform to mandatory provisions whose violation will attract annulment if the arbitration does not 'take place within the state' in a legally important sense. In turn, that will be the case only if the process has a permanent attachment to that state, and this can be established only by looking at the relevant circumstances and, most im-

¹⁰¹ See Arbitration Act 1999 (Sweden), § 34(3).

¹⁰² See also CCP (Netherlands), Article 1073(1) *juncto* 1037.

¹⁰³ It is suggested that the observations below may even apply where the law distinguishes between awards 'rendered' in the territory and outside; eg, Act 9307/1996 (Brazil), Article 34: 'sentença proferida.'

¹⁰⁴ NCPC, Article 1505.

¹⁰⁵ Accord: Gaillard, E, JCI Droit International, Fasc 586-10 (1992) para 31. Cf also TGI Paris, 10 January 1996, (1996) 14 Bull ASA 319; TGI Paris, 12 and 20 December 1991, [1996] Rev Arb 516.

¹⁰⁶ Versailles, 14 January 1987 (unreported), cited by Gaillard & Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 772. See also Paris, 22 September 1995, [1996] Rev Arb 100, 102. The same construction was laid on the relevant provisions of Greek law, CCP (Greece), Article 898, 1st indent: Multi-Member CFI Athens 13998/1984, (1986) 34 NoB 95; and on Portuguese Law, Act 31/1986, Article 37, see Moura Vicente, (1995) 44 ILCQ 174, 184-5.

¹⁰⁷ Paris, 28 October 1997, [1998] Rev Arb 399.

portantly, the agreement of the parties. Otherwise there is no connection at all between the legal order called upon to apply and the arbitral proceedings.¹⁰⁸

The legislative history of the Model Law gives the opportunity nicely to tie up the discussion in this subsection on the predominance of ‘seat’ in modern arbitration practice. The objective of the Model Law was to provide a uniform and modern statement of the law, emphasizing party autonomy in organizing the proceedings.¹⁰⁹ A uniform law avoids substantive conflicts between the legal orders having adopted it, but does not of itself resolve possible conflicts of jurisdiction. Two options were considered. The scope of the law could be, first, strictly territorial, in which case party autonomy would be a consideration subordinate to the law otherwise applicable; or it could be to a certain extent choice-dependent, in which case the law would apply independently of choice only to avoid a negative conflict of jurisdictions.¹¹⁰ It was agreed that certain provisions would apply independently of any connection between the enacting state and the arbitral proceedings, and this was—and still is—notably the case for enforcement of arbitral agreements (stay of proceedings) and awards, and interim protection.¹¹¹ A number of delegations, including that of the ICC, were in favour of the first approach, as being in harmony with international practice.¹¹² It was also noted that outside a simple territorial criterion, detailed fine-tuning would be required to eliminate conflicts of jurisdictions. To avoid gaps in the coverage of the law, the seat state should decline jurisdiction in favour of the state whose law was chosen to apply (positive conflict), but resume jurisdiction if that latter state declined jurisdiction on the ground of lack of a territorial connection (negative conflict).¹¹³ This was for obvious reasons unattractive, and rejected in favour of what is a more straightforward test. Article 1(2) is consonant with the experience and practice from important jurisdictions.¹¹⁴ But it is interesting that some governments still saw, even after Articles 1(2) and 34 had been finalized, a possibility for the parties altogether to opt out of the Model Law, by adopting another state’s arbitration law.¹¹⁵ Such reading is entirely without foundation in the text (and must thus be premised on some prior freedom of choice) and, moreover, would defeat the whole purpose of co-ordination of jurisdiction; happily there are no signs of it in practice.¹¹⁶ The converse situation, the Model Law applying in respect of proceedings in another state, is also excluded, by the ‘only if’ formula in Article 1(2). One must however note that the

¹⁰⁸ In the same vein, Berger, (1993) 39 RIW 8, suggests that the notion of the ‘seat of the proceedings’ is more suggestive of the permanent nexus between the seat and the arbitration.

¹⁰⁹ See UN Doc A/CN.9/21 and Corr.1 (1969), (1968-1970) I UNCITRAL YB 260, paras 263-275 (procedural autonomy, including no control on merits of awards, but unify competent jurisdiction).

¹¹⁰ See UN Doc A/CN.9/WG.II/WP.49 (1983) paras 7-8.

¹¹¹ *ibid* paras 15-27; and see Model Law, Articles 1(2), 8-9, 35-36. Finnish law, which heavily draws on the Model Law, excludes from the territorial coverage only enforcement of foreign awards: Arbitration Act (Finland), § 1.

¹¹² See UN Docs A/CN.9/263 (1985) 46 and A/CN.9/263/Add.1 (1985) 19 (Canada, ICC).

¹¹³ See UN Docs A/CN.9/WG.II/WP.49 (1983) para 32 and A/CN.9/WG.II/WP.42 (1983) 2-9.

¹¹⁴ However, it remained an open question until the eleventh hour, as it were, whether the Model Law would state to apply to arbitrations taking place ‘under’ it, ‘in the territory’, both, or, finally, leave it up to the courts to decide: UN Doc A/CN.9/246 (1984) para 170. The considerations that led the Working Group to lean in favour of the territorial criterion are set out *ibid* para 167; and the considerations that led to the adoption of Article 1(2) are in UN Doc A/40/17, (1985) 16 UNCITRAL YB 3, para 73. The latter document also sets out the reasons justifying a general statement of the principal connecting factor, as in Article 1(2); on which issue see Analytical Commentary, UN Doc A/CN.9/264, (1985) 16 UNCITRAL YB 104, 106, paras 5-7.

¹¹⁵ See UN Docs A/CN.9/263 (1985) 8 (GDR), 46 (Japan) and A/CN.9/263/Add.3 (1985) paras 10-14 (Egypt).

¹¹⁶ See *Corporacion Transnacional de Inversiones, SA v Stet International, SpA* [1999] Ont Sup CJ Lexis 908, *40-*42: arbitration submitted to Mexican law, seat in Ottawa; Mexican law treated as proper law of arbitration agreement only.

enacting legislation in Egypt and Tunisia explicitly enlarged the scope of application, to cover arbitrations abroad submitted by the parties and/or the tribunal to their respective laws; but neither state allows for the exclusion of its law in the reverse hypothesis.¹¹⁷ Similarly, German law, ZPO § 1025(1), omits ‘only’, the purpose being to leave it to the state of the seat to evaluate a choice of German law.¹¹⁸ If that state would allow a sovereign choice of German law, Germany would treat the resulting award as domestic for the purposes of enforcement.¹¹⁹

There is a related observation, to be borne in mind for section III below. Under the Model Law the jurisdiction of the courts is in principle coterminous with its scope of application. The preparatory materials reflect, however, that it was the scope of application which was a function of court jurisdiction rather than vice versa. In other words, the crucial question was ‘which are the courts that should properly exercise control over arbitral proceedings?’. The law applicable was a secondary question, it being presumed that it would be the *lex fori*.

The United States is perhaps the only important arbitration jurisdiction with no clear notion of the scope of application of its law. It may be inferred from 9 USC § 4 (preserving ordinary court jurisdiction to compel arbitration) that the provisions of Chapter 1 of the Federal Arbitration Act (9 USC §§ 1-16) in principle apply territorially.¹²⁰ Support from this proposition may be drawn from cases confining US law and jurisdiction to awards ‘rendered’ in the country and arbitrations ‘conducted’ in the territory.¹²¹ In one case, the court alluded to the choice of seat in the Terms of Reference, but the award was also stated to have been made abroad.¹²² Similarly, 9 USC § 10(b) invests the ‘district court for the district wherein an award was made’ with vacatur jurisdiction. A very recent Supreme Court judgment interprets 9 USC § 10(b) as non-limitative; as a result all jurisdictional venues under federal law (including the defendant’s forum, 28 USC § 1391(a)(2)) are now valid for setting aside purposes.¹²³ As will be seen in Chapter 6 below, Article V(1)(e) of the New York Convention disallows any transposition of the judgment, whatever its wisdom may be, to the international plane. The point here is that vacatur jurisdiction, would seem not to be ex-

¹¹⁷ See Act 27/1994 (Egypt), Article 1; Arbitration Code (Tunisia), Article 47(2).

¹¹⁸ Berger, (1998) 13:1 Mealey’s Int Arb Rep 38.

¹¹⁹ ZPO § 1061(1) maintains in force the Act enacting the New York Convention, whose Article 2(1) treats awards made abroad as German awards.

¹²⁰ See *Bear Sterns*, below, note 296. Territoriality is an accepted principle of the American common law since *The Schooner Exchange v McFaddon et al*, 11 US 116, 136-7 (1812).

¹²¹ See respectively: *International Standard Electric Corp v Bidas Sociedad Anonima Petrolera*, 745 FSupp 172, 175 (a New York Convention case, buttressing the territorial foundation of jurisdiction by arguments from Article V(1)(e); see *M & C Corporation v Erwin Behr GmbH & Co, KG*, 87 F3d 844, 947-9 (6th Cir 1996)); *Bear Sterns*, below, note 296, 165 F3d at 187.

¹²² See *American Const. Machinery & Equipment Corp Ltd v Mechanised Const. of Pakistan Ltd*, 659 FSupp 426 (SDNY 1987); *affirmed*, 828 F2d 117 (2d Cir 1987); *cert denied*, 484 US 1064 (1988).

¹²³ *Cortez Byrd Chips, Inc v Bill Harbert Construction Co*, 120 SCt 1331 (2000).

cludable by submission to another arbitration law.¹²⁴ However, 'made' is not otherwise defined, and the observations above could therefore usefully be transplanted to US law.¹²⁵

The conclusion is that the legal concept of seat suggests itself as the primary anchor between arbitral proceedings and a given legal order, for it is a fair and practical compromise between practicality and party autonomy. But it must be borne in mind that it is a legal concept, often with little or none territorial substance to it.¹²⁶

B. Procedural Autonomy as a Substantive Law Matter

Passing from legislative technique to substantive regulation, the second important tenet of modern arbitration law is the wide autonomy afforded in procedural matters. Such autonomy has ceased to be a conflicts-of-laws issue. Municipal law will cover all proceedings whose seat is in the territory, and allow all procedural arrangements that will not fall short of two basic desiderata, namely equality of the parties and impartiality of the tribunal. (Indeed, these principles are so fundamental that have implications outside the strict framework of municipal law; these are discussed in Chapter 3 below.) The applicable law may also contain provisions designed positively to safeguard these fundamental principles.

The Model Law encapsulates this trend. At the origin of its inception lay a proposal by the Asian African Legal Consultative Committee (AALCC) to supplement the New York Convention by a protocol which would make party-adopted arbitration rules prevail over municipal law at both annulment and enforcement, subject only to considerations of 'fairness'.¹²⁷ The proposal was for various reasons rejected,¹²⁸ but procedural freedom remained a basic aim to be guaranteed by the Model Law.¹²⁹ The ground rules are these:

Article 18

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. ...

¹²⁴ This would be inferred from the *Toys 'R' Us* case (discussed in Chapter 7.II.C.2), where the court retained control jurisdiction and yet accepted enforcement under the New York Convention in respect of non-domestic awards, a category which generally (but not in that case) includes awards under a foreign law. Moreover, even if it be correct that the New York Convention, Article V(1)(d) allows, as a matter of US law, submission to the law of another state (*Splosna Plovba of Piran v Agrelak Steamship Corp*, 381 FSupp 1368, 1370 (SDNY 1974); *Intercarbon Bermuda, Ltd v Caltex Trading and Transport Corp*, 146 FRD 64, 72 (SDNY 1993)), it is unclear whether that operates as a veritable choice, and exclusion of US law; see *Remy Amerique, Inc v Touzet Distribution, SARL*, 816 FSupp 213, 216-7 (SDNY 1993) (arbitrability rules still apply).

¹²⁵ Restatement (Second) of Conflict of Laws, s 220(a), Comment c, states that an award is governed by the law of the state where the proceedings were held and the award rendered; but accepts that when these places do not coincide, rendition should prevail, and that the parties may exclude even that law. See *Agrelak*, above, note 124.

¹²⁶ This is especially the case for *Tribunal Arbitral du Sport* arbitrations, whose seat is always in Lausanne but physically take place elsewhere, and virtual arbitration; see Kaufmann-Kohler, [1998] Rev Arb 517.

¹²⁷ See Note to the Secretary-General, (1977) 8 UNCITRAL YB 233, para 3.

¹²⁸ See UN Doc A/32/17, (1977) 8 UNCITRAL YB 11, para 31.

¹²⁹ See, eg, UN Doc A/CN.9/207 (1981) paras 17-20, 73-74.

These principles are further implemented by rules which are either absolutely binding on the tribunal¹³⁰ or afford it discretion,¹³¹ but in either event the decisions of the tribunal are reviewable by the controlling court.¹³² Non-Model Law derived legislation follows a similar design. Swiss, German, Belgian, Spanish, Italian, Portuguese, and Czech law consecrate procedural freedom in very wide terms.¹³³ A number of laws expressly provide for the possibility of agreeing on another arbitration or procedural law; that will not be true submission but incorporation, for it will neither oust the jurisdiction of the courts nor will it supersede the mandatory provisions of the seat.¹³⁴ French law is noteworthy in that respect. The law admits of ‘submission’ to another procedural law,¹³⁵ and this is more than a linguistic nicety. The courts will not exercise support jurisdiction if the parties have chosen another law and under that law other courts are in a position to exercise it.¹³⁶ The application of French law is therefore strictly functional, in that the courts will exercise annulment jurisdiction, which is non-derogable.¹³⁷ On substance, however, control by the French courts does not seek to impose purely French conceptions of arbitration law.¹³⁸ France simply provides a neutral forum.

Austrian courts have similarly accepted to provide a reserve forum. Statutory law is unclear, but it seems now accepted that Austrian law and jurisdiction are coterminous, and dependent on a choice of the parties.¹³⁹ On the other hand, the courts will assume control jurisdiction even in the absence of express choice, apparently (and eccentrically) on a combination of the reserve forum provisions of § 28 of the Judicature Act and Article V(1)(e) of the New York Convention.¹⁴⁰ It is tentatively suggested that, by contrast with French law, purely Austrian provisions will be derogated from only if there has been submission to a foreign law but the courts of that foreign state will not accept jurisdiction.

On the other hand, the equality of parties as an imperative principle in the constitution of the tribunal and the procedural arrangement of the proceedings is equally widely legislated¹⁴¹ and doubtless a mandatory rule of international law.¹⁴² Despite the fluctuating terminology—fairness and natural justice, *principe de la contradiction*, *rechtliches Gehör*, *égalité des parties*—all laws (and arbitration rules) mean essentially the same.¹⁴³ Procedural equality in the conduct of the pro-

¹³⁰ See Model Law, Article 24(2)-(3).

¹³¹ See Model Law, Article 26(2).

¹³² See Model Law, Article 34(2)(a)(iii)-(iv), (b)(ii).

¹³³ See respectively: LDIP, Article 182; ZPO, § 1042(3); CJ, Article 1693(1); Act 36/1988 (Spain), Article 21; CCP (Italy), Article 816, second indent; Act 31/1986 (Portugal), Article 15; Act of 1 November 1994 (Czech Rep), § 19.

¹³⁴ See Arbitration Act 1996, s 4(5).

¹³⁵ See NCPC, Article 1494(1). Paris, 17 January 1992, [1992] Rev Arb 656; Paris, 24 April 1992, [1992] Rev Arb 598.

¹³⁶ Paris, 19 December 1995, [1996] Rev Arb 110.

¹³⁷ See Paris, 16 February 1989, [1989] Rev Arb 711.

¹³⁸ See NCPC, Articles 1504, 1502.

¹³⁹ cf OGH, 71 SZ 446.

¹⁴⁰ OGH, (1981) 103 JBl 437; criticized below, Chapter 6, text to note 45.

¹⁴¹ See, eg, Arbitration Act 1996, s 33; LDIP, Article 182(3); ZPO, § 1042(1); NCPC, Article 1504 *juncto* 1502(4)-(5); CJ, Article 1694; Arbitration Act 1999 (Sweden), § 24; Act 31/1986 (Portugal), Article 16.

¹⁴² See ILC Model Rules on Arbitral Procedure, Preamble, para 5 and Article 35(c); Mani, (1969) 9 Indian JIL 381; Lan, *La Procédure dans l'Arbitrage International* (Thesis Geneva, 1998) 25-33.

¹⁴³ See already David, [1932] UNIDROIT Actes & Documents, 2nd part, at 74-9.

ceedings is also an imperative general principle of arbitration rules.¹⁴⁴ In that sense, it is correct to state that no law strictly requires an arbitral tribunal whose seat is in the territory to apply its procedural law;¹⁴⁵ but such freedom is subject to control by annulment by the courts of the seat. So the tribunal must, subject to contrary party instructions, respect the provisions of the law of the seat, whose violation would result in annulment of its award, and in that more relevant sense it will be applying the law of the seat.

For reasons fully to be set out in section III below, it is the position of this author that the state of the seat has no sufficient appropriate connection to impose its own conception of procedural propriety on international arbitrations taking place within the territory. Although it *must* enforce the principles of due process, its title stops there: it is a *compétence liée*. However, mandatory rules specific to one state are still to be found in municipal arbitration laws. That would be the case for instance for the following provisions: a prohibition to administer oaths;¹⁴⁶ conversely, an obligation to take evidence under oath;¹⁴⁷ confining the evidence admissible to evidence admissible in state courts;¹⁴⁸ a non-derogable obligation to state reasons;¹⁴⁹ an obligation, on pain of nullity of the agreement, to name the arbitrators in the arbitration agreement;¹⁵⁰ an obligation to have the award notarized;¹⁵¹ a requirement that the tribunal will be composed of an uneven number of arbitrators;¹⁵² a prohibition to order any interim protection at all or certain measures only;¹⁵³ and requirements of nationality or religious convictions for the arbitrators.¹⁵⁴ Such provisions are entirely out of step with modern practice and should be rooted out.¹⁵⁵

There is a possible argument that each state should be free to impose its own particularities, creating a legal market and leaving the choice of venue to sophisticated operators. Such thinking assumes perfect information and knowledge (seldom the case) and overstates the title of each state under international law. Thus, such particularities (eg, an appeal to the courts to determine the law applicable) should apply on an opt-in basis. Moreover, certain mandatory provisions cannot meaningfully apply on a strict territorial basis. A state forbidding its judges to sit as arbitrators¹⁵⁶

¹⁴⁴ ICC Rules, Article 15(1); LCIA Rules, Article 14.1; AAA International Rules, Article 16(1); UNCITRAL Rules, Article 15(1); WIPO Rules, Article 38(b); ICSID Rules, Rule 50(1)(c)(iii), 3rd-4th indent; CAMCA Rules, Article 17(1); SIAC Rules, Rule 17.2; Stockholm Rules, Article 20(3); IACAC Rules, Article 15(1); European Arbitration Rules, Articles 7(4), 11(4), 15(4); Milan Rules, Article 28; Finnish Rules, § 20, 1st-2nd indent; Zagreb Rules, Article 20(1); Oslo Rules, Article 10.

¹⁴⁵ Thus Gaillard, E, JCI Droit International, Fasc 586-8-1 (1994) paras 12-13.

¹⁴⁶ See öZPO, § 588, first indent; Arbitration Act 1999 (Sweden), § 25, fourth sentence; and contrast Model Law, Article 19(2).

¹⁴⁷ Arbitration Law, 5728-1968 (as amended, 1974) (Israel), Article 14.

¹⁴⁸ See Act 31/1986 (Portugal), Article 18(1); and contrast Model Law, Article 19(2).

¹⁴⁹ See Act 31/1986 (Portugal), Article 23(3) *juncto* 27(d); Decree Law 25953/1992 (Peru), Article 44(6); and contrast Model Law, Article 31(2).

¹⁵⁰ See National Code of Civil and Commercial Law (Argentina), Article 740(2); NCPC, Article 1448, second and third indents. Note, however, that the latter provision does not apply to international arbitrations, unless French law has been chosen by the parties, NCPC, Article 1495.

¹⁵¹ Act 36/1988 (Spain), Article 33(2) *juncto* 45(2); TS, 28 March 1994, [1994] Rev Arb 749.

¹⁵² CJ, Articles 1681(1), 1684(1), 1685; and contrast Model Law, Article 10.

¹⁵³ öZPO, § 589(1); CCP (Italy), Article 818; CJ, Article 1696(1) (excluding *Mareva* injunctions).

¹⁵⁴ Codes for the Implementation of the Arbitration (Saudi Arabia), s 3.

¹⁵⁵ cf Goode, (1993) 8 Arb Int 1, 7 (procedural requirements should not go further than safeguarding natural justice).

¹⁵⁶ See öZPO, § 595(3), (6); Act 31/1986 (Portugal), Article 19(5); National Code of Civil and Commercial Law (Argentina), Article 765; Decree Law 25935/1992 (Peru), Article 21(1) *juncto* 56(2); Arbitration Code (Tunisia), Article 10, 2nd-4th indent (with qualifications).

is enouncing a rule which should apply on a personal basis and regardless of where the proceedings are situated. On the other hand, it is much more appropriate to enforce the prohibition by imposing disciplinary sanctions on offenders rather than penalizing the arbitrating parties.

Wide liberty to shape the procedural régime of the proceedings does not necessarily mean uncertainty as to the concrete rules applicable. It is a fact that most arbitration rules are too general in respect of the conduct of the proceedings, save perhaps for the constitution of the tribunal. Where Terms of Reference are obligatory, as in ICC and CEPANI arbitrations for instance, the parties may, and often do, make particular stipulations. Other arbitration rules will refer to the procedural rules applying in court proceedings for supplemental rules, but those arbitration rules are primarily designed for domestic or foreign, as opposed to international, arbitration.¹⁵⁷ The parties may of course make procedural agreements at any reasonable time during the course of the proceedings. But the deadlock of arbitration may prevent reaching agreement, or give the opportunity for dilatory tactics. The duty in those cases inevitably falls on the tribunal. The question therefore is whether the law should provide for fall-back provisions and, if so, whether they should apply on an opt-in or an opt-out basis. French and Swiss law do not contain such provisions for international arbitrations, delegating the duty to create the procedural rules in the last instance to the tribunal.¹⁵⁸ A minority position would be to mandate the 'reasonable' application of court rules by analogy.¹⁵⁹ The Arbitration Act 1996 draws a practical compromise by including provisions that the parties or the tribunal may adopt.¹⁶⁰ The technique of creating a repository of specific rules on which the parties or the tribunal may draw is commendable. Given that the tribunal will consult the parties before adopting any particular rules, even that technique may entail delay and arbitration on how to arbitrate. In the nature of things, the parties must co-operate. The alternative is for the legislator to make certain backbone provisions (eg, on evidence) mandatory;¹⁶¹ but this is an alternative firmly refuted by modern laws.¹⁶² So the price of procedural freedom is a duty to co-operate in creating the playing field.

C. Exclusion of Setting Aside by Agreement

1. Questions of Principle

Certain modern laws allow for prior exclusion of the action to set aside. As a matter of fact, such agreements are of course everywhere possible, and concluded by the adoption of certain arbitration rules.¹⁶³ Annulment jurisdiction follows everywhere the general procedural principle making jurisdiction dependent on the initiative of a party with an interest recognized by the *lex fori* as legitimate;¹⁶⁴ so that actual application of the law is conditioned by the actions of private par-

¹⁵⁷ See CEPANI Rules, Article 33; Oslo Rules, Article 5.

¹⁵⁸ See NCPC, Article 1404; LDIP, Article 182.

¹⁵⁹ Act of 1 November 1994 (Czech Rep), § 30.

¹⁶⁰ Arbitration Act 1996, ss 34-41.

¹⁶¹ As suggested by Mann, *The Financial Times*, 24 November 1988.

¹⁶² The Arbitration Act 1996, s 34(2) draws a good balance by providing a check-list of procedural issues.

¹⁶³ The ICC Rules, Article 28(6) is an exclusion agreement 'insofar as such waiver can validly be made'.

¹⁶⁴ See, eg, TF, 116 II ATF 721 (no practical or actual interest in annulment).

ties.¹⁶⁵ From which also follows that exclusion agreements concluded *after* the conclusion of the proceedings (and after the right has accrued) are binding and enforceable. The crucial thing is for prior arrangements to be binding and enforceable, obliging the courts to decline jurisdiction.

One should pause at the preliminary question, whether such agreements should be binding without specific legislative provision. The matter arose for consideration before an Ontario court. The agreement of the parties excluded all recourse to the courts except for enforcement. The claimant averred that this could not validly exclude an action to set aside, Article 34 of the Model Law, because this is the only means to sanction violations of mandatory provisions of the law. The court refuted the submission, reasoning that while Articles 18 and 19 reserve the application of mandatory provisions of the Model Law (as does the enacting Ontario legislation), Article 34 itself is not a mandatory provision.¹⁶⁶ So Article 34(2)(a)(iv), preserving the application of mandatory provisions, operates only insofar as Article 34 as a whole has not been excluded. The court viewed exclusion as a particular procedural arrangement, but even if it was right in that respect, the interpretation must, it is respectfully submitted, fail. The preparatory materials would surely state the possibility of exclusion had the drafters contemplated it. And the drafters did not contemplate it, because in the system of the Model Law the imperative procedural provisions are so few that their disregard would amount to an egregious violation of due process. Moreover, in the absence of control by annulment, any mandatory provision ceases practically to be mandatory; it is a *lex imperfecta*. Generally, and in matters of procedure especially, there is nothing intrinsically wrong with that, for compliance with fundamental procedural principles will be a requirement for enforcement. This is precisely the point: an exclusion agreement obliges the aggrieved party to oppose enforcement wherever that may be requested. And as an evidentiary matter it is one thing to prove that an award has been annulled (New York Convention, Article V(1)(e)) and quite another to prove violation of due process (New York Convention, Article V(1)(d) and (2)(b)). Because of that serious curtailment of the parties rights, it is preferable to accept the validity of exclusion only under cover of specific legislative provision. Inversely, it is easier to accept an agreement excluding opposition to enforcement,¹⁶⁷ since in that case annulment will still be available and an annulling judgment may be taken account of by the enforcement court under the public policy exception, *sua sponte*.

A similar question is how to respond to a breach of an exclusion agreement absent specific licence by the arbitration law of the controlling forum. It would be logically impossible for the defendant in the action to set aside to be awarded damages in the controlling forum: the court will consider the agreement as violating a mandatory rule, disposing of a right which the parties had no authority to dispose of before the right arose (a 'legally impossible contract' in civil law terminology). Other fora should be for the same reason constrained from awarding damages or disregarding the annulment: the right to apply for setting aside is doubtless governed by the law of the controlling forum, whether that law be considered the *lex arbitri* or not. The only way to circumscribe that will be by classifying the right to apply for setting aside as one arising under the proper law of the arbitration agreement, and even that construction will not help when the relevant *arbi-*

¹⁶⁵ See Cases C-430-431/93, *Van Schijndel & Van Veen v SPF* [1995] ECR I-4705, para 21. This applies even when the interests to be safeguarded are of public policy calibre: Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

¹⁶⁶ See *Noble China Inc v Lei Kat Cheong* [1998] Ont CJ LEXIS 2030, *38-*51.

¹⁶⁷ See *Food Services of America Inc v Pan Pacific Specialties Ltd* (1997), 32 BCLR (3d) 225, 229.

tration provisions of that law do not allow for exclusion agreements.¹⁶⁸ In other words, exclusion agreements cannot on any view be given effect through general contract law.

2. Municipal Legislation¹⁶⁹

The prototype legislation allowing for exclusion is Article 192 of the Swiss LDIP. Paragraph 1 permits parties to contract out of the annulment jurisdiction of Swiss courts in respect of proceedings otherwise subject to Swiss law; and paragraph 2 provides that in such cases enforcement in Switzerland will proceed under the New York Convention, ‘by analogy’.¹⁷⁰ The substantive requirement is that none of the parties must have its domicile, habitual residence or place of business (*‘établissement’*) in Switzerland, and the formal requirement is that the exclusion agreement be in writing. The rule is adopted in almost identical terms in Belgium,¹⁷¹ Sweden,¹⁷² and Tunisia.¹⁷³

The requirement of writing needs no comment; it is only symmetrical with the requirement for the arbitration agreement itself. The requirement of no contact is more contentious: it reflects the notion that the controlling forum owes its protection to those residing within the territory, but only to them. This is in all likelihood to conform to a constitutional law obligation to provide a ‘natural judge’ (Article 58 of the Swiss Constitution). In the submission of this author, there would be no insurmountable barrier to extending the facility to residents; provided that the requirement of writing is fulfilled and there is no weaker party to protect (as in consumer and labour disputes, which are seldom arbitrable in any event), the law has already provided adequate protection.¹⁷⁴ Moreover, the distinction between residents and non-residents seems wholly unrelated to the real cause of the lack of connection between the controlling forum and the arbitration, namely that the dispute and the proceedings as a whole cannot be considered exclusively domestic to any one state.

It is also important to observe that exclusion covers the remedy of setting aside exclusively. The arbitration is effectively detached from the law of the seat insofar as that drastic form of intervention is concerned. But support jurisdiction, in regard to the constitution of the tribunal for example, is still available; and to that extent the arbitral tribunal and the parties must come within the four corners of the law of the seat. It is suggested that no state should allow for exclusion of its support jurisdiction, for the parties may be confident in the tribunal’s ability properly to adjudi-

¹⁶⁸ For application of these propositions see below, Chapter 6, text to note 96.

¹⁶⁹ See generally Berger, (1989) 12 Fordham ILJ 605.

¹⁷⁰ LDIP, Article 192. Under the Concordat exclusion agreements were impossible, and finality provisions in arbitration rules were subject to that mandatory rule, even when all parties were domiciled abroad: TF, 110 Ia ATF 131; TC Vaud, (1981) 129 JdT III 104.

¹⁷¹ CJ, Article 1717(4).

¹⁷² Arbitration Act 1999 (Sweden), § 51. The provision follows a much-discussed dictum of the Supreme Court according to which in certain circumstances (which were not spelt out) Swedish courts should decline to exercise control jurisdiction over proceedings involving exclusively parties with no connection with Sweden: *Soleh Boneh International Ltd v Republic of Uganda* (1990) 117 JDI 597; on which see Heuman, *Current Issues* (1990) 206-215.

¹⁷³ Arbitration Code (Tunisia), Article 78(6).

¹⁷⁴ So Belgian law, which before the 1998 amendment (above, note 171) made exclusion automatic where it is now optional, was out of step with international law; see CJ, Article 1714(4) (old); and Storme, [1985] Rev Arb 461. That provision was controversial; the references are in De Ly in *The Place of Arbitration* (1992) 1, note 95.

cate, but only state authorities can ensure the viability of the process itself.¹⁷⁵ This point is well demonstrated by Malaysian law.

Section 34(1) of the Arbitration Act provides that Malaysian law ‘shall not apply’, in its totality, to arbitrations held under the ICSID Convention or the UNCITRAL Rules if, in the latter case, the UNCITRAL Rules are administered by the Kuala Lumpur Regional Centre for Arbitration.¹⁷⁶ The provision gives effect to an international agreement between the AALCC and may thus be viewed as a limitation of sovereignty imposed by international law. It is a true limitation in the sense that s 34(1) excludes from the otherwise territorial scope of the Arbitration Act all arbitral proceedings falling within its definition.¹⁷⁷ Practically, Malaysian courts cannot intervene in the process for any purpose, not even to assist the proceedings—be that by jurisdiction under the Arbitration Act itself, other enactments, or any inherent jurisdiction they may possess.¹⁷⁸ This excludes declaratory relief as well, in particular on the validity of the arbitration agreement,¹⁷⁹ the validity of the award,¹⁸⁰ or the jurisdiction of the tribunal.¹⁸¹ The courts sought to clarify, rightly, that all the Act may do is lift the jurisdiction of the courts; it cannot relieve arbitrators of duties incumbent upon them by virtue of the New York Convention, in the sense that, in order to produce an enforceable award, they will have to conform to the requirements of Article V(1)(a)-(d) and (2). And of course the arbitrators always have the faculty of applying Malaysian law.

This is true and absolute delocalization: the award is divorced from the law of the seat and subject only to international standards at enforcement. To varying extents, awards covered by exclusion agreements under any law are ‘non-domestic awards’ in the meaning of Article I(1) of the New York, and can be enforced in the state of the seat as such. This results from the fact that when setting aside is not available the law applicable becomes to a large extent dispositive and in that sense an award is not really made ‘under’ it. (The point is moot, because all laws directly provide that enforcement proceeds under the New York Convention,¹⁸² but paves the way for the discussion in Chapter 7 below.)

The controversial point is that the blanket exclusion would seem to cover even support measures. This is clearly problematic, and perhaps not even reflecting the purpose of the provision, since the Kuala Lumpur Centre has no power of coercion and cannot, for instance, issue letters rogatory. There are dicta reserving the possibility of court interference for cases where the act requested from the court is outside the jurisdiction of the tribunal¹⁸³ (and this could be extended to cases where the tribunal is incapable of acting effectively), but in view of the absolute language of the provision the issue is far from clear.

Finally, a peculiar type of exclusion agreement is provided for in Greek foreign investment legislation. The relevant text provides for arbitration as the exclusive means of dispute settlement

¹⁷⁵ Similarly, an exclusive jurisdiction clause will be treated *pro non scripta* if concurrent with an arbitration clause, so as to allow the parties to have recourse to all courts available for interim protection; see *Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd’s Rep 379 (CA).

¹⁷⁶ Arbitration Act 1952 (Malaysia), s 34. ICSID arbitrations are subject to public international law only (see Chapter 5 below); in respect of them the provision is merely declarative.

¹⁷⁷ See generally Arfazadeh, (1991) 8:4 J Int Arb 103; Lim, (1998) 4 ADRLJ 318.

¹⁷⁸ *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd et al* [1998] 2 MLJ 20 (CA).

¹⁷⁹ *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd et al* [1997] 4 MLJ 280.

¹⁸⁰ *Soilchen Sdn Bhd v Standard-Elektrik Lorenz AG* [1993] 3 MLJ 68.

¹⁸¹ See *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd et al* [1990] 3 MLJ 183

¹⁸² Except for Greek law, below, text to notes 184-185.

¹⁸³ See *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd et al* [1998] 4 MLJ 619.

between the state and a foreign investor, and makes the award final and not subject to any means of recourse, including an annulment action and even opposition at the execution stage.¹⁸⁴ The exclusion of recourse appears automatic and in that sense similar to that under Belgian law prior to 1998, but it has to be borne in mind that the provision covers only arbitration arising out of an investment in respect of which the investor has specially applied to benefit from the investment law régime. It is this contractual aspect which must have prompted the *Areios Pagos* to hold that the blanket exclusion does not violate the constitutional guarantee of the natural judge.¹⁸⁵ For reasons apparent from the foregoing, this author would concur, adding that there is no conflict with Article 6(1) of the European Convention on Human Rights either.

III. THE SEAT AS THE FOCAL POINT IN INTERNATIONAL ARBITRATION: ITS JURISDICTIONAL TITLE AND FUNCTIONS

A. The Relevance of Public International Law in general

Jurisdiction is the power to regulate or, more technically, the limits within which rights and obligations may be created, proscribed, and altered by way of legislative, executive or judicial action. And if jurisdiction is an empowerment to regulate, its necessary foundation is sovereignty, for any such empowerment rests exclusively with a sovereign. This is not categorically to deny the thesis of the so-called sociological school of thought, which contends that there are informal clusters of regulatory power in a given society.¹⁸⁶ It is beyond doubt, however, that informal systems of rules are relevant only to the extent that they may effectively operate outside state-provided authority and coercion, or that a given legal order delegates them authority. It follows that on the international plane jurisdiction can be conceived only within the limits prescribed by international law, for sovereignty can attract limitations.¹⁸⁷ In that sense, jurisdiction is a question of entitlement¹⁸⁸—or, which is the same, a list of the factors that permit a state to regulate a given *conduct*.

Conflicts rules delimit the scope of operation of sovereign edicts with competing claims to apply to the same facts. Such delimitation must be subject to international law; it would be otherwise only if international law contained a rule that each sovereign is entitled to regulate whichever set of facts he pleases. Although there do exist subject-matters in respect of which states are, at a given moment, under no restrictions, no such proposition can be accepted in its generality.¹⁸⁹ Mann's elegant formula is that 'conflict rules are a product of municipal law, which has to stand the test of the international doctrine of jurisdiction'.¹⁹⁰ However, there can be no absolute correspondence between private and public international law, because the latter may by nature provide only for restrictions to jurisdiction. This does not mean that the relevant considerations are not common between the two systems. One cannot do better than quote Mann on this point:¹⁹¹

¹⁸⁴ See Legislative Decree 2687/1953, Article 24(1)-(7).

¹⁸⁵ AP 356/1991, (1993) 44 ΕΕμπΔ 386.

¹⁸⁶ In a context close to ours see Goldman, (1964) 9 APD 177.

¹⁸⁷ cf *The S/S Wimbledon*, PCIJ, Series A, No 1, at 25.

¹⁸⁸ Mann, *Studies* (1973) 1, 3.

¹⁸⁹ See *Nationality Decrees in Tunis and Morocco*, PCIJ, Series B, No 4, at 23-4.

¹⁹⁰ Mann, *Studies* (1973) 12. Also Lowenfeld, (1979-II) 163 RdC 310, 326.

¹⁹¹ *ibid. Contra*, Ago, (1936-IV) 58 RdC 243, 289-91; Akehurst, (1972-73) 46 BYIL 145, especially at 174-85; Lipstein, (1972-I) 135 RdC 97, 171-3.

[T]he inter-relation between the conflict of laws and public international law in respect of ... international jurisdiction ... give[s] rise to the same fundamental question: does there exist a sufficiently close connection between a given set of facts and, on the one hand, a particular legal system called upon to govern it or, on the other hand, a particular legislator qualified to regulate it? The former question belongs to private, the latter to public international law.

More practically, and assuming that international law will *ex hypothesi* contain rules in respect of a given subject-matter, there are two perspectives here. The courts and administration will give effect to international law only to the extent that their *lex fori* (a) allows them directly to have recourse to international law or (b) materially incorporates international law. The legislator, on the other hand, is always bound by international law in formulating conflicts rules, because such rules delimit the application of municipal law, and to that extent are subject to jurisdictional limitations imposed by international law. This is precisely where Mann's above-quoted proposition plays.

One does not propose here to enter the debate between the 'universalistic' and 'particularistic' schools of thought, which is almost as old as private international law itself. It is submitted, however, that there must be no doubt that public international law *may* be relevant in the formulation of private international law rules, in that if a private international law rule entails the exercise of jurisdiction contrary to public international law, its application would constitute an international delict. For example, if international law absolutely prohibits the assumption of jurisdiction in respect of immoveables situated outside the territory, the ineluctable inference would be that the law of the *situs* would apply (for otherwise no law would apply at all). The question in the context of this thesis is whether international law contains any rules circumscribing the exercise of jurisdiction (legislative and enforcement) capable of being translated to conflicts rules.

Such international law rules could originate in municipal law and be of so widespread and consistent application as to have attained the status of customary law; or they could originate in international treaties; or, finally, originate in either of the above and be crystallized in international treaties. The position of this author is that certain clear-cut principles have emerged concerning the exercise of jurisdiction over international arbitral proceedings. (Indeed, it would be paradoxical if no patterns on the delimitation and co-operation of jurisdictions had emerged.) Municipal statutes and international instruments are clear on a fundamental distinction between primary jurisdiction (that is, jurisdiction to control and validate, endowed with extraterritorial validity) and secondary jurisdiction (that is, jurisdiction which is confined to allowing or refusing recognition and enforcement within the territorial limits, but only there).¹⁹²

However, as is evidenced by the most widespread international instrument on recognition and enforcement of arbitral awards, the New York Convention, the rule is not absolutely clear-cut, in two respects. First, the enforcement forum may re-examine whether a ground for non-enforcement is extant even if the award has been found regular in that respect by the courts of the state of rendition. Secondly, in limited circumstances, the enforcement forum may deny giving effect to an annulling judgment in the state of rendition. The Convention, however, was made in 1958, when the jurisdictional principles now familiar were still emerging. And even under those limitations, it is clear that the entitlement to control arbitral proceedings belongs primarily to the state of the seat. It is furthermore equally clear that a decision of the courts of that state should *prima facie* be accorded recognition abroad. Further still, enforcement courts seem prepared to

¹⁹² On these distinctions the author follows Reisman, *Systems of Control* (1992) ch 4, 113-20 (distinguishing between primary or venue jurisdiction and secondary or enforcement jurisdiction). For a fuller exposition see Chapters 6-7 below.

pay deference to decisions of the controlling courts finding awards regular in respect of grounds of irregularity common to annulment and refusal of enforcement alike. This is commendable. Though the New York Convention allows for re-trial on the substance of such grounds, it does not prohibit refusing to disturb the findings of the controlling forum—or at least to review them only for grave errors amounting to a violation of its *ordre public*. Indeed, the whole Convention scheme would militate in favour of such a co-ordinating interpretation of the text of Article V(1). Colman J has judicially proffered this principle:¹⁹³

[A] party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat [T]he party who complains of [a] defect [in the award or procedure] must in the first instance pursue such remedies as exist under that supervisory jurisdiction. ... In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, ... it will ... normally be a very strong policy consideration ... that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand.

B. The Foundations and Nature of Primary Jurisdiction

1. Types and Functions of Primary Jurisdiction

Jurisdiction over arbitral proceedings should be seen as specific (or special) jurisdiction relating to a single *process*. The functions that revolve around that process are essentially two: control of the regularity of a final award and support of the arbitral process.¹⁹⁴ There are difficulties with that broad distinction which are outside the ambit of this thesis. One concerns the definition of a ‘final’ award. There is growing support in legislative practice for the view that a preliminary award which conclusively settles an issue (eg, the competence of the tribunal¹⁹⁵ or liability in principle), is final for the purposes of control.¹⁹⁶ Another difficulty concerns the appropriate remedies. The Model Law allows exclusively for an action to set aside, as opposed to a declaratory action on the invalidity and/or non-existence of an award for instance.¹⁹⁷ This seems to be a matter left to each state in the first place; it is submitted, however, that the exclusivity of annulment action attains legal certainty and effective protection. (Thus, in what follows control and annulment jurisdiction are used interchangeably.)

¹⁹³ *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315, 330; cf *Arab Business Consortium v Banque Franco-Tunisienne* [1996] Lloyd’s Rep 485, 491 (CA).

¹⁹⁴ Control jurisdiction encompasses, in addition to remedies leading to annulment etc, applications for interpretation and correction of awards (see, eg, Model Law, Article 33). Common administrative duties (eg, registration of awards) are ancillary to control and support.

¹⁹⁵ Explicitly so for such ‘incidental’ awards, LDIP, Articles 188, 190(3): TF, 116 II ATF 80.

¹⁹⁶ See, eg, Model Law, Article 16(3); Arbitration Act 1996, s 67. It is of course a matter of legislative policy whether such award, otherwise being final, will be subject to annulment separately or only as part of the award on the merits; for the latter solution see Act 2735/1999 (Greece), Article 16(3). The related question, whether an order for interim protection is final and binding within the New York Convention, is under consideration by UNCITRAL; see UN Doc A/CN.9/WG.II/WP.108 (2000) Pt II.

¹⁹⁷ See Model Law, Article 34; Arbitration Act 1996, ss 67-68; NCPC, Article 1504; LDIP, Article 190. However, Swedish and Greek law (the latter only in respect of non-international awards) still distinguish between void and voidable awards and the attendant remedies; see Arbitration Act 1999 (Sweden), § 33; CCP (Greece), Article 901.

Generally, procedural modalities are a matter for individual states to settle. Such are, for instance, the time-limits for the annulment action, the remedies, if any, against judgments on such actions, and the internal competence of courts in respect of such actions.¹⁹⁸ The limits here are set *in extremis*, by human rights law: the arrangements must be such as not to render the process ineffective and too onerous.¹⁹⁹ In the same vein, the proposition seems to have mustered general consensus that if an award is defective only in certain respects which have not contaminated the whole of it, only those defective parts need be annulled.²⁰⁰ Because procedure runs in a single thread, it will normally be the case that a departure from, say, the rule of party equality, will have affected the award as a whole. The rule could thus be stated in more general terms, as follows: violation of a mandatory procedural rule will lead to annulment if it can be reasonably ascertained that it has influenced the outcome of the case.²⁰¹

2. Annulment Jurisdiction: The Relevant Considerations

One starts with certain general considerations which are relevant to support jurisdiction (subsection 3 below) as well.

(a) The Jurisdictional Title of the Seat

(i) General Observations

If international arbitration is considered as a unique and discrete legal category, its distinctive characteristics must be taken account of. (They are all truisms but important to bear in mind.) The origin of any arbitration is exclusively private will. Its purpose is, however, to replace a prerogative of sovereign states, namely binding and conclusive adjudication.²⁰² The essence of arbitration is therefore mixed: private origin and public function. These two elements are so closely interconnected that it would be wrong to give preponderance to either of them on the basis of *a priori* thinking. That difficulty is exacerbated in international arbitration.

As the previous chapter has shown, neither the nature of international arbitration nor the actions of the parties can be said decisively and exclusively to create a connection with any legal system. And yet doctrinal thought and state practice are clear that we do need a single—or at least primary—connecting factor, to one legal system.²⁰³ This is premised on convenience and legal certainty: the international mercantile community needs one forum that can be identified with reasonable certainty and which will conclusively and *erga omnes* pronounce itself on the regularity of the arbitral process. In more theoretical terms, the need for a single controlling forum is im-

¹⁹⁸ For example, and this is a unique one, in Djibouti international arbitrations are subject to a special exclusive body, the Commission for International Appeals: Code of International Arbitration (Djibouti), Articles 25-31. Cf the Cour Commune de Justice et d'Arbitrage and the functions entrusted to it by the *Traité relatif à l'Harmonisation du Droit des Affaires en Afrique* (Port Louis, 17 October 1993), Articles 21-26.

¹⁹⁹ See Chapter 3 below.

²⁰⁰ Certain laws express this general rule only in respect of excess of jurisdiction (eg, Model Law, Article 34(2)(a)(iii)), but others make it of general application (eg, CJ, Article 1705; and Paris, 28 April 1988, [1989] Rev Arb 280).

²⁰¹ See Arbitration Act 1999 (Sweden), § 34(6); CJ, Article 1704(2)(g).

²⁰² In private law will is of course always private in nature. The point here is simply that no-one is obligated to arbitrate (just as no-one is obligated to contract), but an agreement to arbitrate displaces a function that states arrogate in principle only to themselves.

²⁰³ The proposition was first expounded by Balladore Pallieri, (1935-I) 51 RdC 287, 334-55.

posed by considerations of judicial economy: any legal process must be designed so as to liquidate the dispute of which it is seised with *erga omnes* effect, and this applies both to the arbitral and the judicial function.

Generally, it is not helpful to speak in terms of the jurisdiction with the 'closest and most continuing legal and factual connections',²⁰⁴ proximity,²⁰⁵ or similar formulas. Such criteria can, however, usefully serve as guides to the formulation of fixed jurisdictional bases and to the limits of jurisdiction.²⁰⁶ More specifically, it is necessary to take account of two sorts of considerations.²⁰⁷ First, litigational considerations, such as the domicile (or equivalent, or similar²⁰⁸) of the respondent and the claimant, and the connections between the forum, the object of the claim, and the claim itself. Secondly, legislative considerations, that is, whether the forum may assert judicial jurisdiction to enforce its own law.²⁰⁹ In our context, considerations of the latter sort are neutral: the protection of interests specific to one nation should be afforded by a refusal to enforce, not *erga omnes* annulment.

That forum must be provided by the state of the seat of the arbitral proceedings. One hastens to clarify that 'seat' is a term of art. Mobility is inherent in international arbitration. Seeking to accommodate the convenience of the parties (or of its members), or merely conforming to the needs of the case (eg, the need to examine a number of witnesses present in another state), the tribunal may hold hearings outside the designated 'seat'. This is now an accepted principle in arbitration law.²¹⁰ To counter that difficulty, it has been rightly suggested that the legally crucial seat should be the place designated as the 'seat' or 'place of arbitration' by the parties and/or the arbitral institution and/or the arbitral tribunal.²¹¹ Subsection II.A above has shown that state practice is gradually converging on such a conception of the seat. Moreover, this is consonant with arbitral practice. The ICC Rules for example provide that the place designated (ie, fixed or confirmed) by the ICC Court of Arbitration is recorded in the Terms of Reference, and that the award shall be deemed to have been made there.²¹² Generally, the place of the proceedings is the most conspicuous and oft-encountered term in arbitration agreements,²¹³ and thus determinable in advance in the

²⁰⁴ The phrase is borrowed from von Mehren & Trautman, (1966) 79 Harv LR 1121, 1141.

²⁰⁵ On which see Lagarde, (1986-I) 196 RdC 9.

²⁰⁶ As is the case in the US, where the jurisdictional bases asserted by state courts are controlled by the Supreme Court. For a succinct statement and critique of the law see Juenger, (1995) 28 UC Davis L Rev 1027; Silberman, (1995) 28 Vand JTL 389.

²⁰⁷ According to the US Supreme Court, the relevant factors include 'the forum State's interest in adjudicating the dispute, ... the plaintiff's interest in obtaining convenient and effective relief, ... the ... judicial system's in obtaining the most efficient resolution of controversies; and the shared interest of several States in furthering fundamental substantive social policies ...': *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 292 (1980) (citations omitted).

²⁰⁸ eg: property that the respondent may have in the forum, the fact that the claimant has undertaken activities within the forum.

²⁰⁹ See generally González Campos, (1977-III) 156 RdC 227, 338-41; and, eg, Act Reforming Private International Law (Italy), Article 9. The fact that a court may apply another state's law does not, however, render the litigational considerations moot; *pace* Jennings, *Collected Writings* 2 (1998) 885, 887.

²¹⁰ See, eg, Model Law, Article 20(2); UNCITRAL Notes, para 24. Cf also ICC Rules, Article 14(1) and (2).

²¹¹ Mann, (1985) I Arb Int 107.

²¹² See ICC Rules, Articles 14(1)-(2), 18(1)(f), 25(3).

²¹³ 84% of the ICC cases initiated in 1999 contained a choice of seat ((2000) 11:1 ICC Bull at 9), which tallies with the average for 1990-1995 (Lew, *The Financial Times*, 21 May 1996). This is an increasingly recurrent stipulation; compare the figures given by Jarvin in *Recht und Praxis* (1986) at 16; and Verbist in *The Place of Arbitration* (1992) 131 at 132-3.

majority of cases. (This leaves us with no connecting factor for arbitrations whose seat has not yet been designated, an issue dealt with below.)

These remarks do demonstrate that there exists no absolute and predestined connection between a state and arbitral proceedings taking place within its realm. The point is, rather, that the place of arbitration is in principle an easily ascertainable connection; from which follows that it is an appropriate connection for practical purposes. Again, however, this does not detract from the fact that the connection is a relative one. It must always be borne in mind that it is a super-imposed connection based on practical and functional considerations. Apart from the fact that the place of the proceedings is readily ascertainable, it is an appropriate focal place for control over a process involving persons and acts that cannot be identified in advance and may relate to a number of jurisdictions.²¹⁴ That last point, indeterminate parties, is best demonstrated in ancillary jurisdiction for contractual remedies resulting from the arbitral reference, such as an action to recover arbitral fees and an action for damages for arbitral misconduct: such actions should also be concentrated in the arbitral seat.²¹⁵ Even in the exceptional case where that forum would apply another law on the merits, most appropriately that chosen to regulate the procedure,²¹⁶ the essential point is that there is a convenient forum.²¹⁷

The restrictions on the jurisdictional title of the seat do not result only from the lack of attachment of the process itself to that legal order, but also from connections that other legal orders might have with the subject-matter and the parties. Such connections are apparent more in prohibitions of resort to arbitration applying *ratione personæ* ('subjective arbitrability'²¹⁸) or *ratione materiæ* ('objective arbitrability') or, finally, independently of such bases ('procedural arbitrability', for instance when resort to arbitration requires exhaustion of a mediation process).²¹⁹ Take the example where a municipal law prohibits arbitration of property rights arising out of conjugal relations even as an incidental matter. Now to extend this to an arbitration in respect of spouses of foreign nationality and/or where the assets are located abroad would be impermissible as a matter of international law, and such situations are in fact outside the protective scope of the prohibition. On the other hand, enforcing the provisions of the laws applicable to the assets and the persons concerned would be too cumbersome, because it would be too difficult to balance their respective title and sphere of application. The proper course, it is suggested, is to enact special rules in respect of international arbitrations which should be as liberal as could be tolerated by conceptions of (truly) international public policy.²²⁰

This construct gives the arbitrators the power to determine the measure of applicability of each law. That measure could result only from a unilateral assessment of the title of (ie, connections with and interests safeguarded by) each candidate legal system, as relates to the efficacy of the award. In other words, since the parties intended their dispute to be resolved by arbitration, the

²¹⁴ This difficulty was discussed already in 1932: David, [1932] UNIDROIT Actes & Documents, 2nd part, at 92-3.

²¹⁵ See respectively: Arbitration Act 1999 (Sweden), § 41: 'action on the award'; Act 31/1986 (Portugal), Article 19(5).

²¹⁶ This is a debated point. A number of authors consider that contract to be collateral to, and thus governed by the same law as, the arbitration agreement: Schöldström, *The Arbitrator's Mandate* (1995) 428-30.

²¹⁷ See OGH, 71 SZ 446.

²¹⁸ See, eg, CCP (Poland), Article 1105(2).

²¹⁹ See generally Böckstiegel in *Comparative Arbitration Practice* (1986) 177.

²²⁰ See, eg, LDIP, Article 177; and TF, 118 II ATF 193, 196 (exclusive application of the *lex fori* to arbitrability); TF, 118 II ATF 353, 355-6 (making an exception where respect for foreign law is mandated by Swiss public policy).

arbitrator should have the power, though not unfettered, to determine and give effect to public policy concerns as well as mere transactional, private, concerns.²²¹ At the same time, the construct gives the various municipal legal orders a proper role in safeguarding their public policy, for it can be safely assumed that if there is any defensible connection the opportunity will arise for them to assert their public policy at the enforcement stage.

(ii) Preliminary Control of the Arbitration Agreement

It would also follow that pre-emptive challenges of the validity of the arbitration agreement, whether premised on general contract law grounds or special arbitrability rules, should be resisted, unless the invalidity results from a flagrant violation of (truly) international public policy. Thus, pre-emptive declarations, where available, should be limited to a *prima facie* decision on whether the arbitration agreement is 'null and void, inoperative or incapable of being performed'.²²² The court should be looking for an on-its-face vice rather than fully reviewing the agreement, which is in the first instance a matter for the agreed forum, arbitration.²²³ That approach is exemplified by the decision of a US federal court:²²⁴

[T]he meaning of Article II section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is 'null and void' only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) when it contravenes fundamental policies of the forum state.

It is submitted that a judgment which goes further than that should not be accorded *res judicata* effect in the seat of the arbitral proceedings, so that it would not strictly bind the arbitrators.²²⁵ The result can be achieved by construing the New York Convention's mandate to the courts as a rule of allocation of competence between state courts and arbitral tribunals which is universally admitted and thus expressive of international public policy.²²⁶ And imposing a foreign judgment going against such public policy would deprive the parties of their natural judge.²²⁷

There are thus two considerations to be balanced in answering the question whether pre-emptive challenges should be entertained exclusively by the courts of the seat, and not by the courts that would have ordinary personal or subject-matter jurisdiction. The first is that the law is uniform (Article II of the New York Convention) and the result should everywhere be the same. The second is that the seat is a convenient and appropriate focal point in which to concentrate jurisdiction.

²²¹ cf *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc*, 473 US 614, 636-7 (1985).

²²² New York Convention, Article II(3), implemented by, eg, Model Law, Article 8(2); Arbitration Act 1996, s 9(4); LDIP, Article 7(b).

²²³ See NCPC, Article 1458, 2nd indent: 'à moins que la convention d'arbitrage ne soit manifestement nulle'. The provision applies to international arbitrations too; see Cass Civ Ire, 28 June 1989, [1989] Rev Arb 653; Cass Civ Ire, 1 December 1999, [2000] Rev Arb 96.

²²⁴ *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Lauro*, 712 F2d 50, 53 (citations omitted).

²²⁵ For an offensive decision see, eg, *M/S V/O Tractoroexport, Moscow v M/S Tarapore & Co* 1971 AIR (SC) 1.

²²⁶ TF, 124 III ATF 83: foreign judgment given in breach of Article II(3) of the New York Convention cannot produce *res judicata* under LDIP, Articles 1(2), 26, 9(1), (3); ICC 8878/1997, (2000) 11:1 ICC Bull 91, 93-4; van Houtte, (1997) 13 Arb Int 85. The matter is sensibly more complex in a Brussels Convention context, and this thesis will not touch on it; see *Partenreederei M/S 'Heidelberg' v Grosvenor Grain & Feed Co Ltd (The Heidelberg)* [1994] 2 Lloyd's Rep 287; Audit, (1993) 9 Arb Int 1; Hascher, (1997) 13 Arb Int 33.

²²⁷ CA Piraeus 19/1995, (1995) 1 ΔEE 1094, 1096.

Perhaps the proper solution would be to accept ordinary bases of jurisdiction insofar as the seat has not been determined.²²⁸

An obstacle to that suggestion is Article II(1) of the New York Convention, which may be construed as complementing Article II(3) and allowing the court to declare an agreement invalid if the subject-matter of the dispute is not, by its own law, arbitrable.²²⁹ Belgian courts in particular have adopted a contrary interpretation which is more attuned to co-ordinating international jurisdiction. In respect of arbitral proceedings to be held abroad, Belgian courts will examine the agreement only under Article II(3) and leave arbitrability for the enforcement stage, should the award ever reach Belgium.²³⁰ This author would entirely concur, but the matter is highly controversial.²³¹

The suggestions made above in respect of arbitrability are tentative, for arbitrability is outside the ambit of this thesis; but they would seem to follow from the general normative framework accepted here, and be workable. They would produce counter-intuitive results only in case the controlling forum's law, *ex hypothesi* extremely liberal, conflicts with all the other laws which are connected with the controversy and under their own terms applicable.²³² Take for example the case where the controlling forum would allow arbitration of any property rights but the personal laws of the parties and/or the proper law of the contract would prohibit arbitration. A plausible solution would be to apply by analogy a *clause d'exception* similar to Article 15(1) of the Swiss LDIP:

The law designated [as applicable] by this act shall not, exceptionally, be applicable if in the whole of the circumstances it is clear that the subject-matter (*la cause*) has only a very tenuous connection with that law and is much more closely connected with another law.

On the other hand, it is more than arguable that if those systems have a real stake in the arbitration they will be called to intervene by means of enforcement. The Swiss *Tribunal fédéral* has explained that the policy underpinning Article 177 of the LDIP is to expand the arbitrator's jurisdiction as far as possible and to leave it to the state where enforcement is sought to refute the award.²³³ Presumptive validity is, of course, a basic proposition underlying this thesis.

(iii) Anti-Suit (Protective) Injunctions

If a view must for the sake of completeness be expressed on whether the courts of the seat should have jurisdiction to order anti-suit injunctions for violations of the agreement to arbitrate by suing in another state it cannot be a conclusive view. Courts in England have taken the view that such jurisdiction follows from English law being the proper law of the arbitration agreement, and are

²²⁸ See further Samuel, (1992) 8 Arb Int 257.

²²⁹ Thus Pizar, (1959) 33 Southern Cal L Rev 14, 16; Quigley, (1961) 70 Yale LJ 1049, 1064.

²³⁰ See CA Brussels, 4 October 1985, [1986] JT 93; and, eg, TC Brussels, 5 October 1994, [1995] Rev Arb 311. A similar result is reached by Swiss courts, which do not apply the *lex fori*, but the proper law of the contract: TF, (1997) 22 YCA 800, sub [13].

²³¹ See van den Berg, *The New York Convention of 1958* (1981) 152-3; Partsch, (1992) *Actualités du Droit* 1259.

²³² This is a problem inherent in the design of all *règles matérielles de droit international privé*, because they do not apply spatially but on a subject-matter basis; see further Goldman, [1966-69] Tr Com Fr DIP 119, 134; and Francescakis, Remarks, *ibid* 114-5.

²³³ See ATF 118 II at 358.

not reticent in exercising it.²³⁴ On the other hand, courts across the Atlantic have taken the opposite view, against exercising such jurisdiction.²³⁵ The remedy is unknown in other jurisdictions; in most of them it would be considered offending the basic principle that it is for each court to determine its jurisdiction.²³⁶ There are also complications arising under the Brussels Convention.²³⁷ It can generally be said that the remedy leans on the power of a court to protect its jurisdiction and integrity of its process. But if jurisdiction is worthy of protection the forum must be *the* natural forum.²³⁸

In arbitration, the 'natural' forum could only have a relative sense, viz the courts of the seat, but even that could apply only if the seat has already been designated. The further difficulty is that, as has been seen above, Article II(3) of the New York Convention does contain a rule of allocation of competence universally accepted. Thus, the court may only be enforcing the agreement of the parties, not protecting its own jurisdiction.²³⁹ Because in this particular instance jurisdiction to grant anti-suit injunctions is entirely divorced from jurisdiction on the merits (even when the action is brought in the court as of right), the most readily discernible connection between the forum and the arbitration would be the governing law of the agreement to arbitrate. As has been seen in Chapter 1, however, that connection is too tenuous to be accepted for such purposes. If any courts should have such protective jurisdiction, they should be the courts of the seat.²⁴⁰ Under the Arbitration Act 1996, s 1(c), there seems to exist no general anti-suit jurisdiction. It would seem to exist only where the arbitrator makes an order to that effect (s 42) or if it be considered that the power to order a stay can be extended to foreign proceedings (s 9), which is unlikely. It is unclear whether s 1(c) could be read as preserving common law remedies flowing from the arbitration agreement, which would in the submission of this author be undesirable. In any event, anti-suit injunctions, relating only to the arbitral process itself and not the underlying claim could not be enforced under the Brussels Convention.²⁴¹

(iv) Control over the Procedure

By contrast, in the procedural field the antagonism is mainly between the parties' or arbitrators' choice of rules and/or law and the law of the seat. There are two further possible hypotheses. Suppose that the controlling forum's law is very liberal and gives the parties and the tribunal wide discretion in shaping the arbitral process. The first hypothesis would be that the parties, to conform to a mandatory rule of a very closely connected forum, to which, suppose further, the arbitral award will come for enforcement, refrain from exercising their freedom. They may, for instance, agree that no oath will be administered. This should pose no problem under either law. The second hypothesis is when procedural freedom is exercised. It is suggested that this situation should not pose any problems either, because the law is unified, and New York Convention defines procedural public policy in very clear terms. Article V(1)(b) allows enforcement to be refused if the

²³⁴ *Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, 96-7 (CA).

²³⁵ See *Oficina Central de Asesoría v Ayuda Técnica, CA*, 945 FSupp 69 (SDNY, 1996).

²³⁶ OLG Düsseldorf, [1997] ILPr 320.

²³⁷ See *Toepfer International v Societe Cargill France* [1998] 1 Lloyd's Rep 379 (subsequently settled).

²³⁸ See *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provinciën' NV* [1987] 1 AC 24 (HL) in the light of *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC).

²³⁹ cf *Continental Bank NA v Aeakos Cia Naviera SA* [1994] 1 WLR 588 (CA).

²⁴⁰ Tentatively thus: *XL Insurance Ltd v Owens Corning* (28 July 2000).

²⁴¹ See above, text to note 306.

respondent in the enforcement proceedings pleads and proves that he 'was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. This is not exhaustive of the general rules of equality and impartiality, but it does give the flavour of a strict conception of procedural *ordre public*, which will be accommodated within Article V(2)(b) of the same convention. Thus, enforcement should be refused, in principle, if one of the parties had not had an opportunity to designate its arbitrator,²⁴² but should not be refused on the grounds that the arbitrators admitted evidence inadmissible in court proceedings, even if that be mandatory in the enforcement forum. In the submission of this thesis, and under a number of modern arbitration laws, the ground of (procedural) public policy should (absent party agreement) *only* encompass violations of the general rules of impartiality and equality of the parties;²⁴³ this aligns the grounds of annulment to those of refusal of enforcement.

Further, it has been held that a failure adequately, or at all, to provide reasons does not constitute a procedural irregularity of public policy calibre.²⁴⁴ Further still, it will not be sufficient to dress up a challenge as going to procedure, unless the alleged violation relates solely to the conduct of the proceedings. Thus, a complaint that the reasoning is so arbitrary as to cause suspicion that the arbitrator did not in fact consider the arguments of a party is a concealed appeal on the merits. It should be admissible only if the applicant could prove that he was not given an opportunity to put forth his arguments.²⁴⁵ The policy justification is that the parties incur the risks of resorting to arbitration and setting up their tribunal.

The same observations apply in respect of a nation-specific conception of a generally admitted ground of public policy. For example, it is reported that New York law conceives cross-examination as an essential prerequisite of a fair hearing.²⁴⁶ If that be so, vacatur should not be available where the parties have derogated from cross-examination, unless there has been explicit submission to New York procedural law. Equally—and this is reported without passing judgment thereon but merely to illustrate the point—the French *Cour de cassation* has held, in respect of an award made in France but expressly dissociated from French law by the parties, that circumventing a bankruptcy moratorium by arbitration would violate both international and purely French public policy; and, if the arbitrator does not suspend the proceedings until the party in liquidation could lawfully make its claim through the *syndic*, due process (*le principe de contradiction*) would be violated.²⁴⁷

All this shows that 'seat' is indeed a legal concept, often with little, and certainly not exclusive, factual foundation. The state of the seat has no sufficient appropriate connection to apply its municipal law exclusively and totally to arbitral proceedings. In other words, in providing that its law will apply to proceedings having their seat in the territory, that state is not invariably defending its own interests, except to a very limited extent; it is essentially providing a service to the international mercantile community, by facilitating the enforcement of international awards in other ju-

²⁴² cf Cass Civ Ire, 7 January 1992, (1992) 119 JDI 707; Arbitration Act 1996, s 18(3)(c) and DAC Report, para 88; CJ, Article 1678(1). See further Schwab, [1992] DIS 17.

²⁴³ See TF, 117 II ATF 346, 347.

²⁴⁴ TF, 116 II ATF 373.

²⁴⁵ See TF, (1993) 11 Bull ASA 413. And on evidence see TF, (1998) 16 Bull ASA 118.

²⁴⁶ Stein & Wotman in McClendon & Everard Goodman, *International Commercial Arbitration in New York* (1986), as cited by Park, (1988) 82 AJIL 616, 619. But an agreement to exclude cross-examination would not be impeachable under federal law, 9 USC § 10(c): *Laminoirs-Trefileries-Cableries de Lens, SA v Southwire Co et al*, 484 FSupp 1063, 1066-7 (ND Georgia, Newnam Div 1980).

²⁴⁷ Cass Civ Ire, 5 February 1991, [1991] Rev Arb 625.

risdictions. The remedy of annulment, endowed with extra-territorial currency, intends to give the imprimatur of validity or otherwise to awards aspiring to be enforced abroad. By inference, the standard of behaviour imposed on arbitrators on pain of nullity of their pronouncements must be such that it will not lag behind what is internationally accepted as proper, but not unduly reflecting nation-specific conceptions of justice either. An analogy that presents itself is with the concept of '*dédoublement fonctionnel*', which explains the origin and limits of powers of national organs performing duties entrusted to them by international law.²⁴⁸ The analogy is no doubt broad, in that the international mercantile community has no regulatory power to delegate and there is perhaps no absolute international consensus on the limits of the jurisdiction of the state of the seat; but it does serve as a guide to the exercise of jurisdiction, since it shows the purpose of such jurisdiction. The matter can also be looked at this way: if a given law does not keep pace with the needs and expectations of the international mercantile community, no-one will arbitrate there. If all laws are hostile to the concept of arbitral justice favoured by the business community, it will resort to something akin to arbitration but avoiding the application of any arbitration law altogether (*arbitrato irrituale* or *libero* was born that way).

Another consequence is that one is not looking for an attachment with a legal order, a substantive law, as such, but for a court.²⁴⁹ The notion of the *lex arbitri* is thus court-oriented more than anything else. Municipal law seems to belie that suggestion, since the competence of the courts appears in all laws as a mere appendage of the application of that law. The evidence presented so far, however, is to the effect that we do need a court which will be effective, practical, and conclusive in its pronouncements—while the fact that it will apply its own law is more or less a necessary evil and a matter of legislative technique. Again, if and to the extent that the court should apply its own law, the norms contained in that law are not entirely in the discretion of the legislator.

(b) Limits to Annulment Jurisdiction

There are three techniques for a given legal order to assert its mandatory provisions. First, by making certain conduct or result punishable either specifically and individually (eg, lack of deposit of an award within a given period results in its not being enforceable) or as part of a general ground (eg, lack of reasons for an award will be considered a violation of due process).²⁵⁰ Secondly, by resorting to the public policy reservation, for any mandatory rule is susceptible of being considered as embodying the public policy conception of the forum. So, for instance, disregarding a rule that provisional measures are within the exclusive jurisdiction of the courts may be violating *ordre public*, in the sense of the allocation of powers in that legal order. The third way is to consider an award which has not on its face been made in accordance with a given (or for that matter, any) municipal law an anational award which cannot be enforced under the New York Convention. This last construction is considered in Chapter 7 of this thesis, which rejects it on the grounds that only annulment should be a bar to enforcement.

With regard to the former two techniques, it is the position of this author that the jurisdiction of the state of seat is subject to material limitations. It is observed at the outset that non-observance

²⁴⁸ See Scelle, (1933-IV) 46 RdC 327, 358-9.

²⁴⁹ This counters the suggestion that there exists a primary legal order which may or may not delegate some of its functions to other laws (eg, the capacity to enter an arbitration agreement); see thus Aubert, (1958) 37 RCDIP 367, 371.

²⁵⁰ For further distinctions see Mayer in *Planning Efficient Arbitration Proceedings* (1996) 25, 27-34.

of such limitations cannot in principle lead to a refusal to accord *res judicata* effect to a judgment of the controlling forum, and on this point the author begs to differ from learned authors (as will be discussed in detail in Chapter 6). It is consonant with certain fundamental propositions of this thesis, namely that the annulment forum is acting as an organ of the international community, that it should be for that forum to observe the attendant limitations to its jurisdiction. Lawyers are not used to obligations without remedies, but in the law as it stands, and one means here the New York Convention, the enforcement forum is in principle devoid of legal (although not diplomatic) remedies.

The first principle is that the award should never be controlled on the merits.²⁵¹ Except if the parties have otherwise expressly agreed,²⁵² an award should never be controlled for compliance with any conception of the proper choice-of-law process and the result reached, for this is part and parcel of the choice to resort to arbitration. Even if the arbitrator adopted a contradictory reasoning, entirely ignored the conflicts-of-laws stage, applied the law manifestly erroneously, or even relied on facts obviously false, the award should stand.²⁵³ Similarly, even if the arbitrator manifestly ignored the law expressly chosen by the parties his finding should never be reviewable on the covert ground that he exceeded his authority.²⁵⁴ It should similarly cover the case where the arbitrator applies a law other than that stipulated. *A fortiori*, the principle should cover the round-about way of annulling an award made on *lex mercatoria* on the grounds that the arbitrators acted as *amiable compositeurs* without authority to do so.²⁵⁵ The true limits imposed by public policy here should sanction awards whose *dispositive* part offends the basic notions of legality and morality in the forum; subject however to the proviso that this is a matter in the first place for the arbitrator to determine, whose findings should not be disturbed absent manifest disregard of public policy.²⁵⁶

The second principle is that the controlling forum is both obliged and entitled to control the procedural propriety of an award in terms of due process. The two aspects of that control are equality of the parties and impartiality of the tribunal. This is a veritable international law obligation of the controlling forum, which is more fully explored in the next chapter.

The third principle is that the finding of the arbitral tribunal on its competence must in principle be reviewable through an action to set aside. This a discrete area that this thesis cannot enter, but what follows applies to a certain extent to it as well.

The fourth principle is that all legal orders must allow for prior exclusion of recourse, by written agreement. This follows from four considerations: (a) no state has a sufficient appropriate connection always to impose control over international arbitral awards; and (b) the seat state has an international obligation to provide for an effective and practical remedy against arbitral awards; but (c) the parties are sophisticated operators, and the formal requirement of writing adequately pro-

²⁵¹ This is trite law everywhere. If academic authority were required see Park, (1995) 30 Tex ILJ 135, 181.

²⁵² The Arbitration Act 1996, s 69, reverses this, which is unwelcome.

²⁵³ TF, 116 II ATF 634; TF, 121 III ATF 331; TF, 28 January 1997, (1998) 16 Bull ASA 118; Paris, 21 June 1990, [1991] Rev Arb 96, 101.

²⁵⁴ Thus, erroneously, AP 71/1995, (1995) 1 ΔEE 1098 (a domestic case).

²⁵⁵ *Contra*, Mayer in *L'Exécution des Sentences Arbitrales* (ICC Publication No 440/6, 1989) 47, 54.

²⁵⁶ See, below, Chapter 4, note 5.

fects them; and (d) in any event, the grounds for refusal of enforcement are sufficient to stop improper awards.²⁵⁷

The fifth principle is that any procedural agreement that the parties may have made must be given effect to. This involves the problem of so-called 'heightened' control of arbitral awards. The parties may opt for such control in two ways: either provide directly for a ground of invalidity where the law provides for none (eg, control over the choice-of-law process) or make particular arrangements going further than the ordinary requirements (eg, that the arbitrators will be not only impartial but also of different nationalities from the parties). In line with the best interpretation of Article V(1)(d) of the New York Convention,²⁵⁸ it is suggested that the latter possibility can be accommodated within provisions such as Model Law Article 34(2)(a)(iv), permitting annulment if 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties'. In that case, it is further suggested, the court should only examine whether there has been a material breach of the particular obligation, without further looking for an influence of the breach on the award, or for a violation going to public policy interests:²⁵⁹ this is in particular the case under English law.²⁶⁰ French courts will enforce procedural agreements, either by extending the vice of 'irregular composition' to encompass irregular procedure (NCPC, Article 1502(2)),²⁶¹ or by inferring submission to a foreign law.²⁶² The Swiss *Tribunal fédéral* is reluctant to enforce particular agreements in the silence of the law (modelled in that respect on French law), and insists that no party agreement can of itself amount to a public policy concern, public policy being the Swiss law ground.²⁶³

With regard to the former possibility, novel grounds of annulment, there is contrary authority in France, and conflicting decisions in the United States.²⁶⁴ On the premise that the heads of annulment are expressive of public policy, in the sense of an allocation of discretion between arbitral tribunals and state courts, the Paris Court of Appeal has considered *pro non scriptæ* clauses in the arbitration agreement providing for appeal.²⁶⁵ The *Cour de cassation* has pronounced itself in no uncertain terms against contractually created remedies, citing the imperative character of the

²⁵⁷ According to an isolated view, allowing for contractual exclusion violates international law and is against sound government principles: Asouzu, (1995) 7 Afr JICL 68. Similarly, Professor Park contends that the state of the seat 'bears a duty to provide [for] a non-waivable right to challenge an award': Park, (1989) 5 Arb Int 230, 231.

²⁵⁸ See below, Chapter 7, text to note 51.

²⁵⁹ Arrangements imposing time-limits for the initiation of the proceedings will be more directly given effect to, within a review of the tribunal's jurisdiction; see, eg, TF, (1996) 14 Bull ASA 673 (a decision criticized on other grounds). The same applies to agreements mandating the tribunal to split the case by a preliminary award: Paris, 19 December 1986, [1987] Rev Arb 359; *reversed on other grounds*, Cass Civ 1re, 8 March 1988, [1989] Rev Arb 481.

²⁶⁰ Arbitration Act 1996, s 68(2)(c); cf Litman, (1997) 13 Arb Int 269.

²⁶¹ See Paris, 11 February 1988, [1989] Rev Arb 683; *affirmed*, Cass Civ 1re, 4 December 1990 [1991] Rev Arb 81.

²⁶² See Cass Civ 1re, 14 June 1960, [1961] JCP II 12273 (unmotivated award is valid under the law of rendition, presumed to have been chosen); Paris, 6 May 1988 [1989] Rev Arb 83 (same).

²⁶³ TF, 117 II ATF at 348; TF, (1998) 8 RSDIE 574, 575-6.

²⁶⁴ See *LaPine Technology Corporation v Kyocera Corporation*, 130 F3d 884 (9th Cir 1997). See further Rau, (1997) 8 Am Rev Int Arb 225; Raghavan, (1998) 15:3 J Int Arb 103.

²⁶⁵ Paris, 12 December 1989, [1990] Rev Arb 863; Paris, 23 May 1991, [1991] Rev Arb 661 (disregarding clear appeal stipulation on grounds that it is exceptional in international arbitration).

means of recourse.²⁶⁶ These are doubtless valid considerations. The better position would seem however to be that the controlling forum is rendering a service to the parties and should comply with their wishes.²⁶⁷ If that be conceded, the technical hurdle posed by the exhaustive enumeration of annulment grounds can be overcome by considering novel grounds as falling within a public policy violation—that public policy being respect for the overriding wishes of the parties, to be ascertained at the time of the conclusion of the arbitration pleadings.

A problem associated with either of the two possibilities outlined above is how to ascertain the wishes of the parties in default of a direct, explicit, and specific agreement (such as: ‘The award will be subject to annulment for non-compliance with the choice-of-law provisions of the Rome Convention’ or ‘On pain of annulment, the tribunal will not have the power to order interim protection’.) In the unlikely event where the parties choose the procedural or arbitration law of a state other than the controlling forum, and that law contains mandatory requirements which differ from those in the controlling forum,²⁶⁸ such choice should be treated as contractual incorporation with binding effect. A good example is afforded by a recent English judgement on an award made in London between Mauritius, South African, and British parties. The arbitration clause provided that the arbitration would be conducted in accordance with the Code of Civil Procedure of Mauritius. An application to set aside for misconduct (Arbitration Act 1950, s 23(2)) was lodged with the English court, *inter alia* on the ground that documents-only proceedings violated that law. The court admitted that the standard of misconduct would be determined by the mandatory provisions of Mauritius law, but in the result found no infringement thereof.²⁶⁹

The sixth principle, which informs the first, second, and third principles above, is that the concept of public policy must be interpreted in a restrained fashion. Again, the premise is that the controlling forum is in essence facilitating enforcement and not defending its own interests. The consequence is that its own, nation-specific, conception of public policy (as reflected in mandatory rules applying to municipal awards) should not be imposed on international arbitral awards. In other words, there is a lack of appropriate connection, or *Inlandsbeziehung*.²⁷⁰ The appropriate measure of compliance differs somewhat from international public policy (*ordre public attenué*), which applies at the stage of enforcement. International public policy is expressive of the fundamental conceptions of legality and morality of a given forum. But a truly international public policy is one which is expressive of basic legality and morality shared by the community of na-

²⁶⁶ See Cass Civ 1re, 6 April 1994, [1995] Rev Arb 263 (citing Articles 12 and 1507 of the NCPC and not the more obvious Articles 1495 and 1482); Paris 27 October 1994, [1995] Rev Arb 263. But see Paris, 10 March 1988, [1989] Rev Arb 269.

²⁶⁷ Thus, public policy would not be opposed to the parties providing for a remedy open before another tribunal, when that remedy is not provided for in the law; cf Paris, 25 May 1990, [1990] Rev Arb 892, 895-6: absent agreement, the arbitrator is not *obliged* by public policy to open revision proceedings.

²⁶⁸ The same should apply *mutatis mutandis* when the proceedings take place under arbitration rules.

²⁶⁹ See *General Construction Ltd v Aegon Insurance Co (UK) Ltd* (21 May 1997).

²⁷⁰ For the notion as an in-built connecting factor for and a limitation to public policy see TF, 94 II ATF 297, 303-4. Note, however, that since *Westland* (120 II ATF 155) the TF does not use this notion in arbitration. See further Lagarde in *International Encyclopedia* (vol III:11, 1994) 31-43; Bucher, (1993-II) 239 RdC 9, 52-6. The lack of appropriate connection as conducive to the application of public policy rather than mere mandatory rules to international arbitration was first articulated by Robert in *Liber Amicorum Domke* (1967) 266; Lalive, [1980] Rev Arb 341, 359-60.

tions.²⁷¹ Although the notion has not fully matured, in that it will require substantial state and arbitral practice to hammer out the sharp divergences still existing in matters of substantive law and competence, its procedural tenet has been fully crystallized in the notions of fair hearing or due process. The point one tries to make however is that it is unjustified for a state to annul an award with extraterritorial effect based on a conception of public policy which is not shared by other states. This should be more appropriately left to the various enforcement fora, without prejudicing the intrinsic validity of the award.²⁷² So one does not refute the principle that a state should be able to decline to give effect in its territory to an act, private or public, originating in another jurisdiction, if that act offends the pillars of its societal order;²⁷³ one simply allocates the function to a different remedy. In other words, truly international public policy in its *procedural* aspect would seem to require restraint on the part of municipal courts rather than positively safeguarding internationally accepted norms.²⁷⁴ The construct has the virtue of aligning the scope of application of municipal law which has extraterritorial effects (through annulment) with the suggestion that the international arbitrator, being the organ of no particular state, can conceivably defend only truly international public policy.²⁷⁵

The fundamental difference between annulment and enforcement is that enforcement safeguards interests specific to the enforcement forum, though it may safeguard truly international public policy as well. Annulment should serve as a checkpoint ensuring compliance with truly international public policy concerns only. That distinction can be put in effect by separating annulment from enforcement in the territory of the controlling forum, so that the court could at the same time refuse both to annul and enforce an award.²⁷⁶ Certain modern laws do recognize the lack of connection between an award made in the territory and their public policy, and make a violation of *international* public policy a ground for annulment.²⁷⁷ International public policy or *ordre public attenué* are premised on respect for rights vested abroad, that is, validly created under another legal system.²⁷⁸ So that extending an attenuated effect of public policy to awards whose seat is in

²⁷¹ eg, Goldman, (1963-I) 109 RdC 347, 430-7; and see ICC 2730/1982 (unreported), as quoted by Lew in *Contemporary Problems* (1986) 73, 83. See extensively Lalive in *Comparative Arbitration Practice* (1986) 257, 270-319; Racine, *L'Arbitrage Commercial International et l'Ordre Public* (1999) ch II:1. The concept was espoused by TF, 120 II ATF 155; and rejected in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, per Bokhary PJ.

²⁷² During the preparation of the Model Law, there was strong support for the idea that the controlling forum should not be able to impose its own arbitrability rules, unless it had a specific connection with the dispute, but this was not adopted; see Model Law, Article 34(2)(b)(i) and UN Doc A/CN.9/264 (1985), para 12 ad Article 34.

²⁷³ This was partially the *ratio* in *Application of the Convention of 1902 Governing the Guardianship of Infants*, *ICJ Reports 1958*, 55, 70-1; and 79, 94-101 (Sep Op Lauterpracht J).

²⁷⁴ An example of the latter case is provided by the obligation to deny effect to agreements endorsing or mandating bribery of public officials. There is abundant literature and arbitral case-law on the point, but recent developments are more important: see UN Declaration against Corruption and Bribery in International Commercial Transactions (1997); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 17 December 1997), at the time of writing ratified by 20 states (see <<http://www.oecd.org>>); and Civil Law Convention on Corruption (Strasbourg, 4 November 1999), ETS No 174.

²⁷⁵ Kahn, (1989) 116 JDI 305, 313-8 with further references.

²⁷⁶ A similar proposition in Kopelmanas, (1957) 10 RTD Comm 879, 909.

²⁷⁷ See NCPC, Article 1502(5) *juncto* 1504, first indent; Act 2735/1999 (Greece), Article 34(2)(bb); Arbitration Act 1999 (Sweden), § 33(2). Although the LDIP, Article 190(2)(e), refers to public policy *tout court*, the Tribunal fédéral interprets this as in a restrained fashion, for 'public policy in the ... LDIP is Swiss in origin but international in function': 120 II ATF 155, 166-8.

²⁷⁸ eg: Mayer, [1994] Rev Arb 615, 646. And see CA Luxembourg, 28 January 1999, (1999) 24a YCA 714, sub [11], [13].

the territory must only, and properly so, mean that the attachments between the controlling forum are tenuous and, in any event, not exclusive.²⁷⁹ But the courts must go further than that and align that international public policy with truly international public policy; which in procedure is, again, respect for equality and impartiality.²⁸⁰

There is a final point here, which complements the role of the courts of the seat. It is an accepted principle that the arbitral process must not be 'conducted in a manner that disturbs the peace or deeply offends local values or morals'.²⁸¹ 'Local' in this connection must mean not only the seat but any territory within which procedural acts take effect—and in that sense a strictly territorial connection retains some currency. Examples of offensive acts include (a) acts that attract penal sanctions, for instance cruel treatment of witnesses (an improbable situation of course); (b) the disclosure of documents (such as personal, tax, and professional records) which are privileged and confidential under the law of the holding authority and/or the personal law of the person against which the disclosure order is made;²⁸² (c) the disclosure of governmental secrets.²⁸³ When such offensive acts assume a sufficient degree of intensity, they must be sanctioned by the controlling forum, even if in the acts in question took effect within, and/or offended, other legal orders. Comity, being itself part of truly international public policy, requires that the only effective forum should enforce as part of its own public policy stipulations of public policy of other jurisdictions, if that (controlling) forum recognizes the state interests safeguarded by the laws of other jurisdictions.²⁸⁴ If a party is precluded from suing or being sued by a bankruptcy moratorium, such restriction can only meaningfully apply on a personal connection, for otherwise the orderly satisfaction of creditors, a principle *ex hypothesi* espoused by the controlling forum, would be frustrated.²⁸⁵

The seventh principle ties together all the above, reflecting the general principles of finality of adjudication and co-operation of jurisdictions. Grounds of invalidity which could have been put forward during the arbitral proceedings but were not so must be disregarded by the controlling forum, even if they amount to violation of its public policy as defined above. This applies to grounds of procedural impropriety, which safeguard in the first place the interests of the litigating parties. Any system of procedural organization (adversarial, inquisitorial, or mixed) assigns to the parties the primary role in defending their procedural rights. Inertia to do so on their part, if inex-

²⁷⁹ Arfazadeh, (1995) 5 RSDIE 223, 232-3 does not seem to appreciate that point.

²⁸⁰ A recent Canadian judgment accepts that procedural public policy in the Model Law, Article 34(2)(b)(ii), is essentially a cross reference to Article 18, equality and fair hearing: *Stet International*, [1999] Ont Sup CJ Lexis 908, *15-*19; and the same has been accepted in Switzerland: 117 II ATF at 347-8. On the other hand, resort to procedural public policy is superfluous in case the court may directly enforce Article 34(2)(a)(ii), inability to present one's case; cf *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 50 (a New York Convention case).

²⁸¹ von Mehren & Jiménez de Aréchaga, (1989) 63i Ann IDI 31, 44.

²⁸² See IBA Rules, Article 9.2(b). The WIPO Rules, Article 75(iii) and the SIAC Rules, Rule 34.6, contemplate the reverse hypothesis, where one of the parties has to breach the confidentiality of the award because of a requirement imposed *on that party*. Cf *Société Internationale v Rogers*, 357 US 197, 204-6 (1958).

²⁸³ Note that even the state itself as arbitrating party may assert such 'public interest immunity'; see *Heathrow Airport User Charges*, 102 ILR 216, para 3.30 (ad hoc/PCA, 1992); *McIntire v FAO* (ILOAT No 13): production of diplomatic communication without the authorisation of the Government concerned 'would constitute a violation of diplomatic usage in such matters'. The IBA Evidence Rules, Article 9.2(f), on 'political or institutional security', protect secrets of international organizations too.

²⁸⁴ cf *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 (HL); *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, 459; Rome Convention, above, note 5, Article 7.

²⁸⁵ cf *Idot*, [1991] Rev Arb at 630.

cusable, leads to the conclusion that no such interest has been violated.²⁸⁶ In turn, a finding of the controlling forum on the procedural propriety of the proceedings should be accorded deference by the enforcement forum.²⁸⁷

3. Support Jurisdiction

For a number of authors the need for an attachment with a legal order results not so much from the necessity of control over arbitral proceedings but from the need to intervene in the arbitral process.²⁸⁸ Such intervention may roughly take three forms: (a) nomination or replacement of arbitrators; (b) assistance with the production of evidence; (c) interim measures in support of the arbitration. (Consolidation of proceedings is not widely available.) There being no international instrument unifying or harmonizing the exercise of support jurisdiction, one is forced unilaterally to inquire each legal system that may have a connection with the arbitral process.

The evidence from municipal law is that support related to the constitution of the arbitral tribunal should be available only by the courts, and under the law, of the seat of the tribunal. The considerations of expediency, effectiveness, and practicality pointing to a focal jurisdiction are prominent here too. This leaves us with no connecting factor in case the seat has not been designated by the parties. Certain laws will provide for their residual application in such cases, provided that either party is domiciled etc in the country²⁸⁹ or, more generally, there is a general basis of jurisdiction,²⁹⁰ or if the parties have submitted the arbitration to the law of the forum.²⁹¹ The matter was debated during the adoption of the Model Law, where it was decided that it would be undesirable and unjustifiable to extend the application of the law to arbitrations without a fixed seat in the territory.²⁹² If of course the definition of seat is wide enough to encompass circumstances falling short of a formal agreement but sufficiently pointing to the country, as in English law for instance, the problem is by-and-large avoided. If not, a reserve forum should in any event be provided by general jurisdictional bases, in particular the domicile of the recalcitrant party or the arbitrator being challenged.²⁹³ Therefore the laws applying on the basis of party domicile merely restate the position or, in the case of challenge, add a basis of jurisdiction, and are not objectionable. On the other hand, Swedish law goes further to allow the arbitration to commence in Sweden, when Swedish courts would have jurisdiction over the dispute under arbitration.²⁹⁴ This is controversial; it should suffice to create a reserve forum for assistance purposes, not a general reserve forum.

Evidence-related jurisdiction is more complicated. The first general rule is that the courts of the seat are the primary forum for such purpose.²⁹⁵ That does not mean that they have exclusive juris-

²⁸⁶ This is widely recognized in arbitration rules and national law; for a wide formulation see Model Law, Article 4.

²⁸⁷ *Minmetals*, above, note 193.

²⁸⁸ See, eg, Panchaud, [1966] *Rev Arb* 2, who coined the term '*autorité judiciaire d'appui*', *ibid* 3.

²⁸⁹ CCP (Netherlands), Article 1073(2); Act of 1 November 1994 (Czech Rep), §§ 9, 43.

²⁹⁰ According to Lalive *et al*, *Le Droit de l'Arbitrage* (1989) 297-8, Swiss courts retain jurisdiction under Article 2(2) of the Concordat, which cross-refers to the ordinary jurisdictional bases. Austrian courts would have jurisdiction by a forum agreement: öZPO, § 582(1).

²⁹¹ NCPC, Article 1493.

²⁹² See UN Doc A/CN.9/WG.II.WP.49 (1983) paras 13, 34; UN Doc A/40/17 (1985) para 80.

²⁹³ David, [1932] UNIDROIT Actes & Documents, 2nd part.

²⁹⁴ See above, text to note 100.

²⁹⁵ Model Law, Article 27.

diction, for the second general rule would be that the court requested cannot act but within its own law, both in terms of jurisdiction (in respect of which arbitrations it is competent, if at all²⁹⁶) and the assistance it may offer.²⁹⁷ Thus, the tribunal and/or the parties (depending on which one has to initiate the process) has to comply with that law. In terms of the jurisdictional connection required, the matter perhaps resists generalization save for a general formula that there should exist an appropriate connection whose relevance should be determined by the court.²⁹⁸ The law of the requested court may require a letter rogatory from the courts of the seat (as opposed to a request from the tribunal), in which case the requesting party(-ies) will have to comply with that law too. However, compliance with the law of the seat should be required only to the extent relevant to the request. It would be entirely unwarranted and unproductive to require that the tribunal should in fact operate under the law of the seat in respect of the arbitral process in general.²⁹⁹ For that is a matter to be examined in the course of an action to set aside, if any, and, further, by lending its support to the tribunal the court is not endorsing the whole process so far or implying that it will recognize the award.³⁰⁰

Jurisdiction to assist by way of interim protection is a very complex area. It is not crucial for this thesis to define the 'interim', 'provisional', or 'conservatory' character of measures, or when they should be granted. Let us therefore assume what in broad brushes would be everywhere acceptable, that is, measures (a) intended to safeguard the viability of the process itself or ensure the efficacy of its outcome, but (b) ordered *pendente* or *ante lite*, and (c) being of reversible effect. Arbitration rules are clear that the parties retain the right to ask for interim protection, in any event before the constitution of the tribunal, 'and in appropriate circumstances even thereafter'.³⁰¹ The premise is that even where arbitrators are allowed to order interim protection their orders must be enforced through the courts, since they have no coercive authority over the parties, let alone third parties. It is thus universally accepted that a request for interim protection is not in principle an infringement or waiver of the arbitration agreement.³⁰²

The jurisdictional bases of court intervention to assist by way of interim measures are not unified. The Brussels Convention excludes from its scope of coverage 'arbitration' *tout court*³⁰³ and

²⁹⁶ 28 USC § 1782(a) has been interpreted as not allowing assistance to private tribunals sitting abroad: *National Broadcasting Co, Inc v Bear Stearns & Co, Inc*, 165 F3d 184 (2d Cir 1999); and *Republic of Kazakhstan v Biedermann International*, 168 F3d 880 (5th Cir 1999); *In re Medway Power Ltd*, 985 FSupp 402 (SDNY 1997). The reading is criticized by Smit, (1997) 8 Am Rev Int Arb 153; and accepted by Rivkin & Legum, (1998) 14 Arb Int 213. The references are in McDaniel, 46 ALR 956 (1980, Supp 10/99).

²⁹⁷ See, eg, von Mehren & Jiménez de Aréchaga, above, note 281, 44; von Mehren in *Études Goldman* (1982) 217, 222-4; and ICC 6401/1991, (1996) 126 JDI 1055. Cf Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 18 March 1970), (1972) 847 UNTS 231, Articles 9, 12; Inter-American Convention on the Taking of Evidence Abroad (Panama City, 30 January 1975), (1986) 1437 UNTS 385, Article 2(1).

²⁹⁸ So the Arbitration Act 1996 would allow proceedings to secure the attendance of witnesses only if the witness is in the UK and the arbitration is 'conducted' within the territorial scope of the Act: s 43. But other powers, in s 44, are subject to the general discretionary formula of s 2(3)(b).

²⁹⁹ But see Arbitration Act 1999 (Sweden), § 50 (support to foreign tribunals only if the subject-matter of the proceedings is arbitrable under Swedish law).

³⁰⁰ cf the Hague and Inter-American conventions on taking of evidence, above, note 297, Articles 12, second indent and 8 respectively.

³⁰¹ ICC Rules, Article 23(2); UNCITRAL Rules, Article 26(3); LCIA Rules, Article 25.3; Stockholm Rules, Article 31(2); European Arbitration Rules, Article 21(2); AAA International Rules, Article 21(3); CAMCA Rules, Article 23(3); Zagreb Rules, Article 34(2); Milan Rules, Article 14(4).

³⁰² eg: Model Law, Article 9; *Sauer-Getriebe KG v White Hydraulics, Inc*, 715 F2d 348, 350 (7th Cir 1983).

³⁰³ See Brussels Convention, Article 1, second indent, (4). See Civil Jurisdiction and Judgments Act 1982, Schedules 1, 3.

so will the proposed Hague Convention on Jurisdiction and Foreign Judgments.³⁰⁴ The European Arbitration Convention does not deal with the jurisdictional aspect of the matter, and neither does the New York Convention.³⁰⁵ One must at first blush unilaterally enquire the courts and legal systems, if and to what extent they are competent to assist. On the other hand, the European Court of Justice has recently ruled that the Convention does cover interim protection intended to protect substantive rights which fall within Article 1 of the Brussels Convention but have been submitted to arbitration.³⁰⁶ This author has argued elsewhere that the distinction is not practicable to operate, and may have the unwelcome result of protecting the arbitral process less efficaciously than the substantive rights in adjudication.³⁰⁷ However that may be, the law is now that the ordinary heads of jurisdiction (and the enforcement mechanism) under the Convention are preserved.

It is debatable whether the ruling adds jurisdictional bases to the already existing ones. An arbitration agreement excludes the jurisdiction of the courts on the merits; by necessary implication, the jurisdictional bases under the Convention are, as such, irrelevant. On the other hand, Article 24 of the Convention preserves any jurisdictional bases that a contracting state may provide for. Jurisdiction to assist international arbitral proceedings is nowhere a clear-cut matter. As a matter of principle, where court jurisdiction is made concurrent with the scope of application of the law, the courts of the law applicable, normally those of the seat, should be the primary forum for interim protection.³⁰⁸ That follows from considerations of practicality and expediency: the courts of the seat are the most easily accessible to the parties. Moreover, those courts have plenary jurisdiction over the arbitral proceedings as a whole, and may thus be taken to have acquired specific and derived jurisdiction over the arbitrating parties too. Finally, such concentration would promote judicial economy and obviate to a certain extent the need to locate and identify assets of the respondent in various jurisdictions around the world. The courts of the seat should thus have centralized and global, in terms of territorial reach, jurisdiction.³⁰⁹

On the other hand, the multiple connections that an international arbitration may have with various legal orders make it illusory to consider the jurisdiction of the courts of the seat (or any courts in particular for that matter³¹⁰) the exclusively effective remedy. Thus German and Dutch law, otherwise applying strictly territorially, preserve the ordinary heads of interim measures jurisdiction to support proceedings whose seat is not in those states.³¹¹ The same solution prevails under the Model Law: the exhaustive enumeration of bases for court intervention is inapplicable to matters not governed by the Model Law, and interim measures jurisdiction is not covered.³¹² Again, it may be impossible in the abstract to identify the sufficient nexus and to limit court intervention to cases where that nexus exists; indeed, it may be wholly inappropriate, in view of the

³⁰⁴ See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (October 1999), Article 1(2)(g): 'arbitration and proceedings related thereto'.

³⁰⁵ According to an isolated view, Article II(3) of that Convention excludes interim protection; the authorities and literature are cited in Chapter 5, note 92. If that were correct, the Convention would have a horizontal jurisdictional effect, excluding all possible jurisdiction.

³⁰⁶ Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-7091.

³⁰⁷ [2000] LMCLQ 99, 105; cf *Coppée-Lavalin*, [1995] 1 AC at 64.

³⁰⁸ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 368 (HL).

³⁰⁹ cf ILA Principles on Provisional and Protective Measures in International Litigation, (1996) 67 ILA Rep 202, Principle 16; ALI, Transnational Rules of Procedure (Discussion Draft, 1999), Rule 12(a)-(b); *van Uden*, above, note 306, para 22.

³¹⁰ See above, note 175.

³¹¹ ZPO, § 1663(2); CCP (Netherlands), Article 1074(2).

³¹² Model Law, Article 5.

conflicts of jurisdiction that may arise. The Arbitration Act 1996 makes this a wholly discretionary matter, under cover of an ‘appropriateness’ requirement.³¹³ So a foreign seat may not preclude the court from exercising its discretion if the parties have adopted English arbitration law³¹⁴ but, on the other hand, the fact that the measure requested is peculiar to English law (eg, security for costs) may do so.³¹⁵ A particularly important connecting factor is the presence of an asset in the territory:³¹⁶ the courts best placed to order interim protection in respect of that asset individually are of course the courts of the *situs*.³¹⁷ Similar considerations apply as to the *forum arresti*.³¹⁸

An overriding consideration should in all events be whether the courts of the seat are in a position effectively to exercise jurisdiction; in such cases, the court with specific interim measures jurisdiction should decline to exercise it. It is suggested that the role of the courts should be viewed as complementary, so that the courts of the seat should have universal and unlimited jurisdiction, whereas other courts should have a satellite role. Their jurisdiction should always be discretionary and its effects spatially limited within the territory. Within those parameters, it is suggested, jurisdiction should in principle satisfy the quasi-jurisdictional requirement of a ‘real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the ... court before which those measures are sought’ spelt out by the European Court of Justice.³¹⁹

IV. CONCLUSIONS

This chapter went into some detail in a number of municipal laws. Although it would be meaningless to go through those details again, it is important to bear in mind a few basic conclusions that run through the whole of this thesis:

- (1) The concept of ‘nationality’, as a predestined and exclusive attachment, is inappropriate for international arbitration.
- (2) A global attachment for support and control purposes is created between the arbitration and the legal order of the *courts* of the seat of the arbitral proceedings, but that attachment is predicated upon jurisdictional expediency.
- (3) The concept of ‘seat’ is a juridical one. The jurisdictional title of the seat derives from the agreement of the parties or a decision of their agents, the arbitral institution and the arbitrators, on the place of the arbitration.³²⁰ The title of that legal order is created by a choice to which legal significance is ascribed, on practical considerations.³²¹ Further, it is essentially

³¹³ Arbitration Act 1996, s 2(3)-(4).

³¹⁴ Hill, (1997) 46 ICLQ 274, 296.

³¹⁵ *Coppée-Lavalin*, above, note 83. Note, however, that *forum patrimonii* alone may be insufficient in Germany: BGH, 115 BGHZ 90.

³¹⁶ See, eg, *The Lady Muriel* [1995] 2 HKC 320 (CA); *Re Deiulemar Cia di Navigazione SpA v Pacific Eternity, SA* (4th Cir 1999).

³¹⁷ *van Uden*, above, note 306, para 39.

³¹⁸ See Arbitration Act 1996, s 11.

³¹⁹ *van Uden*, above, note 306, para 40.

³²⁰ That alone is a significant development. It has been seen above, sections I-II, that the geographical location (place, venue, seat, place of rendition, and so on) was only loosely described, even when legally relevant. Thus, for instance, the Draft Uniform Law on Inter-American Commercial Arbitration (1956), Article 15, reserved the application of the ‘public policy provisions of the local law’.

³²¹ Panchaud, above, note 288, foresaw that development.

a choice of law and sometimes only that, inasmuch as no geographical connection is necessary.

- (4) From conclusions (2)-(3) it follows that the jurisdictional title of the seat is both bound and limited in respect of its control functions. It must make its courts available for control of arbitral proceedings. Insofar as procedure is concerned, it must ensure that certain standards of due process are respected, but at the same time refrain from imposing more onerous conditions of regularity.
- (5) Finally, it would be desirable to avoid, within the application of a given law, conflicts rules. The law should state material requirements as far as possible in accord with universally shared notions of propriety by substantive rules. This has the virtue of sparing the tribunal the effort to construe its conflicts framework, an exercise next to impossible without a fixed frame of reference.³²²

³²² Contrast Zhang, *Contrôle et Intervention Judiciaire* (Thesis Geneva, 1998) 30-4, where muddled distinctions between procedure, substance, and jurisdiction are proposed in the abstract.

Chapter 3

Human Rights Law Requirements, Jurisdictional and Substantive

The discussion will focus on treaty law, and in particular on the European Convention on Human Rights (hereafter the 'ECHR'),¹ because the case-law under that instrument is the richer and more instructive.² However, the convergence between the regional and universal human rights instruments³ demonstrates a broad consensus on the fundamental rules. It is therefore at least arguable that the conclusions of this chapter reflect the position in customary international law.

I. THE PRINCIPAL OBLIGATIONS

Article I of the ECHR reads:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Article 6 of the same convention provides in part that:

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly

Similarly, Article 14(1) of the (United Nations) International Covenant on Civil and Political Rights, reads in material part as follows:⁴

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), (1955) 213 UNTS 221, as subsequently amended.

² In addition to the literature cited on specific points, on arbitration in the context of the ECHR see also: Geimer, (1992) 33 ZfRV 321 and 401, particularly at 321-7, 407-13; Habscheid in *FS Henckel* (1995) 341; Matscher in *La Convention Européenne* (1989) 281; Lawson, [1996] TvA 157. And generally Ribbing, (1993) 4 Am Rev Int Arb 537.

³ See notes 1, 4-6.

⁴ International Covenant on Civil and Political Rights, GA Res 2200A (XXI) (16 December 1966), (1976) 999 UNTS 171, Article 14(1).

And the American Convention on Human Rights, Article 8:⁵

- (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

The gist of the above-quoted provisions is that they contain a twofold obligation.⁶ In the first place, there will be a right of access to a court: the contracting states have the obligation to have in place a system of courts that is readily available to everyone within their jurisdiction. Secondly, a right to justice of a certain quality: where the international treaty requires a court and domestic law provides for one, the proceedings must comply with certain requirements, notably independence, impartiality, fair hearing, and liquidation of the case within a reasonable time.⁷ Both obligations 'require the achievement of a specified result' (*obligations de résultat*),⁸ and thus afford the state considerable discretion as to the means to fulfil them. It has been held that the right of access to a court 'by its very nature calls for regulation by the state',⁹ including restrictions; whereas the second leg of Article 6(1) encompasses the obligation for the state to 'organis[e] its legal system so as to ensure compliance with the requirements of Article 6(1)'.¹⁰ As will be seen, from that point on the considerations relevant to each limb of Article 6(1) follow different paths.

From the positive role assigned to the state in implementing Article 6(1) there ensue difficulties related to the allocation of competences, in other words the addressee of each obligation under the provision. It is preferable to break down the elements of that problem and pigeon-hole them to different sections, but for the sake of coherence the principles are set out now.

The first principle is stated above: the state as a whole is the primary addressee of Article 6 and entrusted 'in the first place [with] the task of securing the rights and liberties it enshrines'.¹¹ From the perspective of states, this is often encapsulated in the concept of 'procedural autonomy'. (Note, however, that throughout this thesis the term denotes the power of private parties to make procedural arrangements for their arbitration proceedings.) This means that each state must in the first place determine the appropriate remedies and procedural avenues. But in so doing each state is exercising discretion permitted by international law, and its obligations as to the achievement of the specified result remain subject to international law.

The second principle is that the acts of private tribunals, including those in exercise of their adjudicatory function, of private arbitral tribunals cannot by themselves engage the international responsibility of the territorial state, or the state whose procedural law has been applied. For they are not emanations of the state-administered justice,¹² and it is part of the definition of a private

⁵ See American Convention on Human Rights (San José, 22 November 1969), (1979) 1144 UNTS 144, Article 8(1).

⁶ See to the same effect African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), (1988) 1520 UNTS 217, Article 7(1). And see Universal Declaration of Human Rights (1948), Articles 8, 10.

⁷ See *Colozza v Italy*, A 89, para 30; *Lithgow v UK*, A 102, para 194; *Zand v Austria* Application 7360/76, (1978) 15 DR 70, 78.

⁸ See ILC Draft Articles on International Responsibility (1996), Article 21. See further Ago, [1977-II] 2 YBILC 4, 5-20.

⁹ See, eg, *Philis v Greece*, A 209, para 59.

¹⁰ *Guincho v Portugal*, A 81, para 38.

¹¹ *Handyside v UK*, A 24, para 48. Cf Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989, para 5; Case 45/76 *Comet BV* [1976] ECR 2043, para 12.

¹² Case 102/81 *Nordsee* [1982] ECR 1095, para 12; *KR v Switzerland* Application 10881/84, (1987) 51 DR 83.

tribunal that the state exercises no direct control over it. This unavoidably complicates the matter in two respects. First, is an arbitral tribunal within the jurisdiction of a state (in the sense of Article I) of the ECHR so that that the state would have to provide some guarantee that proper justice (in terms of Article 6(1)) be meted out by the tribunal? Even if the answer to that were negative, it would have no influence on the second issue. Namely, *if* a state is called upon to endorse (by way of enforcement or confirmation) a private act by means already in place in the municipal sphere, the responsibility of that state would be engaged to the extent that the originally private act would go against the substantive part of Article 6(1).¹³ Put differently, the substantive guarantees of fair trial can be cognizable within pre-existing procedural means of redress and material law concepts of municipal law; if they can be so cognizable, then they must be given effect to.

This follows from three fundamental considerations. First, Article 6(1) contains some material requirements which are sufficiently clear, unambiguous, and unconditional. Second, the way to implement them is already in place. These two elements make up a directly effective, or enforceable vis-à-vis the state, obligation.¹⁴ Having established the existence of a crystallized obligation, the third consideration is that that state would incur responsibility by its own act, that is, by not preventing the occurrence of an unlawful event (unfair trial)—whose private origin ceases at that point to be relevant.¹⁵

Recapitulating: Exercising original jurisdiction, and within their constitutional law limits, state courts would be bound, first, to interpret their municipal law so as to make it compatible with the directly enforceable substantive law requirements of the ECHR and, second, not to give effect to provisions violating the ECHR.¹⁶ This is strictly speaking irrelevant to our purposes, but it is the principle. Arbitral tribunals would be similarly, albeit on another foundation, bound to apply the ECHR as part of the law of the annulment forum (see section IV). Exercising review or enforcement jurisdiction, the courts are bound not to give effect to arbitral awards violating the duties incumbent upon such tribunals under the ECHR, within the same limits and on the same legal basis as in respect of original jurisdiction. The substantive law obligations incumbent upon arbitral tribunals and courts exercising review are discussed in section III. The duties of the state as a whole to regulate arbitration are discussed in section V. But the prior matter is the validity of arbitration agreements under the ECHR, to which one will now turn.

Warning is given that there is considerable doubt as to whether, in practice, any of the substantive or jurisdictional requirements in respect of voluntary arbitration analysed below will be given effect to by the Strasbourg Court. Quite apart from legitimate modifications of the ECHR requirements to take account of the particularities of arbitral practice, recent case-law of the European Commission of Human Rights (hereafter the 'Commission') suggests that each state is sovereign not only as to the means to control arbitral proceedings but also as to the extent of such control in substance. So the discussion here reflects what in the opinion of the author is the proper position, subject to the above proviso, whose premise is not accepted.¹⁷

¹³ cf below, note 178; ICC 2321/1974 (Preliminary), (1976) 1 YCA 133, 135..

¹⁴ See generally Buergenthal, (1992-IV) 235 RdC 303, Chs I-II. EU law, as first enunciated in Case 26/62 *Van Gend en Loos* [1963] ECR 1 and subsequently developed, is the most instructive on this point. See, eg, Dashwood, (1978) 16 JCMS 229.

¹⁵ See *M & Co v FR Germany* Application 13258/87, (1990) 64 DR 138. And cf *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, 3. The rule is codified in the ILC Draft Articles on International Responsibility (1996), Article 23.

¹⁶ See Human Rights Act 1998, ss 2-4.

¹⁷ For the coherence of this chapter, this is discussed below, in section V.C.

II. ARBITRATION AGREEMENTS AS WAIVERS OF THE RIGHT TO A COURT:
FORMAL REQUIREMENTS

It is trite law under the ECHR, but it must equally be good law under the other instruments, that what is guaranteed is only an effective *opportunity or possibility* to be heard by a court, not an absolute requirement that any and all cases shall be heard by a court.¹⁸ This entails, amongst other things, that the right is subject to waiver. As was affirmed by the Commission in an early decision, and confirmed thereafter, an arbitration clause ‘amounts legally to partial renunciation of those rights defined by Article 6(1)’.¹⁹ The Commission noted that nothing in Article 6 itself or any other provision of the ECHR seemed to disallow such renunciation, subject however to a requirement that the arbitration agreement had not been concluded under ‘constraint’.²⁰

The European Court of Human Rights (hereafter the ‘Court’) was only keeping in line with legal tradition and established dispute-resolution institutions in stating in a later judgment, which concerned the out-of-court settlement of a criminal case:²¹

The ‘right to a court’ ... is no more absolute in criminal than in civil matters In the Contracting States’ domestic legal systems a waiver [of the right to be heard by a court] is frequently encountered ... in civil matters, notably in the shape of arbitration clauses in contracts

It was emphasized that the right to a court was part of the backbone of a democratic society and the rule of law, or a European *ordre public*,²² which thus called for particular vigilance in admitting the validity of waiver in any particular case. The Court stressed that ‘absence of constraint is at all events one of the conditions to be satisfied’.²³ This is to be construed as a necessary but not sufficient condition; it is, however, a primordial consideration, in that, if consent has been vitiated by coercion the inquiry stops there.

This does not exclude that other conditions could be relevant, and again this is a matter largely to be determined by reference to the practice of contracting states. In the same case it was held that no particular requirement of form applied, but the case concerned a minor offence.²⁴ In view of the universality of the requirement of writing (be it constitutive or probative) for arbitration agreements,²⁵ it is safe to suggest that the same will be required as a minimum under the ECHR, pursuant to the rule of most effective protection of Article 60.²⁶ In the same vein, writing should satisfy the rule that ‘waiver ... requires minimum guarantees commensurate to its importance’.²⁷ These remarks introduce the more difficult question, namely whether a waiver of the first leg (access to court) carries with it the material requirements of Article 6(1) as well.

¹⁸ See *De Wilde, Ooms & Versyp v Belgium (Merits)*, A 12, para 86; *Golder v UK*, A 18, para 36; *Airey v Ireland*, A 32, para 26; *Ashingdane v UK*, A 93, para 55; *Bellet v France*, A 333-B, para 31.

¹⁹ See *X v FR Germany* Application 1197/61, (1962) 5 YB 88, 96.

²⁰ *ibid* 97.

²¹ See *Deweere v Belgium*, A 35, 2 EHRR 439, para 49.

²² For the first enunciation of that notion see *Austria v Italy* Application 788/60, (1961) 4 YB 116.

²³ *Deweere v Belgium*, A 35, 2 EHRR 439, para 49.

²⁴ It has also been held that consent can even be implied or tacit: *Le Compte, Van Leuven & De Meyere v Belgium*, A 43, para 59.

²⁵ See New York Convention, Article II(1)-(2).

²⁶ The same would ensue from the condition of compliance with domestic law. If even more stringent conditions (eg, notarized or *ex post* consent) apply, the ECHR cannot require less.

²⁷ *Pfeifer & Plankl v Austria*, A 227, 14 EHRR 692, para 37. Cf *T v Italy*, A 245-C, paras 27-28.

III. MATERIAL REQUIREMENTS UNDER ARTICLE 6(1)

Reading the ECHR against the fabric of national laws would suggest that it would be absurd to consider all attributes or aspects of fair trial as waived by the mere fact of an arbitration agreement.²⁸ For the most part the mandatory requirements concern criminal and disciplinary proceedings, in Article 6(2), so we are here concerned mostly with the due process requirements. In its first arbitration-related ruling, the Commission wrote that the original validity of consent might be affected if the arbitral proceedings were contrary to the ‘spirit’ of the ECHR and particularly Article 6(1).²⁹ The construct of an *ex post* invalidation of consent is patently confused, and utilized only because the Commission was unclear on whether the material requirements under Article 6(1) apply as such to, or even in, arbitral proceedings. For one should be concerned not only to control the validity of consent, but also the fairness of the proceedings themselves.

A. Arbitrability

A preliminary point is that, on the face of the text, all ‘civil’ cases can be submitted to arbitration under the ECHR. Given the broad interpretation the legislative term ‘civil rights and obligations’ has received in the jurisprudence,³⁰ there is no doubt that all ordinary commercial cases are arbitrable. In general, there does not seem to be anything in the letter or spirit of the ECHR to exclude any particular category of disputes from arbitration;³¹ if anything, the wider the scope of Article 6(1) in that respect, the more effective the control of international regularity. This does not of course mean that a state is obliged to render such issues arbitrable, but only that rendering them so does not violate Article 6(1). ‘Civil’ cases should involve the civil law remedies of competition³² and securities legislation and, likely, tax disputes too. Lastly, final monetary awards constitute possessions in the sense of Article 1 of Protocol I to the ECHR,³³ and by the same rationale other civil law rights accruing in virtue of arbitration awards must be protected by Article 6(1).³⁴

The arbitrability of tax disputes,³⁵ as a constitutional law matter, arose in the context of Greek investment legislation. The question was whether providing for arbitration in respect of all disputes between the state and the investor (and arising out of the investment legislation itself or the particular investment contract)³⁶ were consonant with the principle of the ‘natural judge’ in Article 8(1) of the Constitution. It was settled jurisprudence that the provisions themselves, and the

²⁸ cf *Albert & Le Compte v Belgium (Merits)*, A 58, 5 EHRR 533, para 35. See Flauss, [1986] Gaz Pal 407.

²⁹ See *X v FRG*, (1962) 5 YB at 97.

³⁰ According to *Ringeisen v Austria (Merits)*, A 13, 1 EHRR 455, para 94, it includes any proceedings ‘whose outcome should be decisive for private rights and obligations’.

³¹ There is, however, an *obiter* in *Axelsson et al v Sweden* Application 11960/86 (Decision of 13 July 1990), para 1, which would invalidate arbitration agreements ‘involv[ing] issues of public interest, which would [make] arbitration inappropriate or unreasonable’ (and cf *Håkansson & Sturesson v Sweden*, A 171, 13 EHRR 1, para 66, from where the formula is borrowed). It is difficult however to see any standards in the ECHR to determine such ‘inappropriateness’.

³² See, eg, Arbitration Act 1999 (Sweden), § 1.

³³ *Stran Greek Refineries et al v Greece*, A 301-B, 19 EHRR 293, paras 61-62.

³⁴ cf *Hornsby v Greece*, [1997-II] Reports 510, 24 EHRR 250, para 40 (right to court comprises execution of judgment).

³⁵ Meaning, disputes on whether tax is due; to be distinguished from disputes on who has to bear the tax burden: eg, ICC 6515-6516/1994, (1999) 24a YCA 80, sub [5]-[17]; cf ICC 6233/1992, (1995) 20 YCA 58.

³⁶ See Legislative Decree 2687/1953, Article 12 (an enactment hierarchically superior to ordinary Acts of Parliament by virtue of Article 107(1) of the Constitution); which was followed by Act 4171/1961, Article 4(4), and various other investment laws.

arbitration agreements under them, were valid,³⁷ but a judgment of the highest administrative court, the Council of State, reversed the position. It was held that tax cases belong to the exclusive jurisdiction of state courts pursuant to Article 94(1) of the Constitution.³⁸ A pertinent criticism was that the Constitution merely allocates competences as between state courts, but does not set forth a rule of exclusive jurisdiction that would entail the invalidity of submission to other fora,³⁹ and this was the consideration on which *Areios Pagos*, the highest court in civil and criminal matters, adopted the contrary position.⁴⁰ The question was brought before the Extraordinary Supreme Court, a mixed ad hoc body that settles conflicting judgments of the two highest courts. That court conclusively settled the matter, in favour of arbitrability, though with summary reasoning that leaves much to be desired.⁴¹

B. Procedural Impediments in Municipal Courts: Estoppel

It is common practice for arbitrators to request the parties to express their complete satisfaction with the procedure at the closing of the proceedings and before the process of deliberation.⁴² An appropriate mention of such statement, if given, is recorded in the award. This goes hand in hand with the practice of making transcripts of the proceedings, which can readily establish whether the party subsequently challenging the award on grounds of procedural impropriety had the opportunity to raise its objections before the arbitral tribunal. It is becoming a principle of arbitration law that failure to raise such objections at the arbitral phase is punishable by implied waiver (*forclusion*) of an action to annul on the basis of the same objection, which could have been raised but was not (collateral estoppel or issue preclusion).⁴³ The wisdom of the rule is obvious: it is grounded on the principles of procedural good faith and finality in adjudication, which should undoubtedly inform the arbitral, as well as the judicial, process.⁴⁴ However, in a subsequent chapter (and in the context of enforcement proceedings) the author expresses the reservation that the defence must be used with caution.⁴⁵ Assuming that an estoppel objection is well-founded as a matter of law and the evidence adduced, the court must verify at a minimum that (a) during the proceedings the claimant was, or could with due diligence have been, in full possession of the facts that would sustain his objection; (b) the claimant was given an opportunity to raise an objection on the precise point of which he complains before the court; and (c) that the arbitral tribunal, had it been seised of the objection, would be in a position to remedy it. Though some similarity

³⁷ See, eg, AP (Full Bench) 69/1990, (1991) 32 ΕΛΛΔ 512; Council of State (Full Bench) 3132/1989, (1989) 38 NoB 167. See extensively, Μπέη, ΚΕ, *Πολιτική Δικονομία*, τ 20: Διαιτησία (1994) 72-91.

³⁸ Council of State (Full Bench) 1793/1991, (1992) 40 NoB 779. The judgment concerned only arbitration under ordinary Acts of Parliament, not LD 2687/1953 (above, note 36).

³⁹ The references are in Beys, above, note 37, 83, note 4.

⁴⁰ AP 981/1992, (1993) 60 EEN 684.

⁴¹ See Extraordinary Supreme Court 24/1993, (1994) 2 Dike International 184, para 9; followed by Council of State 199/1995, (1995) 49 ΔΦΝ 1380.

⁴² cf UNCITRAL Rules, Article 29(1).

⁴³ See, eg, Model Law, Article 4; Arbitration Act 1996, s 73 (and *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14; *South British Insurance Co Ltd v Gauci Bros & Co* [1928] AC 352 (PC)); Arbitration Act 1999 (Sweden), § 34; CCP (Netherlands), Article 1065(4); CJ, Article 1704(4); TF, 119 II ATF 386; TF, 113 Ia ATF 67; TF, (1998) 16 Bull ASA 118; TF, (1996) 6 RSDIE 539; Paris, 1 July 1999, *Société Braspetro v GMRA* [1999] Rev Arb 835, 840, note Jarrosson; *Nanjing Cereals v Luckmate Commodities Trading Ltd* [1994] 3 HKC 552 (an enforcement case). See also below, Chapter 4.III.

⁴⁴ Compare TF, 111 Ia ATF 72 with CCP (Greece), Article 116.

⁴⁵ See below, Chapter 6.III.B.

with the notion of *res judicata* is obvious, the difference lies in this: if the objection had been raised and dismissed on the substance, the court can still examine the annulment ground which was the basis of the objection, now concerned with how the tribunal handled it. In other words, the estoppel rule aims to give the opportunity to the tribunal to remedy any procedural mishaps, thereby making arbitral proceedings as conclusive as possible. From the point of view of the arbitrating parties, it seeks to spur diligence and exclude bad faith,⁴⁶ not to allow improper awards. Estoppel thus works in a procedural way, imputing on the claimant the intention to accept the award as proper.⁴⁷

Despite the lack of precedent, estoppel defence must be accepted as legitimate under the ECHR.⁴⁸ It is debatable, however, whether that would cover even egregious violations of procedural fairness. On the one hand, the New York Convention, Article V(1)(b), requires express invocation of the ground of inability to present one's case, which means that it is a waivable ground.⁴⁹ On the other (and this transpires from Article 4 of the Model Law too), there is always a limit at which any given legal order stops considering a protective provision within the entire disposition of a private party. There is no reason to assume that this does not apply to, for example, a gross violation of the right to be heard.⁵⁰ The court should however be slow in ascertaining violations of procedural public policy *proprio motu*, or admitting it as a defence when it would otherwise be covered by waiver, for these are matters for private parties in the first instance to police.

Certainly, estoppel will be relevant when the parties make particular arrangements which arguably express procedural fairness as conceived by them. Take the example of an arbitration agreement or Terms of Reference that, derogating from the arbitration rules applicable, eliminate any discretion of the tribunal in the admission of evidence proposed by the parties. If a contrary practice prevails during the proceedings with no objection, then violation of the procedural agreement is not admissible as a defence. Further, estoppel in a procedural context⁵¹ is well established in general international law,⁵² including the jurisprudence of the European Court.⁵³ The similar mechanism whereby the annulment action for impartiality is inadmissible if no action for removal of the arbitrator has been brought pending the proceedings,⁵⁴ must also be legitimate under the ECHR.

⁴⁶ cf the landmark case of *Henderson v Henderson* (1843) 3 Hare 100, 114-6 (PC).

⁴⁷ And must be distinguished from acquiescence to an award as a whole; see Cass Civ 2me, 9 October 1985, [1987] Rev Arb 75.

⁴⁸ cf *D v Ireland* Application 11489/85, (1986) 51 DR 117 (failure to raise partiality objection in the course of the proceedings). But that case (as *Albert & Le Compte v Belgium (Merits)*, A 58, 5 EHRR 533, para 32) may have been decided on non-exhaustion of domestic remedies.

⁴⁹ cf Paris, 27 November 1987, [1989] Rev Arb 62, 65.

⁵⁰ Perhaps this is a way to reconcile the ruling of the UN Human Rights Committee in *Karttunen v Finland*, Communication 387/1989, UN Doc CCPR/C/46/D/387.1989 (1992) para 7.2, that impartiality is a ground always considered *ex officio*.

⁵¹ Often expressed by the maxims '*nemo audiatur turpitudinem suam allegans*', '*allegans contraria non audiat*', and '*non venire contra factum proprium*'.

⁵² *Prosecutor v Furundzija*, IT-95-17/1-A (Appeals Chamber, 21 July 2000), paras 173-4: objection on bias must be raised at the earliest opportunity, on pain of waiver.

⁵³ See, eg, *De Wilde, Ooms & Versyp v Belgium (Merits)*, A 12, 1 EHRR 373, paras 53-59; *Stran Greek Refineries et al v Greece*, A 301-B, 19 EHRR 293, paras 35-36.

⁵⁴ See TF, (1997) 15 ASA Bull 99; *Chambre des Affaires Arbitrales, Neuchâtel*, (1997) 7 RSDIE 633.

C. Procedural Guarantees: Due Process

From the point of view of each state, the inalienable rights under Article 6(1) have both an organizational and a substantive aspect. The former aspect is dealt with in section V; whereas here one looks at substantive content of the provision. And that content, concerning the quality of justice offered, is essentially procedural, that is, it relates to the conduct of the proceedings. The motivating idea behind these requirements must be that they are essential prerequisites of justice in an instrumental sense: a fair trial is presumed to lead to a just decision on the merits.

Characterizing the requirements as procedural is of course merely a convenient umbrella that does not do justice to the complexity of the issue. For the concept of fair hearing, including as it does the procedural equality of the parties, spills over into the domain of jurisdiction. It has thus been held that the joinder of parties which forces them to choose a single arbitrator violates their (procedural) equality.⁵⁵ Or, that admitting an amendment to the claim may violate the equality of the parties if the adversary does not have the opportunity fully to address the factual and legal basis of the new (part of the) claim.⁵⁶ And, finally, it has been argued that an arbitral tribunal may not of its own motion apply a law without requesting pleadings on the point.⁵⁷ This last point seems correct only as an exceptional corrective measure, that is, when one of the parties is defaulting in the proceedings⁵⁸ or when the arbitrators are predisposed to apply *lex mercatoria* rules, whose content is somewhat unpredictable.⁵⁹

Another preliminary observation is that the precise answer to the questions that may arise will depend on the approaches of the various municipal laws considered as a whole: the ECHR was not conceived, and does not operate, in a vacuum. It is to be expected that in arbitration cases the Court will be cautious to do its comparative law homework, gauging the outer limits of tolerance to arbitral tribunals by domestic laws in contracting states before venturing to endorse a particular interpretation of, say, the concept of 'fair hearing'.⁶⁰ This is not new at all in the system of the ECHR,⁶¹ and European human rights law in general.⁶²

It is noted at the outset that corruption of the tribunal is not discussed separately because a corrupt tribunal is bound not to be independent or impartial and (if the bribe is to achieve its purpose) not to treat the parties equally.

⁵⁵ See Cass Civ Ire, (1992) 119 JDI 707.

⁵⁶ See TF, (1995) 13 Bull ASA 711. See further Kessedjan, [1995] Rev Arb 381, 399-405. In public international law, a distinction has been drawn between *ultra petita* awards due to lack of jurisdiction resulting from the terms of submission, on the one hand, and excess of jurisdiction on the other (the latter being the case here discussed); see the literature cited by Secretariat of the ILC, *Commentary on the Draft Convention on Arbitral Procedure*, UN Doc A/CN.4/92 (1955) 109, note 22.

⁵⁷ See Perret in *Études Lalive* (1993) 595, 601-2. The question was left open by Cass Civ Ire, 28 February 1995, [1995] Rev Arb 597; and *The Ministry of Defense and Support for the Armed forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc*, 29 FSupp 2d 1168 (SD Cal 1998).

⁵⁸ cf ICJ Pleadings, *Aegean Sea Continental Shelf*, at 319-20.

⁵⁹ See Bureau, [1995] Rev Arb 57.

⁶⁰ cf *Gillow v UK (Merits)*, A 109, 11 EHRR 335, para 69 (lodging of appeal only by qualified advocate, as a limitation to Article 6(1), a common requirement in contracting states).

⁶¹ cf, eg, *Handyside v UK*, A 24, para 48.

⁶² Indeed, the whole construct of human rights as part of the general principles of European Community law is based on a comparative exercise: Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, 1134; Case 4/73 *Nold v Commission* [1974] ECR 491, 507; and now EU Treaty, Article 6(2).

1. Reasonable Time and Public Hearing

That the right to a public hearing falls away follows directly from the nature of arbitration proceedings,⁶³ provided however that municipal law allows such confidentiality and that the parties have freely and unequivocally consented.⁶⁴ Consent by agreeing on a set of arbitration rules that provide for confidential proceedings will satisfy the latter test.

By contrast, there is considerable doubt whether the requirement of 'reasonable time' applies at all. The requirement aims to eliminate excessive delay⁶⁵ and is interpreted flexibly according to the circumstances.⁶⁶ Similar considerations underlie the Model Law, aiming to remedy 'undue delay',⁶⁷ although other laws leave the issue entirely to the arbitrators.⁶⁸ The author shares the view that there is no reason in principle why a requirement of reasonable time should not apply.⁶⁹ On this point, English law adopts a very reasonable solution, namely that the tribunal is obliged to avoid 'unnecessary delay', a matter which is left in the first instance to its discretion but remains reviewable as a ground of serious irregularity of the final award and only if the party challenging the award has put the matter to the tribunal first.⁷⁰

*2. Independence and Impartiality*⁷¹

'Independence' and 'impartiality' are flexible, if not nebulous, normative concepts purporting to give discretion to the judge (*unbestimmte Begriffe*). They are, however, indispensable safeguards of the proper discharge of the judicial function in all developed legal systems,⁷² to the point that they have with authority been characterized general principles of international law.⁷³ The problem in ascertaining a common denominator and imposing a standard therefore becomes how low to set the limbo stick. In that respect, the few Commission rulings show that ECHR requirements will apply only in a modified form. For instance, independence has been interpreted in somewhat relative terms, to entail not absolute detachment from the parties but rather the opportunity for each

⁶³ See *Nordström-Janzon*, below, note 181.

⁶⁴ See *Albert & Le Compte v Belgium (Merits)*, A 58, 5 EHRR 533, para 34.

⁶⁵ *Stögmüller v Austria*, A 9, 1 EHRR 155, para 5.

⁶⁶ See *X v Belgium* Application 1103/61, (1962) 8 Coll 112; cf *Neumeister v Austria (Merits)*, A 8, 1 EHRR 91, para 21; and see further Stavros, *The Guarantees* (1993) 89-90, 92-105.

⁶⁷ See Model Law, Article 14(1).

⁶⁸ See CCP (Netherlands), Article 1048; Cass Civ Ire, 30 June 1976, (1977) 104 JDI 114; Cass Civ Ire, 15 June 1994, [1995] Rev Arb 88.

⁶⁹ See Moitry, (1989) 6:2 J Int Arb 115, 120-1.

⁷⁰ See Arbitration Act 1996, ss 33(1)(b), 50, 73(1)(c), 68(2)(a). See also DAC Report, para 155.

⁷¹ See further Clay, *L'Arbitre* (Thesis Paris I, 2000).

⁷² For a comparative overview see Weissbrodt & Wolfrum, *The Right to a Fair Trial* (1997). See also Basic Principles on the Independence of the Judiciary (1985) ch I.D.2. For a requirement of independence (from the executive and legislative branches) as a constituent part of the notion of 'court or tribunal' for the purposes of admissibility of a preliminary ruling see Case 14/86 *Pretore di Salò* [1987] ECR 2545, para 7; Case 338/85 *Pardini* [1988] ECR 2041, para 9; Case C-24/92 *Corbiau* [1993] ECR I-1278; Cases C-74, 128/95, *Procura della Repubblica v X* [1996] ECR I-6609.

⁷³ See Report on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc E/CN.4/1995/39 (1995), paras 34-46; Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc E/CN.4/Sub.2/1985/18 and Add. 1-6, paras 75-104. For the position in public international law arbitration see, eg, Lan, *La Procédure dans l'Arbitrage Interétatique* (Thesis Geneva, 1998) 32-3 with references to primary materials. Note, however, that the ILC Model Rules on Arbitral Procedure are framed in more general terms; see Articles 35(b), 6(I).

party to make an appointment that will result in a 'balanced' tribunal.⁷⁴ This would accommodate the so-called 'non-neutral arbitrators' or '*arbitres-parties*',⁷⁵ a practice which is, however, both from a legal and a logical perspective dubious.⁷⁶ A variation of that system is to be found in certain umpire proceedings where, upon the appointment of the umpire, the arbitrators assume the role of advocates of the parties.⁷⁷ That last practice seems more acceptable, in that the deciding arbitrator is the umpire, and not the arbitrators-advocates; though the point can be made that those arbitrators could not have been impartial to begin with.

Further, the case-law would seem to allow the more respectable practice, under English law, where one party appoints his arbitrator as sole arbitrator against the other party's recalcitrance,⁷⁸ or where the court confirms such appointment.⁷⁹ Courts in third states have consistently given effect to English awards made by sole arbitrators appointed unilaterally, on the consideration that the English court always retained the power to revoke the appointment.⁸⁰ A further consideration, relevant under the ECHR, would be that the recalcitrant party had the opportunity to appoint an arbitrator and failed to exercise it. It has furthermore been implied that, by contrast with ordinary principles,⁸¹ mere appearances of bias will not vitiate the proceedings; a stricter (or more lax, depending on one's perspective) standard of actual bias will be sufficient, at least as a ground of annulment.⁸²

Even a superficial comparison of arbitral practice, as evidenced in the various arbitration rules⁸³ and municipal laws,⁸⁴ shows that the ECHR standards are well satisfied. The first observation is that name-calling is not helpful. 'Impartiality', 'independence', 'objectivity', or 'neutrality' in practice merge, because their purpose is identical. Impartiality is only a state of mind, and therefore ascertainable only by reference to concrete circumstances; the requirement of independence

⁷⁴ See *Bramelid & Malström* (below, note 165), (1984) 38 DR 18, para 38. See also *Irvani v Irvani* The Times, 10 February 2000 (CA), where the arbitrator was the sister of the two parties.

⁷⁵ Described as 'arbitrators [who] may be predisposed towards the [appointing party] but in all other aspects ... obligated to act in good faith and with integrity and fairness': AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1977), (1985) 10 YCA 132, Canon VII(A)(1). The Code applies in domestic proceedings only, and seems to be superseded by the AAA International Rules, Articles 7, 8(1).

⁷⁶ Contrast, eg, Paulsson in *International Commercial Arbitration* (1997) at 943-4; and Challenge Decision of 11 January 1995, (1997) 22 YCA 227 (UNCITRAL, 1995) (against); with Rau, (1999) 14 Arb Int 115; Coulson, (1987) 3 Arb Int 103 (for). For a qualified acceptance of non-neutral arbitrators in ICC proceedings see Bernini in *The Arbitral Process* (ICC Publication No 472, 1991) 31, 37; Eisemann in *Liber Amicorum Domke* (1967) 78; and a for a more relaxed standard in respect of party-appointed arbitrators see the Swiss cases cited above, note 54.

⁷⁷ See, eg, *Citland Ltd v Kachan Oil Industries Pvt Ltd* [1980] 2 Lloyd's Rep 274, 277. The practice was held not to violate party equality (New York Convention, Article V(1)(b)) by CA Thessaloniki 871/1998, (1999) 5 ΔΕΕ 735, 737-8, but contrariety to public policy was not tested.

⁷⁸ See Arbitration Act 1996, s 17 (which improves upon the Arbitration Act 1950 (England), s 7(b)).

⁷⁹ See Arbitration Act 1996, s 18(3)(b) (and Arbitration Act 1950, s 10(3)(b)).

⁸⁰ See, eg, CA Venice, 21 May 1976, (1976) 12 Riv DIPP 851; CA Genova, 2 May 1980, (1983) 8 YCA 381, sub [6].

⁸¹ See, eg, *Delcourt v Belgium*, A 11, 1 EHRR 355, para 31; *Piersack v Belgium (Merits)*, A 53, 5 EHRR 169, paras 30-31; *Campbell & Fell v UK*, A 80, 7 EHRR 165, para 78.

⁸² See *Nordström-Janzon*, below, note 181 (although the case was decided on a wider ground).

⁸³ See, eg, ICC Rules, Articles 7(1), 11(1); UNCITRAL Rules, Article 10(1); WIPO Rules, Articles 22(a), 24(b); LCIA Rules, Articles 5.2, 10.3; AAA International Rules, Articles 7, 8(1); IBA Rules of Ethics for International Arbitrators (1987), (1987) 12 YCA 199. And further the literature cited by Carter in *Le Statut de l'Arbitre* (ICC Publication No 564, 1995) 24, note 3.

⁸⁴ See further Gaillard & Savage, *Fouchard Gaillard Goldman* (1999) 560-575; and Challenge Decision of 11 January 1995, (1997) 22 YCA 227, sub [14]-[31] (UNCITRAL, 1995).

aims precisely at eliminating all links and dependencies preceding the appointment of the arbitrator which might causally lead to impartiality.⁸⁵ Thus seen, independence is a preventive notion, ascertainable prior to the proceedings, and more easily so than impartiality.⁸⁶ But the two notions are not coterminous, because a non-independent arbitrator may still be impartial, and vice versa.

One must distinguish between lack of independence and impartiality as a ground for removal on the one hand and as a ground of annulment on the other. Because of the nature of things, appearances of bias, or 'justifiable doubts', will suffice for an action to remove.⁸⁷ By contrast, at the stage of control of a final award one should demonstrate more concrete evidence, affecting the conduct of the proceedings,⁸⁸ often amounting to a violation of public policy.⁸⁹ The same standard would of course be required for enforcement, under Article V(2)(b) of the New York Convention.⁹⁰ Though the ECHR would require that each municipal law prescribe that arbitrators be impartial (and/or independent) as a mandatory rule,⁹¹ which is in fact the case, there is no evidence that such a differentiated standard would violate the Convention.

Moving on to the standard requisite for removal, this is the area where nomenclature breaks down and the examination of concrete cases becomes essential. An exhaustive discussion is outside the ambit of this thesis, but it is interesting to note the great extent of convergence between various municipal legal orders. Indeed, the International Criminal Tribunal for the Former Yugoslavia very recently concluded, after a comparative overview of municipal laws, that 'there is a general rule [ie, a generally accepted rule of law] that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias'.⁹²

English law focuses on impartiality, but this stretches so far as to subsume independence. The Report on the Arbitration Bill (now Arbitration Act 1996) states that 'lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance'.⁹³ This is in line with the common law as pertains to court proceedings, and should be read in that light. A distinction is made between (a) automatic disqualification, triggered by the judge's

⁸⁵ See *Bramelid & Malström* (below, note 165), (1984) 38 DR 18, para 33.

⁸⁶ Hence Article 7(1) of the ICC Rules speaks only of independence, but challenge on the basis of Article 11(1) is allowed for 'lack of independence or otherwise'; see Bond in *The New 1998 ICC Rules* (ICC Publication No 586, 1997) 22, 24. Similarly, the Tribunal fédéral takes the view that economic dependence gives rise to impermissible partiality; see TF, (1997) 15 ASA Bull 99.

⁸⁷ See Model Law, Article 12(2); Arbitration Act 1996, s 24(1)(a); LDIP, Article 180(1)(c). The formula of 'justifiable doubt' seems to originate in the UNIDROIT Draft Uniform Arbitration Law (1954), Article 12, second indent. The final provision cross-refers to the grounds of disqualification for judges; see European Convention providing a Uniform Law on Arbitration (Strasbourg, 20 January 1996), ETS No 56, Article 12. This may be because the Uniform Law applies to domestic arbitration too, but its approach is not current in modern practice.

⁸⁸ See Arbitration Act 1996, s 33(1)(a).

⁸⁹ See Model Law, Article 34(2)(b)(ii); NCPC, Article 1480(6); LDIP, Article 190(2)(e). For Dutch law see below, note 179. For due process as a public policy requirement encompassing impartiality see *Generica Ltd v Pharmaceutical Basics, Inc*, 125 F3d 1123, 1129-30 (7th Cir 1997); *Corporacion Transnacional de Inversiones v Stet International, SpA* (1999), 91 ACWS 3d 520 (Ontario); and cf *Adams v Cape Industries plc* [1990] Ch 433, 494-502; *affirmed*, [1990] Ch 505, 566-7 (CA) (referring to natural justice).

⁹⁰ See, eg, BGH, (1987) 12 YCA 489, sub [4]-[5]; *Fertilizer Corp of India v IDI Management, Inc*, 517 FSupp 948 (SD Ohio 1981); *Bezirksgericht Affoltern*, (1997) 93 SJZ 223; *affirmed*, Obergericht Zurich, (1997) 15 Bull ASA 273. For an overview of the practice under the New York Convention see Schwebel & Lahne in *Comparative Arbitration Practice* (1986) 204, 209-16.

⁹¹ See *Bramelid & Malström* (below, note 165), (1984) 38 DR 18, para 36.

⁹² *Prosecutor v Furundzija*, IT-95-17/1-A (Appeals Chamber, 21 July 2000), para 189.

⁹³ See DAC Report, para 101.

being identified with a party, or so closely connected with it to make the judge a judge in his own cause;⁹⁴ (b) discretionary disqualification, when there is ‘apparent’, ‘unconscious’, or ‘imputed’ bias, that is, a ‘real danger that the judge was biased’.⁹⁵ The latter category includes ‘antecedent bias’,⁹⁶ in other words ties with a party that would in other systems of law qualify as lack of independence. For, as in the independence test, one looks at the circumstances of the case and objectively evaluates whether they qualify under the famous dictum that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done.’⁹⁷

On the other hand, French case-law has reached the same results applying a test of independence. It is becoming a standard formula that:⁹⁸

[T]he independence of the arbitrator is essential to his jurisdictional function, because from the moment of his designation he obtains the status of a judge, which by nature excludes any link of dependency from the parties; on the other hand, the circumstances [that need to be pleaded] to challenge such independence must be coloured by the existence of physical or intellectual ties with one of the parties ..., a situation of such a nature as would affect the judgment of that arbitrator by constituting a definite risk of predisposition towards one party

Even more interestingly, courts in Paris and London have been at one in holding that the independence of a barrister acting as a member of a tribunal is not automatically jeopardized by his belonging to the same chambers as counsel for a party.⁹⁹ The judgments are authorities for the proposition that, because barristers are required by law to be independent professionals, further evidence is required to demonstrate lack of independence or unconscious bias in such cases.

Contrast that with US law, where the relevant test under the Federal Arbitration Act, 9 USC § 10(b) on vacatur, is ‘evident partiality’.¹⁰⁰ Despite the meaning the words seem to be conveying, this has been interpreted by the Supreme Court as creating a duty to disclose, whose violation will, it seems, in itself suffice for a proof of evident partiality. The premise, as articulated by the court, is that ‘any tribunal permitted by law to try cases [must] not only be unbiased but also ... avoid even the appearance of bias’.¹⁰¹ Subsequent judgments have withered on the question whether imputed bias (in an English law sense) or lack of independence (in a French law sense) suffices for vacatur. Some cases suggest that it would not, requiring ‘direct and definite’ bias,¹⁰² whereas others seem to go the other way. The way to reconcile them would seem to rest on a variable standard, depending on whether the arbitrator has satisfied the disclosure obligation imposed by the relevant arbitration rules.¹⁰³ If he has, actual bias (in the sense of a non-trivial and direct

⁹⁴ See, as the latest authority, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 2 WLR 272, 281-2 (HL).

⁹⁵ See *R v Gough* [1993] AC 646 (HL); *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870.

⁹⁶ See Mustill & Boyd, *The Law and Practice* (2nd edn, 1989) 250-3.

⁹⁷ *R v Sussex Justices, ex p McCarthy* [1924] KB 256, 259, per Lord Hewart CJ.

⁹⁸ Paris, 2 June 1989, [1991] Rev Arb 87, 91.

⁹⁹ See *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113 (criticized as too formalistic by O’Sullivan, (2000) 16 Professional Negligence 88, 98-9); Paris, 28 June 1991, [1992] Rev Arb 568. However, this may not be the case in Swiss law; see Jolidon, *Commentaire du Concordat* (1984), as translated in Reisman *et al*, above, note 76, at 587. And cf *Locabail*, above, note 95.

¹⁰⁰ For a critical presentation of US federal law see Rau, above, note 76.

¹⁰¹ *Commonwealth Corp v Casualty Co*, 393 US 145, 149 (1968).

¹⁰² See *Lifecare International, Inc v CD Medical, Inc*, 68 F3d 435 (11th Cir 1995).

¹⁰³ But see *Merits Insurance Co v Leatherby Insurance Co*, 714 F2d 673, 681 (7th Cir 1983).

connection with a bearing on the proceedings) will be required; if not, his negligence or intention is presumed to amount to bias—in other words, to amount to a breach of a duty requiring a standard of behaviour higher than the legal requirement.¹⁰⁴ A very recent judgment suggests that English law too might require more than the statutory standard if the parties' agreement required total independence; but in that case the question was moot because the superior requirement, if any there be, had conclusively been policed by the ICC International Court of Arbitration.¹⁰⁵ Higher standards could be enforceable in Swiss law¹⁰⁶ and perhaps under the Model Law.¹⁰⁷

A perusal thus shows that there is at least a common core conception of independence and impartiality in all developed legal systems, despite some differences on the fringes, which tend to be on the side of higher standards of behaviour, not lower. This should enable the European Court to make rulings on the substance; which would as a side-effect result in further unification of national laws. This would be useful for arbitral institutions having to decide on a challenge, since they will be in some cases uncertain as to the law of the annulment forum, for example when the seat has not been determined or when that law is in a state of flux.¹⁰⁸ Finally, there seems to be a principle of arbitration law that the avenue of action for removal should be open to the parties.

3. Equality of the Parties

This is the second imperative principle of procedure, encountered in all municipal laws and arbitration rules.¹⁰⁹ It informs all stages of the arbitral process, from the constitution of the arbitral tribunal to the hearings and the conclusion of the case. Analyzing the requirements of the principle in all possible factual situations would be a task for a separate thesis. Suffice it therefore to remark that equality commands that (a) each party must be given an effective opportunity to be heard on all aspects of the arbitral process, all arguments of its opponent, and all the crucial points of the reasoning that the tribunal intends to adopt (*principe de contradiction* and *audi alteram partem*);¹¹⁰ and (b) no party should be afforded a privileged position in respect of the other party in any respect whatever.¹¹¹ Applied to the evidentiary aspect of the proceedings, the principle of equality requires that each party be given an opportunity to participate in, and to express its views on, the procurement and presentation of the evidence.¹¹² It also implies that if a party is precluded from exercising those rights, be it by a mandatory rule of law, the tainted piece of evidence must be discarded.¹¹³

¹⁰⁴ See *Olson v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 51 F3d 157, 159-60 (8th Cir 1995); *Schmitz v Zilvetti*, 20 F3d 1043, 1045-9 (9th Cir 1994).

¹⁰⁵ See *AT&T Corporation v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 (CA) (a case on ss 1 and 23 of the Arbitration Act 1950). Thus, a decision of the ICC Court will be *res judicata* only to the extent that it concerns a higher standard of independence; cf TF, 110 Ia ATF 59, 61; TF, (1994) 4 RSDIE 117, 121.

¹⁰⁶ See LDIP, Article 180(1)(b).

¹⁰⁷ See Model Law, Article 34(2)(a)(iv).

¹⁰⁸ For the law to which the ICC International Court has regard see Bond, (1988) 4 Arb Int 300, 307; Craig *et al*, *International Chamber of Commerce Arbitration* (2nd edn, 1990) § 13.05.

¹⁰⁹ See above, Chapter 2.II.B. A detailed discussion in Kessedjian, above, note 56.

¹¹⁰ TF, (1998) 8 RSDIE 553, 560-1.

¹¹¹ But see CA Piraeus 1199/1995, (1995) 1 ΔEE 1091, erroneously confining equality to the right to be heard.

¹¹² See ICC 6057/1990 (Order), (1993) 120 JDI 1068; ICC 5715/1989 (Order), (1996) 123 JDI 1049.

¹¹³ See *McIntire v FAO* (ILOAT No 13); cf *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998) paras 93-97.

IV. ARE ARBITRAL TRIBUNALS BOUND TO APPLY THE ECHR?

Does the construct of inalienable rights entail that Article 6(1) contains a directly enforceable, even as between private parties, provision of international law? This is infested by complex theoretical issues, namely whether private tribunals are bound by international instruments, whether they be in force for the territorial state or not, (in principle they are not) and the applicability of the same as between private parties (the so-called ‘*Drittwirkung*’ of human rights instruments¹¹⁴). For present purposes, the approach may be more practical.

To start, the possibility for an arbitrator to apply the ECHR cannot be disputed. Moreover, if one is right in suggesting that the state of the seat has a duty to provide for an action in annulment of arbitral awards, then arguing that the ECHR does not directly bind arbitral tribunals is somewhat fallacious, and certainly not expeditious. For the annulment or enforcement forum¹¹⁵ will, within constitutional law limits, be bound to interpret the provisions of its domestic law ensuring the respect of procedural public policy (impartiality of the tribunal and equality of the parties) in the light of the ECHR.¹¹⁶ To put this in more technical, and familiar, terms, it is the philosophy of the ECHR itself (and a basic tenet of international responsibility law in general) that the domestic authorities must be entitled to remedy the act giving rise to responsibility. It is only a small step to take this further to say that avoidance of the egregious act should be possible at the earliest possible stage, hence by the arbitral tribunal too.

A useful analogy may be drawn with the application of EC competition law by arbitral tribunals, often sitting in non-EC states, and even where the *lex contractus* is that of a non-EC state.¹¹⁷ It is correct on principle and authority that the tribunal must apply that law, if preemptory, when it has direct effect¹¹⁸ and is part of the public policy of the annulment forum.¹¹⁹ Yet another construction to the same effect would be to admit, as one should, that certain of the ECHR requirements are expressive of international arbitration public policy, for which proposition evidence has been given in the previous section. If that is so, then the rule should apply that: ‘In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.’¹²⁰

¹¹⁴ See further Clapham, *Human Rights in the Private Sphere* (1993) Pt II.

¹¹⁵ For an unusual case where an action to set aside was coupled with a free-standing complaint to a Human Rights Commission see *Noble China Inc v Lei Kat Cheong* [1998] Ont CJ LEXIS 2030.

¹¹⁶ For the proposition that the ECHR is part of the public policy of the (enforcement) forum see Case 7/98 *Krombach v Bamberski* [2000] ECR I-____, paras 39-40; Cass Civ Ire, 31 January 1990, [1991] JCP II 21635. Generally see Mayer, (1991) 80 RCDIP 651; Παμπούκη, (1996) 37 ΕλλΔ 994.

¹¹⁷ See, eg, ICC 7181/1992, (1995) 6:1 ICC Bull 55; ICC 7673/1993 (Partial), (1995) 6:1 ICC Bull 57; cf ICC 7081/1992 (Partial), (1994) 5:2 ICC Bull 51, 53-4; and Derains in *Arbitration and European Law* (1997) 65. The considerable literature on the point is given in Gaillard & Savage, above, note 84, 342, note 447.

¹¹⁸ On that requirement there may be room for disagreement. The Tribunal fédéral has ruled that the competition provisions of the Free Trade Agreement between the EEC and Switzerland (equivalent to Articles 81 and 82 of the EC Treaty) are without direct effect: TF, [1978] 3 CMLR 480, para [10]. Later judgments of the European Court of Justice make this highly disputable; details in Braakman, *The Application of Articles 85 & 86* (European Commission publication, 1997) 23.

¹¹⁹ See BGH, [1969] CMLR 123, 135; TF, 118 II ATF 193, 198 (in both cases: non-application, even *ex officio*, of competition rules violates public policy). See also European Parliament Resolution on Encouraging Recourse to Arbitration to settle Legal Disputes, [1994] OJ C205/519. See further Liebscher, (2000) 17:3 J Int Arb 73.

¹²⁰ IDI Resolution on Arbitration between States, State Enterprises, or State Entities, and Foreign Enterprises, (1990) 63ii Ann IDI 325, Article 2, which on this point expresses a wider principle. Cf Lalive in *Comparative Arbitration Practice* (1986) 257, 270-3.

One hastens to digress to explain the sources and limits of truly international public policy. Chapter 2 has argued that that public policy consists of the core notions of morality and legality underpinning the legal systems of the community of nations. It is in other words, a public policy purified of national particularities but essential to the world community as a whole. The ECHR, as well as the other international instruments quoted in section I above, unequivocally reflect the conception of due process essential to the community of nations. On the other hand, the arbitrator is not the organ of any particular legal order. He does not have to defend truly international public policy any more than he has to defend the international public policy of a given state. His duty is to effectuate the will of the parties. It is *presumed* that the parties intended to have an enforceable award. But this is a presumption, and if the parties decide that they want an award from a biased tribunal, or an award resulting from a process which did not ensure the equality of the parties, the arbitrator must oblige.¹²¹ If he objects to his instructions, the only proper course of action is to resign. In other words, the binding force of international public policy does not differ in nature from municipal public policy. The differences are that (a) municipal law should confine its requirements to truly international public policy concerns in matters of procedure (a proposition explored in Chapter 2.III); and (b) truly international public policy imposes itself with even more rigour than the international public policy of a given state, as a presumptive standard of compliance with the public policy of any given enforcement forum. Thus, in one of the first awards where resort was had to the notion, sole arbitrator Lagergren (erroneously) declined jurisdiction because all connected laws (the law of the seat and the law of the contract, which was also the place of performance) considered the contract as offending their public policy; he only fortified his conclusion by reference to the law of 'any civilised country'.¹²²

The construct here proposed is conceptually more satisfactory and consistent than the view that, in certain situations (which remain unnamed), the arbitrator must take account of the international public policy of the enforcement forum.¹²³ Although it is understandably difficult to go further than such general propositions in matters of, say, arbitrability, the task is rather more straightforward in procedure. First, international public policy in its procedural guise should only contain impartiality and equality, both in the enforcement and the controlling forum. Secondly, if the controlling forum's law is laxer than what would be required by Article 6 of the ECHR, the arbitrator will, by direct application of that provision, require higher standards; that should not jeopardize the validity of the award. Thirdly, such supplementation of the law applicable will be presumed to be in compliance with the law of any enforcement forum. Fourthly, the only situation where truly international public policy could be defeated would be when the controlling forum imposes on pain of annulment a rule directly offending against such public policy (eg, by consecrating irrebuttable presumptions in the law of evidence). That will be in practice very rare indeed.

The only reported award for the proposition here advanced concerned the question whether a supervening municipal statute could take away the tribunal's jurisdiction by submitting a certain class of disputes to the ordinary courts.¹²⁴ There are parts of the reasoning which cannot be trans-

¹²¹ The contrary is proposed by Racine, *L'Arbitrage Commercial International et l'Ordre Public* (1999) 429-31. He suggests that the binding force derives from the proposition that the arbitrator has no forum as such: *ibid* 363-7. Nothing, however, follows from the absence of forum.

¹²² ICC 1110/1963, (1994) 9 Arb Int 282, note Wetter *ibid* 277, (1996) 21 YCA 47.

¹²³ See Derains, (1979) 106 JDI 988, 992-3; Blessing, (1992) 3:2 ICC Bull 18, at 22, 26.

¹²⁴ See Award 10/1989, (1992) 1 Διαιτ 58 (ad hoc, 1989). The *Stran* case, A 301-B, 19 EHRR 293, arose out of similar circumstances, but the complaint in Strasbourg related to a taking of the rights created by an award, not an arbitration agreement.

posed to the international plane of voluntary arbitration, because the foundation of the arbitration agreement with the state was in Greek investment legislation and the tribunal, sitting in Greece, reasoned exclusively on the basis of Greek law. On the merits, it was held that arbitration is a functional equivalent of state justice and thus the 'institutional guarantees' related to the natural judge apply. One need not adopt the reasoning, implicit in the award, that a tribunal is a substitute of the courts of a particular state¹²⁵ to admit its authority for the proposition that human rights guarantees are part of the procedural law objectively applicable.

More direct support may be drawn from the consistent case-law of the Swiss *Tribunal fédéral*. That court was right, if it may be so said, to hold that Article 6 applies to awards of private tribunals 'whose awards are equivalent to those of state courts with respect to their binding force (*Rechtskraft*) and enforceability and must therefore offer the same guarantees of an independent legal pronouncement'.¹²⁶ Support may also be drawn from a judgment of the Paris Court of Appeal which found the arbitrators under a duty to ensure compliance with the 'fundamental and general principles' of fair trial including, 'en tant que besoin', those under the ECHR and the United Nations Covenant.¹²⁷

The judgment concerned a related issue, whether the same duties would apply to the institutions administering arbitral proceedings, such as the ICC International Court of Arbitration. It must be admitted that the ICC Court exercises some quasi-judicial, or at least jurisdictional, functions relating to the appointment etc of arbitrators that may have a bearing on the impartiality of the tribunal.¹²⁸ (One is not concerned with the composition of the ICC Court itself¹²⁹ but the influence it has on arbitral tribunals.) As a matter of practical and effective implementation of the law, the Paris court was right in subjecting the arbitrators to court scrutiny and holding the institution immune.¹³⁰ Even if, *arguendo*, the arbitral institution has improperly exercised its functions, this should not dispense the arbitrators from their duty of proper adjudication. Further, the confidential character of the proceedings of the ICC Court¹³¹ precludes any meaningful control over its functions. Adding a potential respondent to the list would thus be impractical, and inadvisable from the point of view of arbitral practice. Piercing the confidentiality of the proceedings of the ICC Court would amount to removing an essential component of ICC arbitration and, further, would be possible only if that Court could be amenable to the jurisdiction of the court making the relevant inquiry and orders. The Arbitration Act 1996 seems to draw a fair balance by obliging the parties to exhaust any internal (ie, before the arbitral institution) means of recourse to remove an arbitrator, but holding the institution itself immune from proceedings.¹³²

¹²⁵ On whether an arbitrator is a substitute or, on the contrary, a manifestation of the 'natural judge' in constitutional law terms see Pavlopoulos, (1992) 4 REDP 61.

¹²⁶ See TF, 117 Ia ATF 166, 168; criticized on the merits ia by Schwebel, (1995) 6:2 ICC Bull 19, 27-9. See also TF, (1997) 15 ASA Bull 99.

¹²⁷ See Paris, 18 November 1987, [1988] Rev Arb 657; *affirming on this point* TGI Paris, [1987] Rev Arb 371.

¹²⁸ See generally, eg, Grigera Naón in *Arbitration in the Next Decade* (ICC Bull Special Supplement 1999) 55.

¹²⁹ See Statutes of the ICC International Court of Arbitration, Article 2.

¹³⁰ Paris, 18 September 1998, (1999) 126 JDI 162; and generally Fouchard, [1987] Rev Arb 225; Aguilar-Alvarez in *The Arbitral Process*, above, note 76, 63.

¹³¹ See ICC Rules, Article 7(4); Internal ICC Rules, Article 1; Statutes of the ICC International Court of Arbitration, Article 6.

¹³² See Arbitration Act 1996, ss 24(2) and 74. Swedish law goes even further to allow the parties to agree that the decision of the institution will be conclusive: Arbitration Act 1999 (Sweden), § 11.

Two arguments may be made against the construction here advanced.¹³³ The technical argument that, strictly speaking, there is no recourse from an arbitral award to Strasbourg is indisputable;¹³⁴ but this does not detract from the soundness of the propositions adduced above because, it is submitted, international responsibility rules do not dispose of the question. Similarly, the argument that a private tribunal cannot be included in the notion of a 'tribunal established by law' in Article 6(1)¹³⁵ may be semantically and legally correct,¹³⁶ but this does not advance the debate much.

Naturally, there exist domestic law provisions on enforcement and annulment that are meant to pursue the same objective, and be to the same substantive effect, as Article 6(1) of the ECHR; their application will therefore obviate the need to have recourse to the hierarchically superior norm of the ECHR. Nonetheless, the ECHR would be directly relevant where national law would allow, or mandate, the application of a procedural rule that the arbitrators and/or the parties deem to be laxer than the ECHR standard. An example that springs to mind is provided by the Greek International Arbitration Act. Although the Act was based on the Model Law, Article 34(2)(a)(iv) follows the wording of Article V(1)(d) of the New York Convention: the phrase 'unless [the agreement of the parties] was in conflict with a provision of this law from which the parties cannot derogate' was omitted. There is no apparent reason for that, except perhaps to ensure that a violation of the due process standards in Article 19 of the Act will be sanctioned only if the result amounts to a public policy violation (Article 34(2)(b)(ii)).¹³⁷ The ECHR may serve to buttress and concretize the reasoning of a tribunal in that respect.

The concluding submission therefore is that it is logically preferable to consider arbitrators entitled, and even better bound, directly to apply the ECHR. The practical usefulness of that will be limited insofar as the municipal law of the annulment forum will incorporate the substance of Article 6(1), but the relevance of that provision remains residual and its application is triggered if mandatory rules applicable to the arbitration proceedings are found to be contrary to the ECHR.

V. AN INTERNATIONAL OBLIGATION TO CONTROL ARBITRAL PROCEEDINGS?

Even if Article 6 is part of the procedural law applicable by arbitrators, this does not conclude the examination. Arbitration means signing away the direct protection of the courts on the merits of a dispute and while it is reasonably clear that some control over arbitral proceedings should be afforded, the modalities must be discussed. The solutions conceivable are within the spectrum of two extremes: either arbitral tribunals are bound by mandatory procedural rules, which rules are left to them properly to enforce; and/or the states must *ex post* ensure that arbitral proceedings are proper in terms of Article 6(1). In either event, which state has the competence (or, that is equivalent, is internationally responsible), and the precise modalities for such control are matters to which the ECHR is potentially relevant.

Authority for the above proposition is drawn from the exceptional case where access to a court is impossible due to immunities granted by the respondent state. In the recent case of *Waite &*

¹³³ See notably Jarrosson, [1989] Rev Arb 577. Jacot-Guillarmod in *Studies Wiarda* (2nd edn, 1990) 281, 290-3 is indecisive.

¹³⁴ Thus Krings & Matray, (1982) 59 RDIC 228, 256.

¹³⁵ Thus Jarrosson, *La Notion d'Arbitrage* (1987) 107 *et seq.*

¹³⁶ See *HC v Netherlands* Application 11238/84 (Decision of 6 October 1986), para 1 (failure to give effect to arbitration clause not a violation of Article 6). *Süssman & Steiler*, below, note 166, is not authority for such proposition, because it concerned a board whose jurisdiction was compulsory and whose judgments were subject to appeal in the courts.

¹³⁷ A detailed account by Schwebel & Lahne, above, note 90, 209-222.

Kennedy it was held that this is indeed a restriction of the right of access to a court. In the circumstances, the international organization which was immune from jurisdiction (in a labour law suit) provided for an internal appeal procedure, and that was found in the circumstances to be a viable alternative to state courts. The requirements of a legitimate aim, proportionality, and no impairment of the core of the ECHR right were found to be fulfilled.¹³⁸ So this is a particular application of a principle relevant here, namely that giving away competences entrusted to the state by the ECHR presupposes that the territorial state will either (a) obtain a promise, at the time of delegation, from the delegated organ that the latter will itself respect fundamental human rights; or (b) retain a residual discretion to control, *ex post facto*, the organ to which the competences are delegated.¹³⁹

From a technical point of view, affording protection to individuals from acts of other individuals, here the arbitrators, is positive protection amounting indirectly to 'horizontal' effect of the ECHR.¹⁴⁰ Such protection is required when the exercise of the right conferred by the ECHR would otherwise become illusory,¹⁴¹ and must be distinguished from positive obligations purporting to enable individuals properly to exercise their rights vis-à-vis the state.¹⁴² Naturally, the operation of the principle, for instance the extent to which the behaviour of the holder of the right is relevant, depends on the nature of the right. And the same applies to the question whether the state must of its own motion intervene. For instance, it must do so to protect the right of assembly,¹⁴³ but previous solicitation of state help is required for protection of family rights.¹⁴⁴ In all cases, the state possesses wide discretion as to the means to employ,¹⁴⁵ and consequently such discretion will be sanctionable only when the protection afforded is patently inefficacious. It is noted in this respect that there is substantial consensus in municipal law that procedural directions by the arbitral tribunal cannot individually be challenged before a court.¹⁴⁶ Except in the rare case where the applicant would seek to oblige a recalcitrant arbitrator to perform his functions, the law must wait for the tribunal to complete his mission; only then will the court be in a position properly to ascertain whether, and to what extent, the alleged mischief has tainted the proceedings. This is further justified by the consideration that annulment should be improper where the record shows, say, that a party had an unfair advantage over the other in the presentation of a bundle of evidence but that particular bundle had no influence on the outcome of the case.¹⁴⁷

A. The Preliminary Issue: Jurisdiction and Responsibility

It is at this juncture appropriate to dispel any confusion between the notions of jurisdiction and responsibility (or, which is the same, control and obligation). Responsibility, for commission or

¹³⁸ See *Waite & Kennedy v Germany* (Judgment of 18 February 1999), paras 67-69.

¹³⁹ See *M & Co v FR Germany* Application 13258/87, (1990) 64 DR 138.

¹⁴⁰ The debate between Wade, (2000) 16 LQR 217 and Buxton, *ibid* 48 only incidentally touches upon the discussion here. They are concerned with the effect of Article 6(1) of Human Rights Act 1998, whereas we are here concerned with the threshold question of ECHR obligations.

¹⁴¹ cf *X & Y v Netherlands*, A 91, 8 EHRR 235, para 23.

¹⁴² For that latter situation see, eg, *Barberá, Messegue & Jabardo*, A 146, 11 EHRR 360, para 78.

¹⁴³ See *Plattform 'Ärzte für das Leben' v Austria*, A 139, 13 EHRR 204, para 32.

¹⁴⁴ See *Hokkanen v Finland*, A 299-A, 19 EHRR 139, para 55.

¹⁴⁵ See *Plattform 'Ärzte für das Leben' v Austria*, A 139, para 34.

¹⁴⁶ An overview by Jarvin, [1998] Rev Arb 366.

¹⁴⁷ See TF, 7 April 1993, (1993) 11 Bull ASA 413.

ommission, is coterminous with a primary obligation.¹⁴⁸ Jurisdiction, on the other hand, is coterminous with the factual issue whether a state has exercised control over such commission or omission. Jurisdiction therefore merely triggers *in concreto* responsibility, which is the result of an imputable and wrongful exercise of control.¹⁴⁹ Further, whilst the content of responsibility is determined by the obligations under the ECHR, jurisdiction is primarily a matter of fact and municipal law, for the basis of any state act is in that law. Thus, whether a state has exercised 'jurisdiction' in Article I terms will be conclusive for the establishment of international responsibility when the relevant provision requires abstention from a certain course of conduct, whereas when positive action is required (as in Article 6(1)), the primary question will be in what direction, if at all, that state should have exercised jurisdiction.

The case-law does not always make that distinction plain. This is because arbitration, consensual (or voluntary) and non-consensual (or statutory), sits uneasily within a system which is predicated upon the protection of individual rights *vis-à-vis* state authority. In the ordinary case of voluntary submission to, and private determination of the process of, arbitration, a state does not incur any responsibility from such proceedings *qua* facts. Things become blurred when the arbitral proceedings are obligatory, or the default means of dispute resolution, under a given law. Suppose for example that the law provides that all disputes with regional authorities arising out of public works contracts will be resolved by arbitration, except if the parties agree otherwise. Suppose further that the procedure for the constitution and the functioning of the arbitral tribunal is set out in detail by law. Is that state liable if the tribunal takes an inordinately long time to determine the dispute? These were in essence the facts on which the Commission found a petition admissible, and then on the merits well-founded, on the grounds that 'in such a situation the state incurs responsibility because of the inertia of a body [which] is provided for by law'.¹⁵⁰ With respect, this is muddled both in law and logic. The fact that the existence of a body, or institution, is provided for by law cannot, on ordinary principles, engage the responsibility of the state. The fact that arbitration as an institution is regulated by law does not of itself put certain arbitral proceedings within the control of the state. Actually, the Commission hinted that the absence of say by the parties on the procedure was also a ground for its holding, but this is equally insufficient.¹⁵¹

What the Commission needed to have demonstrated, but did not, was that the state incurred responsibility because it should have made arrangements that would allow the process to go on despite the recalcitrance of one or all parties. Now, magistrates were sitting on the arbitration panel, but it was not spelt out that the state should have given them the power to expedite, or revitalize, the proceedings; nor was it spelt out whether alternative remedial action, by intervention of the courts, should have been made available. Thus, bypassing the issue of determining the limits of responsibility by implying that the state has exercised jurisdiction simply by providing for the procedure (or, perhaps, by appointing state officials to the arbitration panel) was unjustified.

¹⁴⁸ See, eg, *Affaire des Biens Britanniques au Maroc espagnol*, 2 RIAA 617, 641 (ad hoc, 1923).

¹⁴⁹ See ILC Draft Articles on International Responsibility (1996), Articles 16, 19(2); further, eg, Tomuschat in *Essays Schermers III* (1994) 315.

¹⁵⁰ See *Cantafio v Italy* Application 14667/89 (Decision of 12 December 1992); Report of 16 May 1995, para 47. The case was not referred to the Court; see Committee of Ministers Resolution DH(95)260 (Interim, 1995).

¹⁵¹ See Report of 16 May 1995, *ibid* para 44.

B. Obligations in respect of Consensual and Statutory Arbitration: An Absolute Distinction?

In the system of the ECHR, a distinction is often made depending on whether the submission to arbitration is voluntary or not.

1. Consensual Arbitration

In this case, there are two obligations. First, to give jurisdiction to the courts to control the validity of the arbitration agreement—in other words, the validity of waiver of access to court. This is nowhere stated in such terms,¹⁵² but ensues from the authorities on the necessity of valid consent¹⁵³ and ordinary rules on the discharge of treaty obligations.¹⁵⁴ It may be queried whether the ECHR obliges states to provide for an *ab initio* declaratory remedy. The law is uniform in that respect, and contained in Article II(3) of the New York Convention. The provision obliges courts to refer the case to arbitration (and not merely to decline jurisdiction) unless the arbitration agreement is ‘null and void, inoperative or incapable of being performed’. The best interpretation of the rule is that the court must refuse referral only in cases of patent, on-its-face, vice.¹⁵⁵ This, to protect the jurisdiction of the arbitral tribunal in the first place and comprehensively to deal with the issue, the opportunity for full review being reserved in an annulment action against the final award. It is not thought that the ECHR should impose an obligation to provide for full initial review, though there is no authority on the question. But the suggestion would follow from the consideration that, if there ostensibly exists an arbitration agreement in writing, the parties suffer no unjustified harm in being obliged to participate in proceedings whose foundation might eventually be found to be inexistent. Admitting the soundness of the allocation of competences under the New York Convention avoids going into issues of conflicts of international instruments that would be further complicated by the fact that one of them is part of European *ordre public*.

The second obligation is to provide a mechanism to ensure that waiver does not affect the core of the right, that is, the inalienable substantive requirements analysed above, section III. As will now be seen, this may apply to obligatory arbitration proceedings too.

*2. Statutory Arbitration*¹⁵⁶

(a) *De Novo* Proceedings Insufficient

When arbitration is the mandatory means of dispute settlement the right to a court has not been waived and thus the obligations of the state in respect of that first leg of Article 6(1) remain intact. This is a common occurrence in a number of legal systems, where disciplinary, civil, and petty criminal adjudication is handled by non-judicial bodies. The Court clarified that¹⁵⁷

¹⁵² But cf *Hedland v Sweden* Application 24118/94 (Decision of 9 April 1997); *KR v Switzerland*, above, note 12.

¹⁵³ See above, text to notes 19-20, 25-26.

¹⁵⁴ See Convention on the Law of Treaties (Vienna, 22 May 1969), (1980) 1155 UNTS 331, Article 26.

¹⁵⁵ See notably van den Berg, *The New York Arbitration Convention* (1981) 155.

¹⁵⁶ Note that statutory arbitration may be an unconstitutional deprivation of the right to the ‘natural judge’. This is the case in Greece; see Act Introducing the CCP, Article 7(1); and CA Athens 4168/1982, (1982) 13 Δ 689. For an example of statutory arbitration see Channel Tunnel Rail Link Act 1996, s 43.

¹⁵⁷ *Albert & Le Compte v Belgium (Merits)*, A 58, 5 EHRR 533, para 29 (emphasis added, citation omitted); and see recently *Ortenberg v Austria*, A 295-B, para 31.

conferring powers in this manner does not in itself infringe the Convention. Nonetheless, in such circumstances the Convention calls *at least for one* of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has *full jurisdiction* and does provide the guarantees of Article 6(1).

The same test has been applied to non-consensual arbitration. The Commission wrote that the ECHR does not oppose jurisdiction being given 'in the first instance [to] an organ which is not a court, provided that the case may be then brought within a reasonable time before a court which is competent to judge it both as to the law and ... the facts'.¹⁵⁸ This would *a fortiori* apply to court proceedings involving more informal procedures, which are thus only in name 'arbitral'.¹⁵⁹

The formula is at first blush reasonable but for it to be workable the 'at least for one' part must not be read as an absolute dichotomy. For such a construction would break down in two distinct hypotheses, which will be illustrated with an example. Suppose mandatory arbitral proceedings which are held *in camera* and thus do not comply with Article 6(1).¹⁶⁰ Suppose further that, though mandatory, they are procedurally controlled by the parties because they are subject to ordinary arbitration law,¹⁶¹ and the process is stultified by inertia on the part of either of them. If municipal law does not allow for the resumption of the proceedings, there will neither be an opportunity for a court trial fulfilling the requirements of Article 6(1) nor any exercise of jurisdiction imputable to the state. To avoid this counter-intuitive result, it must be admitted that the obligation of control by a court with full jurisdiction encompasses putting in place all the accessory remedies that will make seizing such jurisdiction feasible and effective.¹⁶² Applying that test in the *Cantafio* case,¹⁶³ the state was responsible not because of the length of the proceedings as such but because there was no effective way of empowering the courts to remedy that.

The Commission had been moving in that direction in its Report in the *Bramelid & Malström* case, where the 'either/or' bifurcation seems to have been altogether abandoned.¹⁶⁴ It was said that state responsibility accrues in either of two ways: (a) if a full appeal on the merits lies against the award, responsibility accrues only in respect of the appeal proceedings; or (b) if appeal lies only in respect of procedural grounds, state responsibility is engaged if the applicable legislation does not directly prescribe requirements satisfying due process standards.¹⁶⁵ That would mean that providing for *de novo* court proceedings does not extinguish the obligations of the state.¹⁶⁶ And it is the preferable solution, not only in our context but in any case where the option of court proceedings is initially unavailable. First, there is nothing in obliging parties to relitigate if their complaint would concern a discrete procedural point. Secondly (and this applies where arbitration is mandatory as a process but the proceedings are governed by ordinary arbitration law), the option

¹⁵⁸ *Bramelid & Malström v Sweden* Applications 8588-8589/79, (1982) 29 DR 64, 85, (1982) 5 EHRR 249.

¹⁵⁹ cf *Scarth v UK* Application 33745/96 (Decision of 21 May 1998).

¹⁶⁰ cf *Le Compte, Van Leuven & De Meyere v Belgium*, A 43, 4 EHRR 1, paras 59-60.

¹⁶¹ As in *Bramelid & Malström*.

¹⁶² cf *Golder*, A 18, para 36; *Airey v UK*, A 32, 2 EHRR 305, para 26.

¹⁶³ See above, text to notes 150-151.

¹⁶⁴ Above, note 158.

¹⁶⁵ See *Bramelid & Malström v Sweden* Applications 8588-8589/79, (1984) 38 DR 18, paras 30, 32. In the event, Sweden amended its legislation; see Resolution DH(84)4, reprinted in (1984) 38 DR at 42. A subsequent Decision found that this was sufficient reparation; see *Bramelid & Malström v Sweden* Application 11513/86 (Decision of 10 October 1986).

¹⁶⁶ There is authority against that proposition: *Süssman & Stieler v Germany* Application 20024/92 (Decision of 8 September 1993), para 3.

tion of appeal on the merits may be excluded or need to be contracted-in prior to the proceedings. The law should therefore provide for full and limited appeal, at the option of the appellant. In the latter case the appeal will be confined to a review of the due process requirements on consensual arbitration.¹⁶⁷ It is therefore concluded that in certain respects consensual and statutory arbitration are indistinguishable, save that statutory arbitration creates an additional obligation on the state.

(b) The Jurisdiction of the Reviewing Court

The second observation called for concerns the 'full jurisdiction' of the reviewing court. 'Full' means retrying the merits of the case,¹⁶⁸ as a result of the fact that there has been no consent to non-judicial determination. In consensual arbitration the appropriate test could be labelled 'sufficient jurisdiction'.

The concept of jurisdiction, as clarified in subsequent case-law, comprises two essential elements: the matters in which the second court may substitute its judgment for that of the court under review (will it confine itself to jurisdiction and procedure?), and the effects of the review (will it quash or retry?). The necessary and sufficient powers for the court depend, according to the so-called *Zumtobel* doctrine,¹⁶⁹ on the circumstances of the case. This has been criticized on the ground that it leaves municipal authorities uncertain as to the ECHR exigencies,¹⁷⁰ but it does have the virtue of giving these authorities, which are better acquainted with the needs of their particular legal systems, a fair measure of discretion and, perhaps, a spur to go further than what would strictly be necessary. On any view, the strictly jurisdictional powers of the review court should comprise the power to examine afresh all the evidence, and even collect new evidence, to ascertain whether the process has been proper.¹⁷¹

Concerning the adjudicatory effect of the reviewing court's pronouncement, it has been implied that both options, mere quashing and retrial, are legitimate, so long as that pronouncement is binding and supersedes the one under review.¹⁷² In voluntary arbitration, of course, there is a bifurcation depending on whether the arbitration agreement is valid or not. In the former case, the court will only annul the award; the parties must in principle institute fresh arbitral proceedings. In the latter case, there has been no waiver of the right to a court, and the court may withhold the case and hear it on the merits if it has jurisdiction on ordinary principles. But subject to the exception of a non-existent arbitration agreement, the ECHR cannot oblige any state to retain and try the case, for the essence of arbitration is renunciation of state justice.

¹⁶⁷ On this point the author disagrees with Lord Lester's view that independence and impartiality in an Article 6(1) sense are always required in statutory arbitration; see his proposed amendment to the Arbitration Bill, later withdrawn: *Hansard*, HL (series 5) vol 569, cols CWH 26-29 (28 February 1996). For the view here defended see Council of State, 305/1998, (1999) 25 ToΣ 642 (labour arbitration must be conducted by independent tribunals, their awards always being subject to recourse in the courts).

¹⁶⁸ See, eg, *Fischer v Austria*, A 312, 20 EHRR 349, paras 27-34.

¹⁶⁹ See *Zumtobel v Austria*, A 268-A, paras 31-33.

¹⁷⁰ See *Fischer v Austria*, A 312, 20 EHRR 349, Conc Op Martens J, paras 15-21.

¹⁷¹ cf the powers of the Commission in respect of municipal proceedings, where the substance of the ruling is relevant only in cases of gross arbitrariness, which itself violates the equality of the parties; see, eg, *X v Belgium* Application 458/59, (1960) 3 YB 222; *X v UK* Application 5282/71, (1973) 42 Coll 99; *X v Austria* Application 7987/77, (1979) 18 DR 31.

¹⁷² See *Fischer v Austria*, A 312, 20 EHRR 349, para 31.

C. A Pervasive Application of the Procedural Autonomy Principle

The discussion up to this point has tried critically to systematize the case-law, and its findings were briefly as follows:

- (1) Access to state-provided justice can be waived, and this may carry with it some of the material requirements under Article 6(1), essentially publicity.
- (2) The core right of fair trial cannot, however, be waived; though it may be modified to take account of the particular needs of arbitration practice.
- (3) Conclusion (1) entails that the validity of waiver should always be reviewable by state courts. It further entails that a mechanism should be in place to ensure that the core right to a fair trial is safeguarded.
- (4) As to that mechanism, there is no absolute distinction between voluntary and statutory arbitration.

This sub-section will criticize recent case-law which suggests that conclusion (2) may be entirely devoid of substance.

It follows from conclusion (2) and the discussion above on conclusion (4) that devising the appropriate mechanism to ensure compliance with ECHR requirements by private adjudicatory bodies is a duty incumbent upon contracting states. Note however that although procedural autonomy is perhaps more than an organizing principle, it cannot alter the content of international obligations. For this would go against the fundamental rule that a state cannot invoke its municipal law to avoid international responsibility.¹⁷³

In a recent case it was alleged that the arbitration proceedings were excessively long. The Commission considered that 'state responsibility is not engaged by acts of arbitrators except and insofar as the assistance of state courts has been requested'.¹⁷⁴ The courts themselves had speedily disposed of the motion on unjustified delay.¹⁷⁵ Note that the Commission took as a given that the respondent state's courts would, in accordance with municipal law, interfere with the arbitral process only in exceptional cases (*'intervention à caractère subsidiaire'*) and if seised of an application to that end. In that respect the Commission endorsed the submission of the government that (consensual) arbitration does not itself fall within the scope of Article 6(1), except to the extent that state authorities are requested, within the limits of their *lex fori*, to intervene. But it went even further than that submission, for it did not even acknowledge that states have an obligation to provide an effective remedy to ensure compliance with the non-waivable requirements of Article 6(1).¹⁷⁶ Thus, in a subsequent case the applicant complained that control on points of law only (*de nature cassatoire*) was insufficient to detect and rectify procedural mishaps. The Commission sidestepped the issue, confining itself to saying that municipal courts had acted properly within the limits of the functions entrusted to them by law.¹⁷⁷

But this is merely begging the question, for the primary test remains whether the state has organized its legal system so as properly to guarantee Article 6(1), and this encompasses both positive (commission) and negative (omission) obligations. To take again the example of 'reasonable time' (and on the assumption that this is indeed a relevant requirement) it would be no defence for

¹⁷³ The rule is codified by Article 27 of the Vienna Convention, above, note 154.

¹⁷⁴ *KR v Switzerland*, above, note 12.

¹⁷⁵ See Concordat, Article 17.

¹⁷⁶ cf ECHR, Article 13. Technically, Article 13 is subsumed within Article 6(1) when they concur, because the latter provision goes further than the former; see *Bramelid & Malström*, above, note 158.

¹⁷⁷ See *Rychetsky v Switzerland* Application 12759/87 (Decision of 11 July 1989).

a state to argue that in its domestic law that was not an annulment ground or that no remedy lay against a procrastinating party or tribunal. Rather, the question is whether the state should provide effective remedies at all (eg, an action to terminate the mandate of the arbitrators pending the proceedings). As a result of the case-law, the limits of direct and indirect responsibility are, unjustifiably, blurred. Indirect responsibility would arise in cases where a contracting state would give effect to an award by means of *exequatur* though the award would result from proceedings which did not conform to Article 6(1) standards.¹⁷⁸

In effect, the Commission has held that states are under no obligation to control the propriety, under Article 6(1), of voluntary arbitrations. In the most recent case available, the applicant argued that a ruling of Dutch courts which required actual bias (as opposed to appearances thereof) as an annulment ground was violating the ECHR.¹⁷⁹ As has been said above, even appearances of bias would violate the ECHR in respect of court proceedings.¹⁸⁰ The Commission was not content to modify that standard. The ruling is worth quoting extensively:¹⁸¹

Account must be taken ... of [municipal law] in order to determine whether the domestic courts retained some measure of control of the arbitration proceedings and whether this control has been properly exercised in the concrete case. [T]he grounds on which arbitral awards may be challenged ... differ amongst the Contracting States and [thus] it cannot be required ... that national courts must ensure that arbitral proceedings have been in conformity with Article 6 of the Convention. In some respects—in particular as regards publicity—arbitral proceedings are often not even intended to be in conformity with Article 6 [A]n arbitral award does not necessarily have to be quashed because the parties have not enjoyed *all the guarantees* of Article 6

With respect, this cumulative (*à faisceau*) argumentation is too sloppy (and unusually going beyond the specifics of the case, one might add). From the fact that states adopt different standards of, and means for, review it cannot possibly follow that there is no common denominator, nor that there is no standard to test the efficacy of the remedy. Such differences exist in respect of court proceedings too, but this has not precluded the Strasbourg organs from imposing an internationally acceptable standard. The usefulness, and even the legitimacy, of excluding arbitration as a subject-matter within the ECHR domain is at least dubious.¹⁸²

From an international responsibility viewpoint, a municipal court will in principle be acting properly in refusing enforcement or confirmation within the procedural limits of the *lex fori*. What international law requires from a court is to grant for the enforcement of international law a remedy equivalent to that granted for the enforcement of municipal law. Thus, a court must interpret

¹⁷⁸ cf *Boss Sohne AG v FR Germany* Application 18479/91 (Decision of 2 December 1991); *Schiebler KG v FR Germany* Application 18805/91 (Decision of 2 December 1991).

¹⁷⁹ See HR, [1995] NJ 3642. The ruling was made under Article 649 (old) of the Dutch CCP, which had been interpreted as encompassing violation of public policy in the grounds for annulment. The current provisions of the Code, Articles 1065(1)(b), (e) and 1033(1), reflect the substance of the judgment cited.

¹⁸⁰ Text to note 81.

¹⁸¹ *Nordström-Janzon v Netherlands* Application 28101/95, (1996) 87A DR 112, 116 (emphasis added, citation omitted).

¹⁸² The residual relevance of the ECHR hidden in the italicized words ‘all the guarantees’ has nominal value, if account is taken of the modifications necessary in respect of the other requirements of Article 6(1); see above, section III.

violations of Article 6(1) due process as contravening its concept of public policy,¹⁸³ but it does not have to abandon the procedural limitations of the *lex fori* (relating to the burden of proof or the limits of *ex officio* procuring evidence).¹⁸⁴ Further, a court may of its own motion decline to give effect to municipal law provisions, substantive and procedural, which would result in violating international law obligations.¹⁸⁵ But, in any event, that does not extinguish the responsibility of the state as a whole to provide appropriate and effective remedies for the enforcement of due process, for this stems directly from Article I of the ECHR.¹⁸⁶ As has been found in the previous chapter, control exclusively at the enforcement stage is neither efficacious nor expressive of current legislative practice. Thus, if the Commission rulings imply that such control delineates the outer limits of responsibility, this author would disagree, both on policy and methodological grounds. It is hoped that under Protocol 11 to the ECHR the Court will have the opportunity to restate the principles correctly.¹⁸⁷

VI. CONCLUSIONS

It is suggested in conclusion that the recent case-law of the Commission must be read restrictively. States do have wide discretion in affording the means for, and extent of, review of (voluntary) arbitral proceedings, but within the following limits. First, municipal law must at a minimum provide that the arbitration agreement has not been concluded under duress. Second, the law must sanction violations of due process. Limiting annulment to awards offending mandatory rules of public policy calibre certainly seems acceptable. Further limiting the grounds to violation of international public policy, as argued above,¹⁸⁸ seems permitted as well. Third, there must be effective and practical means of redress in place. In our particular context, it would fall to be arranged by each state, amongst others (a) which is the court competent, in terms of territorial and personal jurisdiction, to control an arbitration; (b) whether an appeal will lie against decisions of that court; (c) the time limits within which applications must be lodged;¹⁸⁹ (d) the precise mode of enforcement of such court's judgments. For example, it is in the discretion of states to determine whether it is appropriate to provide an action to terminate the mandate of arbitrators pending the proceedings if they proceed with undue delay, and whether that will be a condition precedent to an annulment action.¹⁹⁰ Going further than that to surrender to entire discretion of each state, moot as it may be in the law as it stands, is wrong as a matter of policy and law.

¹⁸³ See Case C-393/92 *Municipality of Almelo* [1994] ECR I-1477, para 23; cf Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, para 37; Case 106/77 *Simmenthal (No 2)* [1978] ECR 629, para 19; cf Case C-38/98 *Renault SA v Maxicar Spa* [2000] ECR I-____, para 32.

¹⁸⁴ cf Cases C-430-431/93, *Van Schijndel & Van Veen v SPF* [1995] ECR I-4705, paras 13-14.

¹⁸⁵ This is the only way to reconcile the authorities above, note 183, with the authorities cited in note 184. See also above, note 50.

¹⁸⁶ cf Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency* (Advisory Opinion OC-9/87), Series A No 9, paras 22-24. For a rare example where the court admitted of a remedy not prescribed by law see TF, 118 II ATF 199: *revisio propter nova* admitted, though in principle the *recours de droit public* is the exclusive remedy, for situations where the tribunal's decision was tainted by party-produced evidence procured through criminal conduct or similar; but see Paris, 25 May 1990, [1990] Rev Arb 892, 895-6.

¹⁸⁷ Article 34 of the ECHR, as amended by Protocol No 11, Article 1, abolishes the control of admissibility by the Commission and makes the Court the sole organ under the ECHR.

¹⁸⁸ See above, Chapter 2.III.

¹⁸⁹ cf *X v UK* Application 3332/67, (1970) 34 Coll 1.

¹⁹⁰ See Model Law, Articles 14(1) and 34.

A final point concerns international arbitration. The ECHR has little to say on the delimitation of competence in matters of control jurisdiction as between states. Lest it be accepted that excluding all international awards from the jurisdiction of state courts (as in Belgium before the 1998 reform) is admissible, it is submitted that the state of the seat of the arbitration has a duty to provide for such control jurisdiction. In a domestic arbitration context, the proceedings are *ipso facto* within the jurisdiction of the territorial state, since they replace the jurisdiction of the courts of that state. But in an international arbitration context there is no predestined court (and responsible state). The obligations under the ECHR would then follow from the consideration that this is the state in which it is most practical and effective to concentrate the remedies aiming to control the arbitral process. This applies to control jurisdiction pending the proceedings and over the final award. However, the ECHR prescribes only *de minimis* requirements and has nothing to say on limitations of control jurisdiction (for instance on whether the state whose procedural law applied may exercise concurrent jurisdiction). This should be interpreted in a flexible manner, on two fronts: the action to set aside may be, first, waived even by prior agreement (as any other remedy according to Article 6(1)) and, second, inadmissible insofar as there is another forum with jurisdiction to adjudicate over it and which would not be inequitable or unreasonable under *forum non conveniens* criteria. The latter option is criticized in Chapter 1.IV.B as impractical, but it does not offend against the principle of effective protection.

Chapter 4

Arbitral Practice: Conflicts and Material Rules on Procedure

No discussion of international arbitration law is complete without a survey of arbitration practice. This chapter looks at major arbitration rules applied in international disputes (section I) and the practice of arbitral tribunals (section II) to ascertain the choice of procedural law—the method for doing so and the relationship of the law so chosen with the law of the *situs* of the arbitration. A final section (III) briefly discusses principles of arbitral procedure.

Two questions are immediately raised. First, how can arbitration practice have any independent significance? Secondly, with the proliferation of arbitral institutions around the world, which body of practice should be considered as representative?

In the submission of this author, if arbitral practice (arbitration rules and practice) can demonstrate a consistent body of rules, this may properly be regarded as evidence of usage of the international mercantile community. The needs of that community are the life and blood of international arbitration, and arbitral practice must therefore be presumed to conform to the expectations of that community. In fact, in areas of practice where the business community has a direct input, the courts have expressed their willingness to interpret the law in conformity with accepted practice. The English Court of Appeal stated that the ICC Uniform Custom and Practice for Documentary Credits (UCP 500) is¹

a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. [The] Courts ... seek to give effect to the international consequences underlying the UCP.

On the other hand, this author cannot accept the claim that the practice of the mercantile community can have any independent normativity. It is a trite point, but a crucial one nonetheless, that that community is too diffuse to be able to provide sanctions comparable in their effectiveness to those of state authorities.² Chapter 1 has argued that in arbitration the international business community is looking for a mode of dispute resolution which will be at the same time neutral and flexible, but also subject to some minimum controls by municipal courts.

Thus, any evidence of normativity in, say, ICC arbitration practice, in the sense that it responds to the needs and expectations of the international business community, has to be interpreted in a limited way.³ One element is that practice does shape municipal law. Arbitral awards by distin-

¹ *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, 148 (CA).

² An example of the sanctions contemplated by advocates of auto-regulation is notice of recalcitrance and non-compliance with arbitral awards; see ECE Rules for Agricultural Products, Articles 34-45.

³ See Craig, (1985) 1 Arb Int 49, 60-1.

gushed tribunals stating that the conflicts rules of the law of the seat were not binding on an international arbitral tribunal were not based on the authority of the law—any law—but arbitral *fiat*.⁴ In turn, municipal law granted, by means of substantive law rules, arbitrators wide authority in the determination of the applicable law, and took conflicts rules outside the ambit of public policy (unlike in court procedure). It became moreover a principle of public policy in its own right that the findings of the arbitrator on the law and merits are not reviewable save when the *result* violates public policy; and that it is for the arbitrator in the first place to ascertain whether that public policy is violated.⁵ The conclusion is that arbitral practice is significant as emerging custom, but that one should not look further than that process of cross-fertilization between the law and practice.⁶

Thus, arbitral practice is relevant to the extent that it reflects the situation on the ground, the expectations of the business community, and the view of expert lawyers.

The second matter is hardly amenable to exact science status. Choosing a sample from the multitude of rules and awards depends in the first place on the availability of sources. As far as awards and Terms of Reference ('ToR') are concerned, those published are mostly made under the ICC Rules. Furthermore, the ICC is the institution that can make the most valid claim to administering a truly international arbitration, in terms of geographical coverage and subject-matter of disputes. Additionally, at least one experienced lawyer (rather than a technical or other expert) will sit on any one ICC tribunal; the tribunal will have a *corpus* of ICC jurisprudence to draw on; and the ICC Court and Secretariat consist of expert lawyers too. Hence the primary role given to ICC practice here.

I. A SURVEY OF ARBITRATION RULES

A taxonomy of the hundreds of arbitration rules would distinguish between three types.⁷ First, rules designed exclusively for municipal disputes, usually promulgated by and organized under a national professional association, typically a chamber of commerce. Secondly, rules catering to the needs of the international trade community of a particular state. Again, these are often promulgated by chambers of commerce. A discrete sub-category of that type of rules would consist of bi-national rules, designed for disputes in a particular trade sector between two states., typically France and Germany.⁸ Such rules are not as current as they used to be in the 1950s-1970s. The rules of the third type are universal, in that they purport to apply regardless of the provenance of the parties. The first type is irrelevant to the purposes of this thesis. Examples of the second type will be briefly noted in subsection A below, essentially to contrast them with universal rules (in subsection B); and certain of their material procedural rules will be used for comparative purposes in section III.

⁴ See notably ICC 1250/1964, (1980) 5 YCA 168: 'the arbitrators, not being obliged to follow the rules of conflict of laws of the State where the arbitral tribunal has its seat, are, in principle, bound by the agreement of the parties on the applicable conflict rules.' ICC 1512/1971, (1976) 1 YCA 128, sub [3]: 'The international arbitrator has no *lex fori*, to which [sic] he can borrow rules of conflict of laws.'

⁵ See *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740; *affirmed*, [2000] 1 QB 288 (CA); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 636-7 (1985).

⁶ Thus, a German appellate court was correct in refusing to see in the ICC Rules anything more than a contractual arrangement, rather than submission to a law: OLG Frankfurt, (1984) 30 RIW 400. Such examples could be multiplied.

⁷ For other classifications see Fouchard, Ph, 'Typologie des Institutions d'Arbitrage', [1990] Rev Arb 281.

⁸ eg: Rules of the Food and Grain Arbitration Chamber for Crop Products at Strasbourg and Mannheim.

A. Rules of National Institutions for Foreign Trade

Foreign trade arbitration rules far outnumber international rules. Equally, arbitrations under such rules outnumber those under international rules. From a purely quantitative point of view, therefore, foreign trade rules are practically more important in the international trade than international rules. On the other hand, the jurisprudence under foreign trade rules is not systematically published, at least not as systematically as the jurisprudence under international rules. Moreover, there is a general (though unsubstantiated by hard evidence) feeling that the awards under foreign trade rules are less sophisticated and more summary in their reasoning than, say, ICC awards. This would probably be due to the fact that the economic importance of the cases brought under foreign trade rules is typically smaller than, again, a typical ICC case; the resources, including legal ones, devoted to each case are therefore commensurately fewer.

It is noted at the outset that one is not only looking for explicit references to a municipal law as the *lex arbitri*, a catholically governing system of law. When, in 1958, the UN Economic Commission for Europe undertook a survey of 197 arbitration rules of all types, only 13 sets of rules made reference to the law of the seat of the arbitral institution (not of the tribunal), typically confining the reference to procedural matters. Two sets of rules reserved the right of the parties to choose the procedural law applicable, and eight made that law apply suppletively, in default of choice by the tribunal.⁹ The study thus warned that the rules should be read ‘in the light of the national laws applicable thereto’,¹⁰ that being determined by a conflicts rule outside the arbitration rules themselves.

1. East European Rules

The archetypal examples of foreign trade rules are provided by the rules of the various chambers or commissions of foreign trade in the former East-European Bloc.¹¹ Such rules were designed to operate in the context of trade both as between the countries of the Council for Mutual Economic Assistance (CMEA or Comecon) and as between a ‘third’ state and a CMEA state. It is of interest that disputes involving persons domiciled, or organized under the laws of, the states-party to the Moscow Convention were by direct operation of that convention excluded from the jurisdiction of state courts and obligatorily submitted to arbitration under the rules of a chamber of commerce.¹² Remnants of such statutory arbitration are still to be found in certain arbitration rules, which provide for their application without specific agreement of the parties but by operation of a treaty rule.¹³ In fact, the Moscow Convention was building on an already existing infrastructure of arbitration courts attached to chambers of commerce. The particularity of such courts was, and to a certain extent still is, that they operated by specific licence of the state, and often by explicit authorization in the arbitration law of the state concerned. The chambers of commerce remained part of the state apparatus.¹⁴

⁹ UN Doc TRADE/WP.1/15/Rev.1 I (1958) 50. Of those only two were designed for disputes involving foreign parties and transactions, namely the ancestors of the LCIA and Stockholm Rules.

¹⁰ *ibid* 2, para 8.

¹¹ The general observations in Pissar, (1958) 72 Harv LR 1409, 1409-42 were still valid thirty years after publication.

¹² See Moscow Convention, Articles I(1), II(1).

¹³ See, eg, ICAC Rules, § 1(4); Czech Rules, § 1(2)(a). The prototype provision giving effect to the Moscow Convention is CMEA Uniform Rules, § 1(2); on the implementation of which Rules see Lebedev, below, note 14, 126.

¹⁴ Lebedev, (1977-V) 158 RdC 87, at 108-10, 114-6.

It is interesting that the arbitration rules themselves do not always contain clear evidence that the *lex arbitri* is the law of the state under whose legislation they were enacted.¹⁵ The Czech Rules, for example, clearly state that they operate ‘under’ Czech law.¹⁶ Indirect evidence is equally telling. Certain arbitration rules allowed arbitral tribunals directly to apply to a consular authority of the same state in order to obtain evidence abroad;¹⁷ others incorporated the rules on arbitrability of the enacting state;¹⁸ while others incorporated certain procedural rules¹⁹ or referred to the conflict-of-laws rules of the enacting state.²⁰ Further, many of the rules apply only if the dispute involves a foreign party and/or an international transaction, this restriction being imposed by the legislation authorizing the establishment of, or directly establishing, the relevant arbitral institution.²¹

A particularly telling sign of the national character of those bodies is that they did apply the conflicts rules of the enacting state, at least when the arbitration rules were silent or in the absence of party choice.²² And of course the mandatory substantive law rules of that state defeated the law applicable by operation of choice-of-law rules.²³ The tribunals generally subjected questions of validity of the arbitration agreement, jurisdiction, and procedure to the law from which they directly derived their powers, that is, the law of the enacting state.²⁴ A Bulgarian Chamber of Commerce and Industry award applied Bulgarian procedural law to a question not resolved by the arbitration rules, justifying that decision by stating that the Court of Arbitration was ‘entrusted with the functions of a special civil court’.²⁵ Such was the tendency to follow national law that it was disputed whether even those arbitration rules which were enacted as legislation could override general procedural or arbitration law, though the rules had the same hierarchical value and were *leges speciales*.²⁶

Two other problems arose in practice. The first was caused by oft-encountered provisions in the arbitration rules in advance fixing the seat (or ‘venue’ or ‘place of arbitration’) at the seat of the relevant chamber of commerce. This was reasonable in view of the strict adherence to the arbitration law of that state. But it meant in turn that the arbitration rules were good only insofar as the seat would remain in that state, for it was expected that the law of that state would always control.

¹⁵ Exceptions are provided by the Zagreb Rules, Article 1(2) of which prohibits procedural arrangements violating Croatian public policy and the Polish Rules, whose § 4(1) even more strictly provide that the tribunal ‘shall apply mandatory procedural rules of law in force at the place of arbitration proceedings’. Less clearly, ICAC Rules, § 13(2).

¹⁶ See, eg, the Czech Rules, § 1(1). Details (now of historical interest only) in Szászy, *International Civil Procedure* (1967) 591-5; and Pfaff, *Die Aussenhandelsschiedsgerichtsbarkeit der sozialistischen Länder* (1973) 47-866.

¹⁷ eg: Bulgarian Rules (1953), § 36; Polish Rules (1970), § 27(6).

¹⁸ eg: Hungarian Rules, Article 1(2).

¹⁹ eg: GDR Rules (1957), § 41.

²⁰ eg: Hungarian Rules, Article 13(2); Bulgarian Rules (1953), § 47.

²¹ eg: Zagreb Rules, Article 1(1); ICAC Rules, § 1(2).

²² See, eg, FTAC 46/1954; FTAC 54/1986; FTAC 60/1957; FTAC 61/1957: all in Butler, *Collected Awards* (1980). See also Ionasco & Nestor in *The Sources* (1964) 167, 184-200.

²³ See MAC 25/1981, (1989) 14 YCA 203, sub [1]. An exception is an award of the Bulgarian Chamber of Commerce and Industry Award 41/1964, (1965) 94 JDI at 178-9, where the tribunal did not extend, probably on equitable grounds, the effect of Bulgarian mandatory law to a foreign party.

²⁴ See, eg, FTAC 109/1980, (1993) 18 YCA 92, sub [6]-[13]: separability under USSR law; and Butler in *id*, above, note 22, at 13; Ramzaitsev in *The Sources* (1964) 138, 140-2; Kalogjera, (1968) 15 *Revue Yougoslave de Droit International* 192, 199; Kleckner, (1972) 5 NYU JILP 233, 243, 246-7; Dietz, (1972) 5 NYU JILP 251, 267.

²⁵ Bulgarian Chamber of Commerce and Industry Award 32/62, (1965) 94 JDI at 158. See also the following awards of the same body: 64/1969, (1978) 105 JDI at 650; 11/1971, *ibid* 651; 119/1975, *ibid*; 127/1973, *ibid*; 68/1971, *ibid* 653-4; 68/1969, *ibid* 654-5.

²⁶ See Faragó, (1965) 14 ICLQ 1124, 1127.

The problem was posed by the Gdynia Rules, § 3 of which distinguishes between the ‘residence’ of the tribunal (always in Gdynia) and the ‘venue’ (normally in Gdynia, but possibly in Warsaw, Berlin, or Prague). As has been seen in Chapter 2 above, the provision should be interpreted as providing for a fixed legal seat with the faculty of holding hearings in other places. The Polish Supreme Court, however, considered an award stated to have been made in Prague as a foreign award.²⁷ Now if rigid stipulations on the seat of the tribunal are to make any sense they must be followed regardless of the factual circumstances surrounding the making of the award. This is consonant with legislative and arbitral practice, as has been seen in Chapter 2, and is the proper way to justify the strict application of the law of the designated seat—this time not because of a choice of seat but because of a choice of rules. This is a more general observation, relevant to other arbitration rules which pre-determine the seat (on which more below).

The second problem arose in the context of an award made under the Foreign Trade Commission Rules of the former German Democratic Republic. This was an award made in a compulsory arbitration under the Moscow Convention. The German Federal Court declined to treat compulsory arbitration as arbitration proper, in the sense of the ZPO; and noted that this type of arbitration took place under the aegis of state institutions which were entrusted with the authentic application of the law and whose awards were endowed with exceptional enforceability by the Moscow Convention (Article IV(1)-(2)).²⁸

2. Other Rules

A number of other arbitration rules, this time promulgated by private institutions, are also attached to the arbitration law of the state of the seat of the promulgating institution. A characteristic example are the CIETAC Rules, whose Article 1 states: ‘These Rules are formulated in accordance with the Arbitration Law of the People’s Republic of China’ The Indian Council Rules contain a narrower attachment, but the net result should, it is believed, be the same: ‘The procedural law shall be the laws of India and the parties shall be deemed to have submitted to the jurisdiction of the Courts in India.’²⁹ A comprehensive statement is to be found in the By-laws of the Liverpool Cotton Association. The seat of the arbitration will be in Liverpool, the arbitration will be governed by English law, and will be conducted in accordance with English law and procedure; the arbitration will be exclusively subject to the supervisory (including appeal) jurisdiction of English courts.³⁰ The Zurich Rules regulate the capacity of arbitrators, validity of arbitration agreement, and jurisdiction to act as *amiabile compositeur* by specific reference to the Zurich ZPO.³¹

Other traits of attachment to the law of the state of the institution include:

- (a) provisions that the rules may be supplemented by that law, subject however to contrary party instructions;³²
- (b) provisions fixing the seat of the arbitration at the seat of the institution,³³ subject to a special permission of the administering institution or a reasoned decision of the tribunal or both;³⁴

²⁷ Supreme Court, Poland, 27 August 1982 (unreported).

²⁸ BGH, 128 BGHZ 380.

²⁹ Indian Council Rules, Rule 6, second indent.

³⁰ Liverpool Cotton Association Rules, By-Law 200, quoted and discussed in *Indocomex Fibres Pte Ltd v Cotton Co Intern, Inc*, 916 FSupp 721, 724 (WD Tenn 1996).

³¹ Zurich Rules, Articles 4, 16, 18, first indent respectively.

³² CEPANI Rules, Article 33; Oslo Rules, Article 5; Beograd Rules, Article 39.

³³ CAS Rules, Rule 28. In 1958, the overwhelming majority of 197 rules contained an equivalent provision, only 3 explicitly providing for derogation by party agreement: UN Doc TRADE/WP.1/15/Rev.1 I (1958) 60-1.

(c) provisions that the choice-of-law rules of the seat of the institution will determine the law applicable to the merits,³⁵ or even that the substantive law of that state will apply in absence of party choice,³⁶ or both;³⁷

(d) provisions indirectly incorporating local law,³⁸ including rules of court competence.³⁹

But even when there is no particular rule requiring that local law be respected, foreign trade arbitration bodies seem instinctively, and perhaps as a matter of course, to apply that law, both as regards procedure and conflicts rules.⁴⁰ Two awards under the Rules of the Hamburg Chamber of Commerce justified their having adopted German choice-of-law rules on the basis that they were 'German' tribunals.⁴¹

A potential problem with rules closely modelled on a particular municipal law is that they cannot be applied without alterations necessitated, perhaps, by mandatory provisions of the law of the legal seat, if that seat be fixed outside the state of the relevant institution. Thus, the Vienna Rules, Article 1(3), were amended in 1999 to include a note that if the seat is fixed outside Austrian territory foreign law will control. This is not to suggest that arbitration rules enacted by national bodies are invariably attached to or modelled on a municipal law. The Stockholm and Finnish Rules in particular were designed for arbitrations taking place in their respective states as neutral locales, and there is no obvious influence by municipal law on those Rules. The approach has the twofold merit of creating the appearance of a neutral playing field and allowing the Rules to be 'exported'; although the mandatory law provisions of the law applicable (that the seat of the proceedings in the first instance) will normally have to be respected.

B. Universal Rules

This subsection discusses the two main branches of universal arbitration rules, that is, rules designed to apply regardless of the seat of the proceedings, nationality of the parties, and (usually but not always) subject-matter of the dispute.

³⁴ ICAC Rules, § 7; Milan Rules, Article 11; Vienna Rules, Article 1(3); Geneva Rules, Article 3.

³⁵ Zurich Rules, Article 18, second indent. In 1958 47 rules of similar design were found: UN Doc TRADE/WP.1/15/Rev.1 I (1958) 69.

³⁶ CAS Rules, Rule 45.

³⁷ Hamburg/Bremen Rules, § 12(2).

³⁸ The NAI Rules, Article 3(2) refer to the Dutch law notion of *bindend advies* (informal, contractual arbitration) for arbitration agreements not valid as such under Dutch law. The same Rules, Article 50(1)(b) incorporate CCP (Netherlands), Article 1058(1)(b) on deposit of awards. The CIETAC Rules were modified in 1998, following an authorization by the State Council, to include proceedings between Foreign-Invested (Chinese) entities, in Article 2(3). The same Rules, Article 23, require recourse to the court for interim protection, forbidden to tribunals under the Arbitration Act (PRC), Article 68. The DIS Rules (1989), § 17(2) referred the parties to the court for sworn testimony, forbidden before 1999. Cf the DIS Rules, § 30.1, which more explicitly than other arbitration rules state that default of the respondent does not amount to admission of the factual allegations of the claimant (as is the rule in German courts).

³⁹ Hamburg/Bremen Rules, § 15(4); LMAA Rules, s 4(b).

⁴⁰ See, eg, the following CIETAC awards: 341/1993 (conflicts rules); 16/1983; 102/1987; 151/1988 (on documents-only proceedings); 62/1986; 20/1983 (on the effect of default of the respondent): all in Leung Mei-fun & Sheng-chang, *CIETAC Awards (1963-1988)* (1995); and the following CIETAC awards: 22 May 1990, 25 May 1990, 14 July 1990 (on the law applicable), all in *id*, *CIETAC Awards (1989-1995)* (1998) 182 at 185, 194 at 199, and 220 at 225 respectively. See also the awards from CMEA states cited by Zhilsov, (1995) 42 Neth ILR 81, 85, note 8.

⁴¹ See Hamburg Chamber of Commerce: Partial Award of 21 March 1996, (1996) 42 RIW 766; Award of 4 September 1996, (1997) 22 YCA 51, sub [2].

1. The Genealogical Tree of the UNCITRAL Rules

Article 1 of the UNCITRAL Rules reads in material part:⁴²

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

There are two observations: First, the Rules merely make a *renvoi* to any law that may assert itself as 'applicable'; which law that will be, is a question for the arbitrator. The approach is commendable, because arbitration rules designed for ad hoc arbitrations between private parties anywhere in the world could not contain any universally valid conflicts rules,⁴³ or indeed resolve possible conflicts between domestic conflicts rules. It was of course presumed that in the ordinary hypothesis the 'law applicable' would be exclusively that of the seat.⁴⁴ It is however systematically preferable merely to contain a flag that the arbitration may be subject to certain mandatory provisions and leave further inquiry to the arbitrator.⁴⁵ This is further justified by the fact that in real life there may be more than one applicable laws. For instance, the law of the seat, *ex hypothesi* asserting its application, may permit the tribunal to order interim measures of protection,⁴⁶ but if they are to take effect in another jurisdiction the law of that state will inevitably apply, at least insofar as enforcement is concerned.

Therefore, and this is the second observation, the question is posed whether it would be preferable either to refer to the 'law(s) applicable' in a general provision or to subordinate specific provisions to one law applicable on a case-by-case basis⁴⁷ (or both). The latter approach was originally adopted for the UNCITRAL Rules, but it was at the eleventh hour discarded in favour of the catch-all provision in Article 1(2). The solution adopted eliminates any misunderstanding that the powers of the arbitrators may in certain respects only be limited by mandatory law;⁴⁸ whereas Article 1(2) leaves it to the arbitrator to work out the applicable rules, unilaterally inquiring the relevant laws.

Furthermore, that approach, pointing to a potential plurality of laws, is consonant with practical necessities. This is indirectly admitted by the UNCITRAL Rules themselves. Article 32(7) obliges the tribunal to register the award if so mandated by the law of the state where the award is made,⁴⁹

⁴² Article 1(2) will also be part of the arbitration rules which are modelled on the UNCITRAL Rules, eg the IACAC and certain PCA Rules. The three regional centres established under the aegis of the AALCC have adopted the UNCITRAL Rules, either with certain modifications (thus the Cairo Rules) or by direct reference (the Kuala Lumpur Rules). The Lagos Rules, Article (1)(c), are exceptional, in that they purport to eliminate Article 1(2).

⁴³ This is not clarified in the *travaux* but follows ineluctably from the nature of the document; see however UN Doc A/31/17, (1976) 7 UNCITRAL YB 9, ch V (20 *et seq*), paras 46-52.

⁴⁴ UN Doc A/CN.9/97/Add.2, (1975) 6 UNCITRAL YB 182, 183. See also Sanders, (1977) 2 YCA 172, at paras 4.4, 10.2.

⁴⁵ It was also suggested that the Rules should not contain any reference to municipal law, both to emphasize their comprehensiveness and autonomy *vis-à-vis* municipal law (UN Doc A/CN.9/97/Add.1, Annex II (1975) 181 (ICC)) and to leave it to the parties and the tribunal to decide whether to conform with municipal law (Fouchard, (1979) 106 JDI 816, 824-7).

⁴⁶ UNCITRAL Rules, Article 26(1).

⁴⁷ The following rules refer to the law of the seat on specific matters: Milan Rules, Article 14(1); MMAA Rules, Rule 20.1; Gdynia Rules, § 27(2) ('venue').

⁴⁸ See UN Doc A/CN.9/IX/CRP.1 (1976), Annex II to UN Doc A/31/17, above, note 43, at 67, para 12. An example is the ECE Rules, Article 18 (on authority to proceed despite challenge of jurisdiction); and contrast with Article 22; but see Cohn, (1967) 16 ICLQ 946, 959 (the law of the seat controls).

⁴⁹ The ancestors of Article 32(7) and 28(3) were expressly subjected to municipal law before the introduction of Article 1(2).

but that provision would be superfluous by the combined effect of Articles 1(2) and 16(4). To make it intelligible it must be made to mean that if the award is stated to have been ‘made’ in a place other than that designated as the seat, the award shall be considered made in that state (of the seat: Article 16) but, *ex abundante cautela*, the mandatory provisions of the place where the award was actually made will be respected.⁵⁰

A variant solution would be to refer to the mandatory rules of a ‘primary’ law, but point out to the tribunal that a number of other laws may be relevant. Article 16.3 of the LCIA Rules provides that:

The law applicable to the arbitration (if any) shall be the arbitration law of the seat of the arbitration, unless and to the extent that the parties have *expressly agreed in writing* on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat.⁵¹

On the other hand, Article 14.2 affords the tribunal, subject to contrary party instructions, the ‘widest discretion to discharge its duties [in the conduct of the proceedings] allowed under such law(s) or rules of law as the [tribunal] may determine to be applicable’. To reconcile the above-quoted provisions one must distinguish between the ordinarily (or principally) applicable law and the exceptionally (or peripherally) applicable laws. This applies to two other institutional arbitration rules.

The WIPO Rules contain an Article 3(a) of import equivalent to Article 1(2) of the UNCITRAL Rules, but Article 3(b) refers to Article 59(b), the latter reading as follows:

The law applicable to the arbitration shall be the arbitration law of the place of arbitration [defined in Article 39 as a legal concept], unless the parties have *expressly* agreed on the application of another arbitration law *and* such agreement is permitted by the law of the place of arbitration. (emphasis added)

In effect, the WIPO Rules amalgamate the UNCITRAL and the LCIA Rules. A preliminary point, relevant both to the LCIA and the WIPO Rules, is that the requirement of express choice is commendable: express choice should be required to defeat the presumption for the law of the seat (to the extent that such choice is allowed, at all events) and, practically, the provision minimizes the potential for procrastinating litigation. On the merits, however, it must be observed that the ‘law of arbitration’ is not in the WIPO Rules the same concept as in the UNCITRAL or the LCIA Rules, as ensues from Article 59(a) and (c). Paragraph (a) deals with the law applicable to the substance of the dispute, in familiar terms; while under paragraph (c) an arbitration agreement is valid as to its ‘form, existence, validity and scope’ if it conforms either to the law of the merits in paragraph (a)—ie, normally the law chosen by the parties—or to the law of the arbitration in paragraph (b). It follows that the arbitrability rules, for instance, of the law of the seat may be defeated by the law of the merits (*règle de rattachement alternatif à validité maximale*). It is questionable whether this is wise.⁵² To start with, the concept of arbitrability itself implies that it is a requirement which is

⁵⁰ That will be the case of course only if that law considered the award made there regardless of the fact that the designated seat was elsewhere; a hypothesis obviated by most municipal laws and criticized in this thesis (see above, Chapter 2.II.A).

⁵¹ To the same effect, without the proviso for choice allowed by the law of the seat: DIS Rules, § 24.1. The Euro-Arab Rules, Article 23(2) are the most straightforward ones in that family of rules: ‘The place of arbitration shall be agreed between the parties or, failing agreement, shall be determined by the arbitrator. The consequence of this choice shall be the application of the mandatory provisions of the municipal laws of the place chosen.’

⁵² Commending the solution: Hermann in WIPO Publication No 741, 1995.

potentially independent of, and additional to, the law of the main relationship. Further, all arbitration laws contain rules of arbitrability; if the law of the seat *qua lex arbitri* clashes with the law of the merits, making the latter prevail exposes the award to annulment on violation of public policy of the forum. (Chapter 2.III.B.2 has argued that the law of the seat should be as liberal as possible in that regard, but this is irrelevant to the point made here.) Thus, the way to avoid the risk of annulment would be to make paragraph (b) prevail over paragraph (c) in such cases; in other words to make the *lex arbitri* always a general frame of reference rather than a mere law of the process.⁵³

The European Arbitration Rules confusingly refer to ‘mandatory time provisions’, ‘mandatory provisions of the applicable law’ in respect of the faculty to make procedural orders, general ‘mandatory provisions of the *lex fori*’, and ‘the applicable procedural or customary law’ with regard to the possibility of submitting a special type of brief.⁵⁴ Not only is the terminology inconsistent and sloppy, but it would seem that all those provisions refer to the same law, the law of the arbitration.

It is suggested, therefore, that a single reference to the ‘law(s) applicable’ should be sufficient and less confusing. It is further submitted that it would suffice to alert the arbitrator to the potential for multiple applicable laws by a single provision to the effect that the arbitrator will ensure, subject to contrary party instructions, that the award will be ‘enforceable’ as widely as possible.⁵⁵ These observations raise a wider question, namely whether arbitration rules enacted by private institutions (rather than public bodies or the legislature itself) should at all contain conflicts rules on the procedure to be followed or the *lex arbitri* more generally.

A critique that has been raised against the UNCITRAL Rules, Article 1(2), is that a provision of wide import (a) gives too wide a title to the municipal law that asserts its applicability⁵⁶ and perhaps (b) creates an additional issue, determining the *lex arbitri*, even where the circumstances of the case do not warrant that.⁵⁷ Point (a) is only academically valid. Article 1(2) is merely declaratory of a fact of life, namely that the parties and the tribunal will have to conform to the provisions protected by setting aside in the controlling forum.⁵⁸ Furthermore, there is simply no question that the parties may derogate from Article 1(2), if obtaining an enforceable award is not a primordial consideration. The UNCITRAL Rules derive their binding force from (in fact, constitute) the agreement of the parties and obtain no higher dignity by a general precept of validity. Thus the position is that the Rules will give way to mandatory provisions (of which law and to what extent the arbitrator will determine), subject to contrary party agreement that will reinstate the impeached provisions of the Rules or further amend them.⁵⁹ That general rule applies to arbitration rules which contain provisions similar to Article 1(2).⁶⁰ Point (b) is more practical, but again to a certain extent theoretical. Article 1(2) is essentially a flag: it does not oblige the tribunal to state the *lex arbitri* if the case does not require such determination, neither of course does it require the tribunal

⁵³ The suggestion would not be weakened by WIPO Rules, Article 38(a).

⁵⁴ See European Rules, Articles 1(6), second indent, 11(2), 12(4), 15(8), first indent respectively.

⁵⁵ This was in fact the position under the LCIA Rules (1985), Articles 5.2 and 20.2 (equivalent to Articles 14.2 and 32.2 now).

⁵⁶ See Fouchard, above, note 45.

⁵⁷ See Sacerdoti, (1977) 11 JWTL 248, 258.

⁵⁸ Details in Böckstiegel, (1984) 1:3 J Int Arb 223, 229-31 (Article 1(2) is declaratory). Accord: von Hoffmann, (1976) 22 RIW 1, 4; Pirrung, (1977) 23 RIW 513, 514.

⁵⁹ The fact that an Article 2 of the Revised Draft which would expressly allow the parties to amend the Rules (see UN Doc A/CN.9/112/Add.1, (1976) 7 UNCITRAL YB 166, 167) was eventually discarded does not, of course, detract from that proposition.

⁶⁰ See AAA International Rules, Article 1(2) (a provision not contained in the AAA International Rules (1993)); CAMCA Rules, Article 1(2); ILA Rules, Article 21.

to supplement the Rules by reference to that law.⁶¹ Thus, pursuant to the general principle of arbitral economy, Article 1(2) should not be read as obligating the tribunal to make a conclusive finding on the *lex arbitri*.

The conclusion to this subsection is that arbitration rules should usefully be confined to warning the parties that there are mandatory provisions of at least one municipal legal system which may be crucial to the validity of the arbitration, without further aspiring to formulating universally valid conflicts rules. The statement of principle in the LCIA Rules (and its followers) is largely valid, but the statement is necessarily accompanied by the proviso that the law of the seat may allow submission to another law; and the application of other laws to specific procedural acts and other matters is not excluded. One then wonders if provisions offering more detailed guidance to the parties and the tribunal are not self-defeating. Perhaps the best way to accommodate both postulates, accuracy of the statement on the *lex arbitri* and some degree of guidance, would be to include both a general statement on the 'law(s) applicable' and a specific, and subordinate to the first, statement on the law of the seat.⁶² A related conclusion is that the 'seat' or 'place of arbitration' is defined in all modern rules as that determined by the parties and/or the arbitral institution and/or the tribunal, whether or not the rules refer to the law of the seat.

2. The Rules of the ICC: Historical and Textual Analysis

Initially, the 1922 ICC Rules contained no general provision on procedural law. Article XXXIII provided that the National Committee or Organization Member (not the tribunal) 'shall determine and regulate the procedure in order that the award, when rendered, may be entitled to legal recognition'.⁶³ This was clarified in the Explanatory Report as being subject to certain *de minimis* requirements of procedure, such as notice being given to the parties and an opportunity to rebut the arguments of the opponent.⁶⁴ It is plain that the intent was to comply with mandatory requirements of the law of the *situs* of the proceedings whose violation could entail annulment.⁶⁵ The philosophical foundations were also clearly stated: '[T]he arbitrators are real judges exercising their functions by an implicit mandate from the State.'⁶⁶

The 1927 ICC Rules followed the same pattern, save that an Article 16(1) granted the arbitrator discretion in establishing the evidence (the predecessor of Article 20(1) of the current version of the Rules). Moreover, the due process requirements were formalized and detailed.⁶⁷ An important change, which was to remain a fixture of ICC arbitration, was the inclusion of a rule to the effect that 'The Court of Arbitration and the arbitrators ... shall so act as to render an award capable of legal enforcement'.⁶⁸ It was clarified that this overriding rule did not concern exclusively the law of the seat. The provision went on to state:⁶⁹

⁶¹ On the latter point: Böckstiegel, above, note 58, 227-8; Blessing in WIPO Publication No 74I, 1995.

⁶² Thus the SIAC Rules, Rules 1.1 (= UNCITRAL Rules, Article 1(2)), 17.2 (= LCIA Rules, Article 14.2), 25.

⁶³ ICC Rules (1922), Article XXXIII.

⁶⁴ See Explanatory Commentary of the Rules of Conciliation (Good Offices) and Arbitration (Appendix to ICC publication No 21, 1923) 4.

⁶⁵ See Proposed Plan for ICC Arbitration (ICC Publication No 13, 1920) 18.

⁶⁶ *ibid* 17.

⁶⁷ See ICC Rules (1922), eg, Articles 17(3) (notice), 18 (exchange of briefs).

⁶⁸ ICC Rules (1927), Article 16(2), first indent. Article 27 of the ICC Rules (1927), which directs the tribunal to supplement the Rules 'in accordance with [their] general tenor' must be read subject to Article 16(2); indeed, in subsequent versions the two provisions merge: ICC Rules (1955), Article 31; ICC Rules (1975/1988), Article 26; ICC Rules, Article 35.

⁶⁹ ICC Rules (1927), Article 16(2), second indent.

It shall be in the discretion of the Court of Arbitration ... whether or not the grounds of the award shall be stated and in this connection due regard shall be had to the laws of the country in which the award may have to be enforced.

This transpires even more clearly from Article 17(3), which permitted *amiable composition* with the agreement of the parties and ‘provided that it will not in any way interfere with the legal enforcement of the award’.⁷⁰ The original proposal provided however for compliance only ‘with the law of the country where the case is tried’.⁷¹ All those provisions survived intact the 1931⁷² and 1933⁷³ amendments.

Admittedly, *amiable composition* is in the realm of competence rather than procedure, but it goes to show the conception of the law of the arbitration by the ICC in its early days. The duty to produce an enforceable award comprised two distinct obligations: first, compliance with the law of the seat (a non-technical concept at the time) insofar as its non-observance would lead to annulment and, second, compliance with requirements of the law of the enforcement forum insofar as they would preclude enforcement. Their interrelationship poses some interesting questions to which we return below. The point here is that the shorthand of ‘enforceable award’ takes account of the ambulatory nature of international arbitration and subsumes under it detailed rules of compliance of the ‘relevant’ or ‘competent’ laws. It recognizes that there cannot be a single conflicts rule, but the tribunal has unilaterally to inquire the laws that assert their application and to act accordingly, being guided by the principle of enforceability.⁷⁴ Thus, from its inception the ICC sought not to dissociate arbitral proceedings from the law of the seat, but to serve two masters, as it were.

Subsequent versions of the Rules must be seen in that light. Thus, in 1939 Article 16(h) was amended to read that appeal was waived to the extent that such waiver could ‘validly’ be made, without further specifics.⁷⁵ Those amendments marked, however, the birth of a much-discussed provision, which remained unaltered in the 1947 revision, and only slightly modified in the 1955 version of the Rules.⁷⁶ Read against Article 17(3) (which was added in 1939), Article 16 of the 1955 ICC Rules would read as follows (suppressed language of Article 17(3) in brackets, new language by Article 16 in italics):

[Subject to § 2 of this Article] The rules [of law] by which the arbitration proceedings shall be governed [as well as those applying to the formalities of the drafting of the award] shall be these Rules and, in the event of no provision being made in these Rules, *those of the law of procedure chosen by the parties or, failing such choice, those of the law of [the place of arbitration] the country in which the arbitrator holds the proceedings.*

Textually, the hierarchy and meaning are clear. Party autonomy, in the form of the rules, is paramount. A certain procedural law intervenes to regulate the issues, if any, not resolved by the rules

⁷⁰ ICC Rules (1927), Article 17(3), as amended in 1933 (below, note 73). Drafting changes made in 1947 (below, note 76) were retained in the ICC Rules (1955), Article 19(3).

⁷¹ Arbitration Report, ICC Journal (June 1926) 3, 4. Cf Frowein, ICC Journal (May 1928) 19, 20.

⁷² See ICC Resolution No 14 (1931).

⁷³ See ICC Resolution No 19 (1933). Language improvements were made to Article 17(3).

⁷⁴ This explains the suppression of Articles XVI/XXXVII (evidence to be taken by tribunal) and XVII/XXXVIII (sworn statements) of the ICC Rules (1922) in the ICC Rules (1927): permissibility was now to be determined by the arbitrator.

⁷⁵ See ICC Rules (1975/1988), Article 24(2); ICC Rules, Article 28(6).

⁷⁶ See ICC Resolution 14 (1939); Amendments to the Rules (ICC Publication No 117, 1947) 73-7.

themselves, and the law of the state of the proceedings applies only as a fall-back option.⁷⁷ This picture is incomplete. There is ample evidence in other provisions of the 1955 ICC Rules that the supremacy of the interested law(s), that is, the law(s) whose violation would lead to annulment, was preserved.⁷⁸ The generally accepted interpretation was also that the law of the designated seat (according to Article 18) would have to be respected, on pain of annulment.⁷⁹

Three further observations are called for. First, the wording ‘by which the arbitration proceedings shall be governed’ is in itself very broad. It may also cover the validity of the agreement and the law applicable to the merits. The reference to a procedural law further down does not necessarily detract from that, since arbitration as a subject-matter was, and still is, often regulated in procedural codes. The absence, in the 1955 Rules, of a specific provision regarding the law applicable to the merits corroborates the suggestion. Secondly, the reference to the state of the proceedings contemplates the state determined as such by the parties or the ICC Court and where the award is deemed to have been made. Despite the infelicitous formulation which leaves doubts, the place where proceedings are ‘held’ is a legal notion, and this became a permanent feature ICC arbitration.⁸⁰ Thirdly, it transpires from the provision as a whole that the parties could supplant the law of the seat by specific agreement. Since that law was rendered applicable by Rules which *are* the agreement of the parties, the parties could amend the Rules.

This last point is often overlooked, and the 1975 revision of the Rules is often cited as a quantum leap. Article 11 of the 1975/1988 ICC Rules stated:

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, *and whether or not reference is thereby made to a municipal procedural law* to be applied to the arbitration.⁸¹ (emphasis added)

It is noted at the outset that the corresponding provision in the (1998) ICC Rules, Article 15(1), is in all material respects identical, save that ‘municipal procedural law’ has now been replaced by ‘rules of procedure of a national law’—which clarifies that the intervention of municipal law, if any, is limited to procedure (ie, rules of conduct) rather than extend to the ‘proceedings’ as a whole.⁸²

The change between 1955 and 1975 was one of emphasis only. First, it is clarified that the parties’ guidelines to the arbitrators are binding on the tribunal even if they are creatures of agreement only. By extension, the agreement of the parties does supersede, as far as the arbitrator is concerned, the law of the *situs*. However, the provision is extremely neat in not taking a stance on which procedural law may be relevant or what effects it may have. It is clear that the ICC Rules seek as far as possible to create a self-contained, good-for-all-cases procedural code (or, more realistically, the framework in which to create one). But one must be reserved in that regard.⁸³ While it is clear that the rules do not require the parties or the tribunal to adopt, or even draw

⁷⁷ To the same effect, eg, ECE Rules for Agricultural Products, Article 15(i)(c).

⁷⁸ See ICC Rules (1955), Articles 15(1), 17 (notifications), 19(g), 31 (general duty). This explains the rejection of the Swedish Committee proposal to suppress the proposed amendment; see World Trade (August 1939) 47-8.

⁷⁹ See, eg, Cohn, (1965) 14 ICLQ 132, 150-6; cf *id*, above, note 48. Eisemann, (1966) 15 ICLQ 726, 732 subordinates the law of the seat to party autonomy.

⁸⁰ See ICC Rules (1955), Article 27; ICC Rules (1975/1988), Article 22; ICC Rules, Article 25(3).

⁸¹ See also ILA Resolution, (1962) 50 ILA Rep ix, Recommendation IV: ‘The rules applicable to the arbitral proceedings should be chosen ... by the parties ... either in the submission itself or by reference to [international arbitration] rules.’

⁸² The change was also meant to clarify that ‘municipal’ did not refer to internal law relating to municipalities: Craig *et al*, *Annotated Guide* (1998) ad Article 15(1).

⁸³ cf, eg, Böckstiegel in *Essays FA Mann* (1977) 575, 586-7.

it is clear that the rules do not require the parties or the tribunal to adopt, or even draw inspiration from, any municipal law, nothing is said in Article 15(1) on the more relevant issue of preemptory norms.

It transpires from the ICC Rules as a whole that striving for independence from the law of the seat is not an absolute priority. First, there is the duty of the tribunal (but not the parties, of course) to 'make every effort to make sure that the award is enforceable at law'.⁸⁴ That general duty is limited to matters 'not expressly provided for' in other provisions, but it must be extended as a gloss to every provision of the Rules. Further, the ICC Court is obliged to draw the attention of the parties to elements of the award which may attract annulment. Article 22/17 of the 1980/1988 Internal ICC Rules for the first time stated that the Court

pays particular attention to the respect of the formal requirements laid down by the law applicable to the proceedings and, where relevant, by the mandatory rules of the place of arbitration, notably with regard to the reasons for awards, their signature and the admissibility of dissenting opinions.

The rule was modified in 1998. Article 6 now provides, more generally, that the Court 'considers, to the extent practicable, the requirements of mandatory law at the place of arbitration'.

The wording changes are not significant. The essential elements are, first, that the mandatory rules of the seat may be relevant even when the applicable procedural law is not the same (that will be the case when the scope of application of the law of the seat is not conditioned on its having been chosen) and, second, that the requirements of that law may not be 'relevant' or 'practicable' to follow. That will be the case when the exclusion agreement contained in Article 28(6) will eliminate the possibility of the award's being setting aside; and it may be the case where the award is destined to be enforced exclusively in another state.

The conclusions to draw are rather straightforward. The overriding rule remains that the tribunal must produce an enforceable award. When the rule was formulated it was intended to cover, to the extent possible, all relevant laws. In other words, it was meant to add to, rather than subtract from, the coverage of the law of the place of the proceedings. In particular, it was intended to cover requirements of public policy particular to the enforcement forum. On the other hand, no international instrument or municipal law intends to give effect to annulled awards (though it may permit that in limited circumstances). Consequently, when *situs* law and enforcement law prescribe conflicting requirements which would entail annulment or hinder enforcement, Articles 15(1) and 35 of the ICC Rules would direct the tribunal to consult the parties, whose will is primordial. Should the parties give discretion to the tribunal, the proper course of action is to comply with the law of the place of arbitration, for the overriding public policy in most states is to afford a wide leeway to the controlling forum. Only if it is certain that the parties will not, or cannot, seek annulment and/or that enforcement will be sought only in a certain state must the requirements of that latter state prevail over those of the state of the proceedings. In a nutshell, the ICC Rules substitute the sacrosanctity of the law of the seat with the notion of maximum enforceability. To the extent, therefore, that the law of the seat would be the sole determinant of enforceability, and subject to contrary instructions by the parties, the tribunal must comply with that law.⁸⁵ Thus, Article 15(1) of the ICC Rules has limited import. It emphasizes that procedure should be uniform (and therefore independent of the locale of the proceedings) and tailored to the needs of the case. The parties

⁸⁴ ICC Rules, Article 35.

⁸⁵ Paulsson, (1983) 9 DPCI 323, 338 puts it well by saying that it would be 'irresponsible' to ignore local law in such circumstances; cf Jarvin, [1990] Swedish and International Arbitration 85, 85-7.

and the tribunal may explore the full latitude of the autonomy under Article 15(1) within the confines of enforceability. An ICC tribunal put it thus:⁸⁶

[Article 11 of the ICC Rules (1975/1988)] permits the parties and the arbitrators to conduct the arbitration proceedings outside any specific national procedural law, except insofar as any such relevant procedural law contains rules that may apply mandatorily.

No *en bloc* submission to a given law is necessary.⁸⁷ Nonetheless, the parties' attention should be drawn to elements that may jeopardize the validity of the award in the eyes of the law of the seat, normally controlling, and thus its enforceability.⁸⁸ On a more technical note, whatever discretion in the classification of an issue (as procedural or not) the Rules may grant the tribunal, the relevant classification will be that of the controlling forum.

The position under the ICC Rules is therefore extremely balanced, the parties being the masters of the process: mandatory rules are neither imported⁸⁹ nor expurgated automatically. Unsurprisingly, arbitral practice confirms these propositions.

C. Conclusions

One must note that universal arbitration rules do reserve the mandatory provisions of the law(s) applicable, by different techniques. The ICC Rules have the merit of signalling to the parties that they do not have faithfully to follow any municipal law. The UNCITRAL Rules on the other hand more clearly signal the impact of municipal law; and the arbitration rules inspired by them are even more accurately pointing to a multiplicity of potentially relevant laws. On the whole, arbitration rules, and the literature thereon, are clear on the primordial importance of the law of the seat of the proceedings as the controlling forum. Thus, arbitration practice and municipal law converge on two points (probably as a result of their being developed in parallel): first, the seat is the focal point of arbitral proceedings and, secondly, the seat is a place fixed, in principle by agreement of the parties. It is *not* a geographical location.⁹⁰

Certain consequences follow. The first is that the arbitral institution having the final say on the determination of seat must confine itself to a confirmation of the place chosen by the parties. Since that agreement may be crucial to the fate of the award, the parties must bear the attendant risks and the contractual balance must not be frustrated. This is the standard practice of the ICC Court.⁹¹ Secondly, and this is again general practice and reflected in all modern arbitration rules, it would be advisable to contain a statement in the Terms of Reference or similar pre-hearing agreement clearly stating that the seat of the proceedings will be without prejudice to the faculty of the tribunal to hold hearings elsewhere. Again, this is a recurrent statement in ToRs.

⁸⁶ ICC 8879/1998 (Interim), (2000) 11:1 ICC Bull 85, 88.

⁸⁷ And if a given law is chosen, that should be the arbitration, rather than civil procedure, law: Craig *et al*, *International Chamber of Commerce Arbitration* (2nd edn, 1990) 269. Since the arbitrator is entitled to resort to municipal law only as regards procedural matters, *quaere* according to which law (if at all) such classification should be made. ICC 7620/1997 (unreported), paras 41-52, held that French law, chosen suppletively to apply to procedure, governed the issue whether the original claimant still had standing after the assignment of the claim to a third party (*nul ne plaide par procureur*). ICC 6786/1996 (unreported), paras 91-93 submits the question to the law of contract.

⁸⁸ This is consistently stated in the official commentaries; see ICC, *Guide to Arbitration* (1983) para 4.7; *id*, (1994) 36. The literature is unanimous on the point; see, eg, Robert, [1976] Rev Arb 83, 85; Schwab in *Recht und Praxis* (1986) 53, 59; Kopelmanas, [1975] AFDI 294, 304-5; Derains, (1993) 120 JDI 829, 839-40.

⁸⁹ Thus Bond, (1992) 8 Arb Int 83, 84; Eisemann, (1976) 1 YCA 157, 168-9.

⁹⁰ See LCIA Rules, Article 16.1: 'The parties may agree in writing the seat (or legal place) of their arbitration.'

⁹¹ eg: Verbist, (1996) 12 Arb Int 347, 348-9.

An obvious advantage of the alignment between arbitral practice and arbitration law on the central importance of the seat is that the parties may with some certainty foresee the ground rules. It is important that the law of the seat will impose its own conception of which requirement is mandatory, whether that be classifiable as ‘procedural’ or not. This avoids the quite roundabout situation where the arbitrator determines that non-conformity with a certain rule would lead to annulment and then classifies that as procedural, to justify conforming to that law.⁹² Note also that the general rule would not depend on whether the arbitrator acts as *amiable compositeur* or not.⁹³

However, the alignment between arbitration practice and law cannot, in the nature of things, be absolute. Chapter 1 concluded on the note that the parties cannot be considered, on principle or law, to need the licence of any legal system for their arbitration to take place. They have the contractual freedom to arbitrate. Whether they will arbitrate within or without inverted commas is irrelevant here; the point is that they control the whole exercise. An important consequence of that is that the parties may at any point derogate from the arbitration rules they agreed upon, for these rules are after all their agreement, subject to a newer agreement.⁹⁴

Most arbitration would at first blush belie the proposition, putting the agreement of the parties in second position, after the rules themselves.⁹⁵ Arbitration rules must, however, be self-referential, in other words continue to assume that they express the agreement of the parties on the conduct of the proceedings on all points dealt with by such rules. So the general proposition and the formulation of arbitration rules are both, from different angles, correct.⁹⁶ It is not correct, however, to state that as a principle the arbitrators, once appointed, should have absolute control over the proceedings, because ‘the parties should not be able to impose their will upon an unwilling tribunal’.⁹⁷ It is not ‘a’ tribunal, it is their tribunal; and the arbitrator may always resign, whereas a final award is binding on the parties. Thus, arbitration laws draw a healthy line when they prescribe that the parties may amend the terms of reference for the tribunal at any reasonable point before the conclusion of the proceedings.⁹⁸

The practical relevance of this point arises when the parties wish to derogate from a provision regarded as imperative by the administering institution,⁹⁹ or in CIETAC arbitration when the parties wish to derogate from the CIETAC Rules at all.¹⁰⁰ If the parties wish to invest a state court with exclusive authority to determine a challenge of an arbitrator, or to replace an arbitrator, or if they wish to avoid the ICC Court’s scrutiny of the draft award, it is certain that the ICC will not consider the arbitration as being under its auspices anymore.¹⁰¹ But there is no doubt that (a) this is the maximum sanction conceivable and (b) the arbitrators are still bound to the parties.

⁹² cf ICC 4604/1984, (1985) 112 JDI 973, 976.

⁹³ cf ICC 2879/2978, (1979) 106 JDI 989.

⁹⁴ cf Bucher in *Recueil de Travaux suisses* (1984) 127, 134.

⁹⁵ eg, ICC Rules, Article 15(1), quoted above.

⁹⁶ The situation would not be legally different under rules which do not seem to give any standing to the parties to determine the rules of conduct further than having chosen those rules to apply; see, eg, ECE Rules, Article 22.

⁹⁷ Smit in *Worldwide Forum* (1994) 216, 220.

⁹⁸ cf CJ, Article 1693(1); Act 31/1986 (Portugal), Article 15(1).

⁹⁹ See Arnaldez, (1993) 120 JDI 858, 868.

¹⁰⁰ See CIETAC Rules, Article 7. For an example see Connerty, (1999) 65 JCI Arb 203.

¹⁰¹ See ICC Rules, Articles 11-12 and 27.

II. OVERVIEW OF ARBITRATION PRACTICE
WITH PARTICULAR REFERENCE TO ICC PRACTICE

A. The Practice in regard to Choice of Procedural Law by the Parties

1. Preliminary Questions

It is important at the outset to make a note on the wisdom of arbitrating strictly in accordance with a municipal arbitration law¹⁰² or, worse, procedural law. As has been seen immediately above, the ICC Rules indirectly discourage that, and this tallies with practice and authority. The first element is that arbitration statutes do recognize the inadvisability of setting out detailed rules of conduct good for all cases by confining themselves to a few mandatory provisions. The second element is that unless the tribunal consists of locally qualified lawyers they will not be able to administer the law chosen. The resulting evil is a window of opportunity for procrastinating litigation. The misadventures of the *Black Clawson* case were in no small measure due to an agreement to submit ‘in all respects’ to the relevant provisions of the Zurich ZPO, ‘whether the arbitration is in fact held in Zurich or elsewhere’.¹⁰³ The parties also agreed that the arbitrators would have no power to appoint an independent expert except with the parties agreement. The case turned out to be exceptionally complex and a vigorous dispute arose on whether, under the law of Zurich, the tribunal could depart from its order and appoint an expert. The tribunal did in the end make an appointment, but the dispute on that incidental point derailed the process: the case went up and down the Swiss judicial ladder twice¹⁰⁴ and travelled to England too. In another case the parties agreed on the application of the Mauritius CCP. An award was challenged on the ground that an arbitration conducted on the basis of documents only was a nullity in Mauritius and should be set aside on misconduct in England.¹⁰⁵ The English court did uphold the award, but that involved the determination of a point of foreign law, on which detailed (and contradictory) expert testimony was provided.

Thus, resorting to a particular national law should be avoided except to the extent indispensable to the validity of the award,¹⁰⁶ and perhaps where certain of its rules are appropriate to the circumstances (and then on a rule-by-rule basis). There would therefore be no inconsistency between a clause of the ToR preserving the mandatory provisions of the law of the seat, while stating that the rules of procedure will be determined by the tribunal ‘*sans avoir à se référer à une loi interne de procédure*’.¹⁰⁷

Statistics for arbitration agreements insofar as procedural law stipulations are concerned are rare, because the ICC does not compile such statistics. It is reported that in 1987 and 1989 only one clause each year provided for the application of a particular law.¹⁰⁸ It is also reported that of all the arbitration agreements submitted to the ICC in 1992, 1993, and the first quarter of 1994,

¹⁰² eg: ‘This Agreement and Arbitration thereunder shall except as otherwise expressly provided be governed by the Law of England’: Lloyd’s Standard Form of Salvage Agreement (LoF 1990), [1991] LMCLQ 117, s 1(g).

¹⁰³ See *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd’s Rep 446, 450.

¹⁰⁴ See TF, 105 Ia ATF 247; TF, 106 Ia ATF 229.

¹⁰⁵ See *General Construction Ltd v Aegon Insurance Co (UK) Ltd* (21 May 1997).

¹⁰⁶ See further Blessing, above, note 61, 23; *id.*, (1997) 8:2 ICC Bull 16, 22-3; Hascher in *Planning Efficient Arbitration Proceedings* (1996) 322, 335-6.

¹⁰⁷ ToR in ICC 6339 (1998).

¹⁰⁸ Bond, (1987) 2 ICSID Rev-FILJ 153, 167; *id.*, (1990) 1:2 ICC Bull 14, 21. In 1987 and 1989 respectively 285 and 309 cases were introduced: (1988) 115 JDI at 1196; (1990) 117 JDI at 1018.

only 5-10% referred to a procedural law. Some of those provisions were only intended to supplement the ICC Rules; others made the 'law' of a state the 'procedural law' of the arbitration (in which case the arbitration law of that state applies, not the civil procedure law); others still referred to the 'procedural law' of a state. In that context it is mentioned that an agreement on 'the international arbitration law' (of the seat or other)¹⁰⁹ should in the first instance be construed as a *renvoi*: where that law allows for procedural autonomy, the arbitrator's mandate does not encompass the local procedural rules,¹¹⁰ save to the extent that (a) the Rules are silent and arbitrators have not been empowered to determine the procedure, and/or (b) the procedural law rules are specifically applicable to the arbitration at hand and are mandatory.

Similarly, if the arbitration clause is accompanied by a forum clause, the forum clause will be construed as a procedural law clause.¹¹¹ But it is not straightforward to determine the effect of clauses fixing the seat in state A, submitting the 'arbitration' to the law of state B, and being followed by another clause, on the law applicable to the main clause.¹¹² These could be construed either as agreements on the law applicable to the arbitration agreement only, or to the procedure only, or both. Opting for the first of those alternatives would be the most practical solution.¹¹³ It is certain, however, that a choice-of-law clause without further specifics will not refer to procedural law, but only, if at all, to the proper law of the arbitration agreement.¹¹⁴ A final point is that when the parties submit to the law of a state other than that of the seat, the stipulation should, within proper limits of construction, be taken as contractual incorporation of, rather than veritable submission to, the law so chosen. Alternatively, it may be taken as veritable submission, but to the extent allowed by the law of the seat.¹¹⁵ The justification would be in either case that such construction would give maximum enforceability to the resulting award.

The paucity of procedural law agreements is partly due to the fact that the ICC suggested clause, as all institutional suggested clauses, merely provides for settlement 'under the Rules'. It is also reasonable to assume that by contrast with the law of the contract, the applicable procedural law will hardly be a priority for the draftsman of a standard commercial agreement. It is believed that if the parties do apply their minds to the particulars of the proceedings they will tend to determine the locale of the proceedings and leave it at that.

The following subsections include the results of a research based on a sample of 160 cases pending before ICC tribunals in June 1999.

2. 'Plain Vanilla' ICC Agreements

There were 108 instances where the parties had inserted a clause based on the suggested ICC clause, or a simplified¹¹⁶ or pathological¹¹⁷ variation thereof ('Variant A'). Further to confirm the

¹⁰⁹ eg, ICC 4237/1984, (1985) 10 YCA 52.

¹¹⁰ Hascher, above, note 106, 329 and 331; Paris, 3 April 1985, [1985] Rev Arb 170 ; but see Cohen, [1991] Rev Arb 155, 173-4.

¹¹¹ ICC 7314/1995 (Partial), (1997) 8:1 ICC Bull 64; and see *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 127, 129-30.

¹¹² See ICC 9997.

¹¹³ See above, Chapter 2, note 87.

¹¹⁴ ICC 5505/1985, (1988) 13 YCA 110, sub [9]. In ICC 5029/1986, below, note 158, sub [6] the same conclusion was reached on the ground that that '[t]he prevailing interpretation of the Rules ... nowadays is also that the mandatory provisions of the arbitration law of the place of arbitration govern the arbitration'.

¹¹⁵ See ICC Interlocutory Decision of 1990 in *METEX v Turkiye Elektrik Kurumu Genel*, as quoted by Ehrat in *The New York Convention* (1996) 225, 228-9.

¹¹⁶ eg: 'All disputes shall be settled by the ICC, Switzerland.' Cf ICC 9885, 10630.

point, some of them even set out in full Article 11 of the 1975/1988 ICC Rules or Article 15 of the ICC Rules (1998).¹¹⁸ This standard clause and its variants will here be called 'Variant A'. In all those cases the terminology employed varied, but this should not be legally relevant: one finds the terms 'venue', 'seat', 'place', 'place of jurisdiction',¹¹⁹ 'place where the arbitration is to be carried out' or 'take place' used interchangeably.

Interestingly, at least fifteen ToR reproduced *verbatim*, or contained words to the same effect as, the ICC standard clause.¹²⁰ At least five ToR explicitly gave the tribunal authority to settle any questions not covered by the Rules.¹²¹ A variation of that is to stipulate that the procedure will be determined by the clause, the ToR, the ICC Rules and, if need be, by the tribunal and the parties 'by consensus'¹²² or by the tribunal after consultation with the parties.¹²³ Of course, those and similar stipulations merely confirm the provision in the ICC Rules.¹²⁴ Such arrangements are to be contrasted with certain clauses which do make provision for the case where the stipulated substantive law will be silent but no such provision concerning procedure.¹²⁵

Again, the standard clause is not determinative in itself, in that it gives the parties and/or the tribunal ample scope to shape the procedural régime. The evidence shows that in the uncommon case where the parties intend to make specific arrangements in regard to procedure, they do so directly, by setting out specific rules for the production, presentation and evaluation of evidence;¹²⁶ on deadlines; rules confirming the availability of court-ordered interim protection pending the proceedings;¹²⁷ and, occasionally, providing for waiver of recourse.¹²⁸ Obviously, such arrangements take precedence over any contrary provision in the Rules.¹²⁹ A clear formula would be as follows: 'The arbitration is governed by the ICC Rules ... in force ..., subject to such further agreement as the parties may make, or in default of agreement as the arbitrator may order.'¹³⁰ However, on one occasion the ToR conditioned any particular arrangements upon 'any mandatory provision' of the ICC Rules.¹³¹ The term 'mandatory' is either promiscuous or premised on something outside the Rules themselves..

In a nutshell, agreements providing that the procedure will follow the ICC Rules are a vehicle to confer maximum procedural flexibility and in no way prejudge the applicable procedural law, if any. It is believed that, as such, they are favoured by the ICC itself.

¹¹⁷ On pathological clauses, whose occurrence is diminishing, see generally Eisemann in *Essais Minoli* (1974) 128.

¹¹⁸ ICC 8635, 9042, 9216, 9391, 9692.

¹¹⁹ ICC 8624.

¹²⁰ ICC 8941, 9063, 9070, 9158, 9187, 9217, 9358, 9442, 9528, 9671, 9839, 10043, 10112, 10123, 10214.

¹²¹ ICC 10076, 10107, 8732, 8733. The ToR in ICC 9611 read: 'lacking provision [in the Rules] the procedure shall be freely determined by the Arbitrator.'

¹²² ICC 9614.

¹²³ ICC 9435 (settled by award on agreed terms, 1999).

¹²⁴ See ICC Rules (1975/1988), Article 11; ICC Rules, Article 15(1).

¹²⁵ See ICC 9691.

¹²⁶ ICC 9610 (the arrangements in the clause were elaborated in the ToR), 9773 (on, *inter alia*, confidential documents), 9883 (where Article 19(2) of the UNCITRAL Model Law is reproduced *verbatim*), 10043 (where witness statements are admissible only if the witness will also provide oral evidence; settled by award on agreed terms, 1999), 10326 (the clause providing for umpire procedure).

¹²⁷ See ICC Rules, Article 23.

¹²⁸ ICC 9787.

¹²⁹ Expressly so ICC 9042.

¹³⁰ ICC 9836.

¹³¹ ICC 8624.

3. Municipal Law as Suppletive

Arrangements whereby a municipal law, most commonly that of the seat of the tribunal, will supplement the ICC Rules are another common category, which will here be called ‘Variant B’. An example would be worded as follows: ‘The place of arbitration shall be [X]. The procedural law of this place shall apply where the Rules are silent.’¹³² Or even more clearly:¹³³

The rules of procedure not expressly provided by the [ICC Rules] shall be determined according to the law applicable in the Canton of Vaud, Switzerland, including all the provisions of the [Concordat], whether mandatory or not.

It is much more common, however, to have a blanket reference (rather than specific reference on procedural law) to a certain municipal law; for example: ‘The proceedings will be governed by the ICC Rules and Chapter 12 of the Swiss LDIP.’¹³⁴ Such wording really gives the tribunal flexibility to determine whether ‘and’ intends to give precedence to municipal law or simply to designate a pool of authority from which the tribunal can draw. The ToR in ICC 10026 establish a clearer hierarchy. They state that as a principle the arbitration is subject to the ICC Rules and then that ‘subject to [those Rules], the provisions of the English Arbitration Act 1996 shall apply ...’.¹³⁵ There are two interesting cases where the law suppletively designated was not that of the seat, namely that of the main contract¹³⁶ and that of the nationality of the arbitrator¹³⁷ respectively—the assumptions of the parties being clear in either case.

The effect of such choice poses interesting questions. When the law chosen as supplemental contains provisions going further than those of the controlling forum, which are mandatory in the chosen law but allowed by the law of the controlling forum, should the arbitrator give effect to them as mandatory *inter partes*? The better answer is probably yes.¹³⁸ On the other hand, the arbitrator should not as a principle have to apply the provisions of a law chosen as supplementary when they would conflict with mandatory rules of the controlling forum, because the ICC Rules (the primary choice of the parties) incorporate those mandatory provisions.

¹³² Clause in ICC 7776/1996 (unreported). Also: ICC 9812, 9976, 9984, 10008, 10383.

¹³³ ICC 9056.

¹³⁴ cf ICC 8753 (Swiss law will ‘also apply’), 8877, 9143, 9705, 9673. See also ICC 9305/1999 (unreported) para 15, where a tribunal in Bucharest appointed experts in compliance with Romanian law procedure, and where the ToR mandated that the procedure would be that ‘prescribed by the [ICC Rules] and, so far as applicable, by the provisions of Book IV of the Romanian CCP’.

¹³⁵ ICC 10026. Cf the clause in ICC 7397/1998 (unreported): ‘Unless [otherwise] provided by the [ICC Rules] the municipal law shall apply to the procedure.’

¹³⁶ The clause in ICC 10377 provides that disputes will be resolved by a tribunal ‘appointed in accordance with the [ICC Rules] supplemented as necessary by the procedural rules of the law of the country of the Supplier’s place of business, most closely connected with the contract’ (the last part having been lifted from the applicable law clause).

¹³⁷ ICC 9752: arbitration in Karachi between Libyan and Pakistani parties; in silence of the ICC Rules Kuwaiti law applicable.

¹³⁸ cf ICC 3540/1980, (1980) 107 JDI 914 (on authority to make partial awards).

4. Mandatory Provisions Safeguarded

‘Variant C’, where the mandatory procedural rules of the state of the proceedings (or a third state) are expressly given precedence, is the most clear-cut type of arrangement.¹³⁹ There are two observations *in limine*, as it were. First, most of such arrangements are done in the ToR; which indicates that when the arbitrators intervene in the choice-of-law process and when the parties apply their minds to the procedural law issue they tend to be on the safe side. Second, a wholesale choice of procedural law will import the mandatory provisions as well, which will therefore take precedence, in the agreement of the parties and so far as the arbitrators are concerned, over those of the law of the seat. Such submission to a procedural law in the arbitration clause is, this author found, not so rare as sometimes depicted in the literature.¹⁴⁰ Also contrary to popular belief, parties do sometimes, but by no means often, designate the law of a state other than that of the proceedings as wholly applicable to procedure. This was done, for example, in a German law arbitration in Paris, where the contract was governed by German law and drafted in German.¹⁴¹ However, there is only so much the parties can do by agreement, and ICC 10128 is an eccentric example. The clause provides for arbitration in Switzerland and that remedies against the award are available only insofar as 9 USC §§ 9-11 permit. Now Swiss law has a unique remedy, *recours de droit public* (which is equivalent to, but allowed on more limited grounds than, *vacatur* under 9 USC § 10), but not for confirmation or modification (9 USC §§ 9 and 11 respectively). Clearly, the clause would have effect only insofar as Swiss law allows it to have effect, for Swiss law asserts its application unilaterally.¹⁴² Here the parties lose the possibility of ‘heightened’ control, because Swiss law excludes it.¹⁴³

An interesting example, which moreover imports elements seen above, is to be found in the ToR for ICC 9719:

The present arbitration is subject to Chapter 12 of the [LDIP]. It shall be conducted in accordance with the ICC Rules and those of the present [ToR]. In case of doubt concerning the meaning of these rules, the interpretation of the Sole Arbitrator shall be controlling. Where these rules are silent, the procedural rules shall be determined by the Sole Arbitrator after due consideration of the views of the Parties.

Note the bifurcation between global subjection (Swiss law as the *lex arbitri*) and the rules of conduct. This, of course, is merely a statement of the legal situation; Swiss law does by its own terms apply to all proceedings in Swiss territory (*in casu* Zurich), and does prevail over private arrangements, as is also implied in the statement. However, the rule quoted was in the section of Procedural Rules in the ToR, which emphasizes by implication a point made repeatedly in this thesis, namely that the main impact of the *lex arbitri* is on procedure.¹⁴⁴ Nonetheless, many clauses, and

¹³⁹ ICC 9658, 9701, 9880, 10062, 1066, 10188, 10199, 10202, 10214 (with varying formulations). For example: ‘The arbitrators shall not be obliged to follow judicial formalities or the rules of evidence except to the extent required by governing law, that is, the state law of [Pennsylvania as] the *situs* of the arbitration as herein agreed’; quoted by Wirth, M, ‘Enforceability of a Foreign Security Award in Switzerland’ in *The New York Convention of 1958* (ASA Special Series No 9, 1996) 244, 244-5.

¹⁴⁰ For submission to the law of the seat see ICC 8877, 9797 (if proceedings are to take place in Switzerland, Swiss law), 9961 (‘subject to any mandatory rules of [state X]’), 10099, 10211 (‘The law governing the arbitration (*lex arbitri*) is Swiss law’), 10261, 10322. See also the clause in ICC 10412: arbitration in London, the award to be ‘in accord with applicable law and supported by material evidence’.

¹⁴¹ ICC 9958. See also ICC 9942 (arbitration between Pakistani parties, one of them state-controlled: ‘English law shall also [ie, in addition to the contract] govern any submission to arbitration hereunder.’)

¹⁴² Additionally, the ToR confirmed the applicability of the mandatory provisions of Swiss law.

¹⁴³ TF, 117 II ATF 346, 347.

¹⁴⁴ To confirm the point: ICC 8447, 8880, 10246.

more commonly ToR, will more directly speak of the applicable procedural rules or law.¹⁴⁵ This is exemplified in an exceptionally detailed arbitration clause made between French and US parties, which distinguished between substantive law (California) arbitrability (US federal law), and procedural law and venue (French).¹⁴⁶

5. Negative Choice

Not surprisingly, there are very few instances of such ('Variant D') arrangements. Hascher found only three clauses purporting to exclude the application of municipal law. A typical one was drafted as follows:¹⁴⁷

Les arbitres auront la qualité d'amiables compositeurs, c'est à dire qu'ils ne seront pas tenus d'appliquer les dispositions d'une loi quelle qu'elle soit, qu'elle se rapporte à la procédure ou au fond de l'affaire

Further, one must be cautious to distinguish a clear dissociation from municipal law from the more oft-encountered case where the parties stipulate that the tribunal shall act fairly and impartially and afford each party a reasonable opportunity to present its case, or words to that effect.¹⁴⁸ These last words, are lifted from the ICC Rules, Article 15, and are insufficient altogether to exclude municipal law; although they may exclude a particular rule, even mandatory, going against fairness as perceived by the tribunal (eg, a rigid presumption on evidence). In other words, negative choice must remain exceptional and be given effect to only in presence of explicit language. That being the case, the parties would be well advised to provide, more generally, that:¹⁴⁹

Procedural questions arising in the course of the Arbitration not resolved by these Terms of Reference shall be resolved by decision of the Tribunal applying the ICC Rules or, where they are silent, any other rules or standards which the Tribunal considers appropriate in furtherance of fairness and justice.

B. The Practice of Arbitral Tribunals

Principle of Arbitral Economy. It is important to bear in mind that, unless required by a specific question, arbitral tribunals will not make a ruling on either the *lex arbitri* or procedural law.¹⁵⁰ They will far more commonly, and correctly, try to resolve the issue by applying the ICC Rules directly.¹⁵¹ Arbitrators will similarly try to exhaust the limits of interpretation of the relevant provision of the Rules before resorting to municipal law, even if they have found that that municipal law is applicable (on the whole or to procedure).¹⁵² This probably purports to emphasize the self-contained character of the ICC Rules.

¹⁴⁵ eg: ICC 9698.

¹⁴⁶ ICC 10366 (the clause also excludes punitive damages, provides for the possibility of a mini-arbitration, and confirms the separability of the arbitration clause and that interim protection would be available).

¹⁴⁷ Hascher, above, note 106, 325.

¹⁴⁸ See ICC 8419, 8834, 9770.

¹⁴⁹ ToR in ICC 3998, quoted by Jarvin in *Contemporary Problems* (1987) 50, 56.

¹⁵⁰ For an exception see Award 27/1992, (1994) 12 Bull ASA 481, 486 (ad hoc).

¹⁵¹ Thus, eg, ICC 7001/1994, (1997) 8:2 ICC Bull 60 (on validity of appointment of arbitrator); ICC 5622/1992, (1997) 8:1 ICC Bull 52 (on which version of the Rules is applicable).

¹⁵² See ICC 5835/1988 (Interim), (1997) 8:1 ICC Bull 67, 68: whether jurisdiction to direct party to waive attachment in municipal court; though arbitration is subject to Swiss law, tribunal resolves matter by finding an implicit authorization in the Rules.

However, the reported cases are split on whether decisions on jurisdiction should be based on the *lex arbitri*¹⁵³ or the ICC Rules *tout court*. It is probably safe to assume that in all those cases where the arbitrators felt comfortable to state that they had *compétence de la compétence* without founding such jurisdiction on municipal law¹⁵⁴ their finding had been checked for conformity with the law of the seat.

1. The Law of the Seat as the Lex Arbitri

(a) Possible Foundations

A principle of International Law. In an ad hoc award from 1977, the tribunal stated that '[i]t is settled that in the absence of party agreement the arbitral procedure is governed by the law of the state in which the proceedings take place', citing Article V(1)(d) of the New York Convention.¹⁵⁵ This must be wrong. The provision cited has a patently different purpose, namely to allow the *enforcement* forum to ascertain the conformity of the arbitral procedure with the wishes of the parties. And the opposite side of that argument is equally erroneous. An ICC award rendered in Cairo had to determine the impact of a provision of Egyptian law prescribing that the arbitrators be named in the arbitration agreement. The tribunal determined that the provision did not operate with mandatory effect, at least in international cases, but started its reasoning with Article V(1)(d), to support the proposition that the parties may supplant the law of the seat.¹⁵⁶ Again, the provision is entirely inappropriately cited. It purports, among other things, to eliminate any doubt that compliance with the law of the seat of the proceedings is not an *in limine* requirement for enforcement. But it does not operate, nor is it reflective of, any allocation of competence as between states and what they may wish to prescribe or proscribe for arbitrations within their territory.

If a principle of international law on the procedural law applicable could be deduced from the New York Convention that would be from Article V(1)(e), which points to the law of the controlling forum, but neither tribunal alluded to that provision. Moreover, one does not see the usefulness of resorting to principles of law generally accepted in the determination of the procedural law applicable when all one has to do is find the controlling forum. Thus, the statement of a distinguished ICC tribunal that 'in international commercial agreements ... the parties are entitled, under the principle of the autonomy of the will, to choose the law ... applicable ... to the procedure of ... arbitration'¹⁵⁷ must be read as subordinate to the principle of effectiveness. Another ICC tribunal has described the result of that freedom of parties as 'internationalization of arbitration within the framework of national law'.¹⁵⁸

The Law is Applicable by its Own Terms. In ICC 5294/1988, a sole arbitrator sitting in Zurich held that 'since Zurich is the place of the arbitration, the procedure is governed by the ICC Rules and

¹⁵³ See, of many examples: ICC 6786/1996 (unreported), paras 73, 85 ('in determining jurisdictional issues the Tribunal is required to respect the mandatory provisions of [Dutch law]'); ICC 3572/1982, (1989) 14 YCA 111, sub [10] (*compétence*); ICC 4402/1983, (1984) 9 YCA 138, sub [1], [4] (partial awards) [7] (*compétence*).

¹⁵⁴ See ICC 6437/1990, (1997) 8:1 ICC Bull 63; ICC 7895/1994, (1997) 8:1 ICC Bull 67.

¹⁵⁵ Award of 3 November 1977, [1980] Rev Arb 560, 562. See also Hamburg Friendly Arbitration, Final Award of 29 December 1998, (1999) 24a YCA 13, sub [4] where the reasoning is also based on § 1025 ZPO.

¹⁵⁶ ICC Award of 5 April 1984, [1986] Rev Arb 469, 473.

¹⁵⁷ ICC 4695/1984, (1986) 11 YCA 149, sub [4].

¹⁵⁸ ICC 5029/1986, (1987) 12 YCA 113, sub [7].

the Zurich [ZPO]'.¹⁵⁹ It is interesting that the arbitrator chose that foundation for its holding, since the arbitration clause provided in any event for ICC arbitration 'in accordance with Swiss law of the Canton of Zurich'.¹⁶⁰ The examples of this sort could be multiplied, but the present one is indicative of a trend to settle the *lex arbitri* in certain and wide terms.¹⁶¹

Implied Choice. There is little arbitral precedent on the application of the law of the seat through an implied or imputed choice. In ICC 4145/1983 the tribunal held that to determine the validity of the arbitration clause it would apply Austrian law as the law of the '*lex fori*', should there be no precise applicable law provided in the clause itself.¹⁶² This type of reasoning points to either an application of the subsidiary vocation of the law of the seat or an implicit choice of the parties to be found in the choice of the venue. ICC 5505/1985 is a clear example of the latter possibility.¹⁶³ The arbitration clause provided that '[t]he arbitration will take place in Switzerland, the law applicable is that known in England'. The sole arbitrator held that a choice of venue is a strong indication for the application of the local procedural law, which can be overturned only by explicit contrary agreement or serious reasons related to the organization of the arbitral proceedings by the parties: 'Nothing indicates that the parties could have reasons to avoid the application of Swiss procedural law and to choose specifically English procedural law. Moreover such choice would bring with it numerous difficulties.'¹⁶⁴ The arbitrator treated the agreement as a contractual incorporation of English law rules, subject to Swiss law. This approach may generally be called *the principle of prudence*, and is commendable.

An interesting example, illustrating the difficulty arbitrators may find in justifying an implied choice, is provided by ICC 2730/1982.¹⁶⁵ The parties had agreed on the 1955 version of the ICC Rules, and the issue before the arbitrators was whether a lapse of five years between the request for arbitration and the seizure of the tribunal caused a lapse of jurisdiction equivalent to want of prosecution ('*péremption d'instance*'). The tribunal applied French procedural law (and found that there was no lapse of jurisdiction), on the cumulative grounds that Article 16 of the 1955 Rules referred to the law of the place of arbitration and that the parties had argued on the basis of that law. Derains, in his case note, makes the point that the tribunal was uncertain whether the choice of the ICC Rules, and Article 16 in particular, should always be construed as an implicit, if subsidiary, choice of law applicable, and that it corroborated its conclusion by referring to further evidence supplied by the actual behaviour of the parties. It would follow that the inverse is equally possible; that is, where the agreement makes subsidiary reference to the law of the seat, exclusion of that law may even result from an implicit agreement, evinced by the behaviour of the parties during the proceedings. This construction, however, would too easily bring about serious consequences, and should be refuted.

The implied choice construction would yield satisfactory results in the vast majority of cases, where a choice of seat without more must be construed as an acceptance of the law of that state as

¹⁵⁹ ICC 5294/1988, (1989) 14 YCA 137, sub [1] (the issue was to determine the effect of parallel court proceedings).

¹⁶⁰ *ibid* sub [3].

¹⁶¹ See also ICC 7047/1994, (1997) 8:1 ICC Bull 61, 62-3; ICC 7929/1995 (Interim), (1996) 14 Bull ASA 544, 547-8 (on *compétence*); ICC 5791/1989, (1995) 13 Bull ASA 728, 735 (whether there is jurisdiction to admit set-off claims); and the awards cited in note 153 above.

¹⁶² ICC 4145/1983 (First Interim), (1987) 12 YCA 97, sub [7].

¹⁶³ See also ICC 3099-3100/1979, (1982) 7 YCA 87, sub [1]: the law applicable to the remedies (and by extension to the procedure) is that of the seat, chosen by the parties.

¹⁶⁴ ICC 5505/1985, (1988) 13 YCA 110, sub [9] (emphasis added).

¹⁶⁵ (1984) 111 JDI 914.

the *lex arbitri* and by extension the procedural law (at least to the extent so provided by that state). In that sense, the seat cannot be fortuitous.¹⁶⁶ But the law implicitly chosen must be excludable by express choice of the parties.

A Matter of Enforceability: The Principle of Effectiveness. In the view of this author, this is the most appropriate and consistent test. It would subordinate the procedural régime of the tribunal to the law of the seat in the ordinary hypothesis, but make two exceptions.

A clear statement pointing to considerations of effectiveness is contained in a decision on a challenge of an arbitrator pursuant to the UNCITRAL Rules. It was held that:¹⁶⁷

This matter is governed by the UNCITRAL Arbitration Rules and its interpretation must be based on their text. However, assistance may be gleaned from jurisprudence in other jurisdictions. United States law, the law of the *lex fori*, is particularly relevant. This is because, *inter alia*, it is conceivable that judicial proceedings in relation to the arbitration process, including a challenge to the award because of alleged bias, could be taken at the conclusion of the arbitration in the courts of the United States. The arbitration process, although apart from the judicial process, and notwithstanding that it may be international in character, is nevertheless subject to a modicum of judicial control on the part of those courts where it takes place

The appointing authority clearly and correctly stated that the measure of mandatory application of the law of the seat is given, absent contrary party agreement, by the jurisdiction asserting its mandatory application on pain of setting aside. An ICC tribunal pronounced itself in very similar terms:¹⁶⁸

[A]rticle 11 [of the 1975/1988 ICC Rules] stipulates reference to a municipal procedural law not to be necessary. With regard to the enforceability of the award (see Article 26 [1975/1988] ICC Rules) it is, however, generally advised to refer to the local procedural law ..., since ... both recognition and enforcement of an award may be refused [if the award is set aside].

The general rule is thus that the law of the seat is the first hurdle in the race for effectiveness; compliance with it is to be presumed a necessary, if not always sufficient, condition of validity. The arbitrator should never have to proceed to his own characterization in order to determine the applicability of the law of the seat: applicability should always depend on that law, as measured by the principle of effectiveness.¹⁶⁹ That is the only standard of applicability so far as the arbitrator is concerned.

The rule is clearly proven by the case-law on interim measures, where arbitrators invariably rule that if the law of the seat prohibits them to order interim protection (generally or in respect of a specific measure requested), they have no such jurisdiction.¹⁷⁰ The law of the seat permitting, and if the interim measure is to take effect outside the seat, the law of the latter state is also to be taken into account.¹⁷¹

¹⁶⁶ See thus *TWTT SA v Bangladesh Biman Corp* (ad hoc, 1998) (unreported but cited in *TWTT SA v Bangladesh Biman Corp* (CA, 19 November 1998)).

¹⁶⁷ Challenge Decision of 11 January 1995, (1997) 22 YCA 227.

¹⁶⁸ ICC 7184/1994, (1997) 8:2 ICC Bull 63.

¹⁶⁹ ICC 7544/1996 (Interim), (2000) 11:1 ICC Bull 56, 57. With conflicting statements: ICC 6228/1990 (Interim), (2000) 11:1 ICC Bull 53.

¹⁷⁰ eg: ICC 7895/1994, (2000) 11:1 ICC Bull 64-5; 8113/1995 (Partial), *ibid* 65 at 67-8. ICC 8879/1998 (Interim), *ibid* 84 curiously applies both the *lex arbitri* and the proper law of the arbitration agreement.

¹⁷¹ See ICC 7589/1994, (2000) 11:1 ICC Bull 60, 61.

Following the construct to its logical construction would mean that in principle the rules of the state of enforcement never need be taken into account.¹⁷² However, a rule affecting the jurisdiction of the arbitrator, on the formal validity of the agreement to arbitrate for example, will have to be applied by the arbitrator if the award is *exclusively* destined for enforcement in a state considering those rules of public policy;¹⁷³ inversely the arbitrator may give no effect to the law of the seat in such cases. In ICC 6697/1990 an arbitral tribunal sitting in Paris in a dispute with no connection with France had to determine an objection to its jurisdiction on the ground of a moratorium (*suspension de poursuites*) of Luxembourg law which applied to the respondent. The tribunal examined that law citing Article 26 of the ICC Rules, as it was certain that Luxembourg would be the only state in which enforcement would be sought.¹⁷⁴ But the application of French law was not even indirectly, that is, as a conduit to Luxembourg law, admitted by the tribunal, although that was the respondent's submission. This, however, is an exceptional case.

(b) The Law of the Seat should not provide more than Fundamental Standards of Validity

Throughout this thesis it has been argued that the law of the seat, *qua lex arbitri*, should state its field of application in clear terms and based on the concept of the seat of the proceedings. Chapter 2 has also explored the proper functions of, and limits to, that law. Nonetheless, international arbitral tribunals may, or even have to, devise their own standards for the application of municipal law (one deliberately avoids the term 'conflicts rules'), for they are the organs of no particular legal order and are bound by a legal order only to the extent that doing so would effectuate the will of the parties. It would be consistent with that premise for each law to state the rules that apply to arbitrations having their seat in the territory directly by substantive, not conflicts, rules.

Be that as it may, arbitrators do follow their own conflicts rules. In that framework, there are at least two clear trends:

- (1) The law of the seat has no appropriate sufficient connection to impose its rules on the determination of the law applicable to the merits.¹⁷⁵ The rules of that state may be taken into account, to the extent that they are evidence of universally accepted rules.¹⁷⁶ (Thus, a number of the awards referring to the conflicts rules of the law of the seat did so because it was thought a to be by operation of a generally accepted rule.¹⁷⁷)
- (2) Subject to express contrary agreement of the parties, the arbitrator will conform to the rules of the law of the seat whose violation would expose the award to annulment, whether they be termed 'procedural' by that law or not. And in any event he shall make every reasonable effort to reconcile the wishes of the parties with such provisions of municipal law as may be applicable.

The arbitrator is not obliged to conform to or adopt any other rules of municipal law. Indeed, it may conflict with legitimate expectations of the parties for the arbitrator to adopt a certain municipal law as his global *lex arbitri*, when that law is out of step with international standards. On that premise one may criticise two ICC awards which applied English law on limitation of claims, when English law was by its own terms applicable to claims arising under a foreign law, even in

¹⁷² eg: ICC 4604/1984, (1985) 112 JDI 973, 977; ICC 2476/1976, (1976) 104 JDI 936.

¹⁷³ See ICC 953/1976, (1978) 3 YCA 214.

¹⁷⁴ ICC 6697/1990, [1992] Rev Arb 135, 141.

¹⁷⁵ See above, note 4.

¹⁷⁶ See ICC 2637/1975, (1977) 104 JDI 947; 9420/1998 (unreported), paras 60-61. Cf also ICC 6848/1992 (Order), (1995) 121 JDI 1047, for an autonomous characterization of the conflicts issues and for conflicts rules apparently of general acceptance.

¹⁷⁷ See ICC 1446/1966, quoted by Lew, *Applicable Law* (1978) 258-9.

arbitration.¹⁷⁸ But, crucially, it was never suggested that application of another law would constitute misconduct. Nor is it appropriate without more ado to adopt a procedural rule reflecting a particularity of municipal law, such as the rule that if the content of the foreign law pleaded is not proved as a fact the arbitrator is ‘compelled’ to presume that the law of the seat is the same as that foreign law.¹⁷⁹ Finally, no principle would seem to require an arbitrator to classify a contract as a nominate contract of the law of the seat.¹⁸⁰

So, to summarize, an arbitrator will not in the ordinary hypothesis be subject to ‘other limitations than those resulting from the international public policy’ of the law of the seat.¹⁸¹ Sometimes the arbitrator may seem to apply particular rules of the law of the seat, only however to convince the parties of the universal, as it were, validity of his reasoning and procedural instructions. This may be called *the principle of persuasion*. An example is provided by a recent ICC award where a tribunal sitting in Greece stated that the briefs submitted to the tribunal did conform to the CCP’s standards on ‘precision of the exposition of the subject-matter’ and the prohibition to amend the factual basis of a claim after the exchange of the statements of claim and defence.¹⁸² Under Greek law, those formal rules would be protected by annulment only to the extent that the equality of the parties would be violated; indeed, that is the purpose of those rules in civil procedure. Despite the strict irrelevance of the argument, the tribunal was anxious to assure the parties of the propriety of its award.

2. *An Autonomous Lex Arbitri?*

Certain famous pronouncements lend support to the view that party autonomy reigns supreme. Upon closer inspection, they have more limited effect than that.

In ICC 2321/1974 a sole arbitrator sitting in Sweden in an arbitration between a private law entity and a state authority had to determine a plea of sovereign immunity as a bar to his jurisdiction. The claimant argued that the sovereign immunity bar fell to be determined by Swedish law, on the ground that the proceedings were taking place in Sweden. The arbitrator made a general statement of principle:¹⁸³

I ... do not see the need for referring to any particular set of national law rules or court practice of any particular country in this respect. ... Nor do I see any necessity for relying ... upon Swedish law as the law of the place of arbitration. As arbitrator I am myself no representative or organ of any State. My authority as arbitrator rests upon an agreement between the parties to the dispute and by my activities I do not, as State judges or other State representatives do, engage the responsibility of the State of Sweden. Furthermore, the courts and other authorities of Sweden can in no way interfere with my activities as arbitrator, neither direct me to do anything which I think I should not do nor to direct me to abstain from anything which I think I should do.

Parts of the above statement are entirely consistent with the basic propositions of this thesis. The last sentence, on the complete independence of the arbitrator from the local courts is, however,

¹⁷⁸ See ICC Award of 1990 in *Licensor OY v Licensee Pty* (1985) 2:1 J Int Arb 75, 76-7, note Jarvin; ICC 5460/1987, (1988) 18 YCA 104, sub [4].

¹⁷⁹ ICC 5460/1987, *ibid* sub [3]; and contrast ICC 6848/1992 (Order), above, note 176.

¹⁸⁰ But see ICC 3540/1980, (1982) 7 YCA 124; ICC 7219/1995 (unreported) at 33 (which was the subject of a dissenting opinion along the lines here suggested).

¹⁸¹ ICC 8938/1996, (1999) 24a YCA 174, sub [2].

¹⁸² See ICC 6515-6516/1994, (1999) 24a YCA 80, sub [21]-[22] and [24]-[27]; and CCP (Greece) Articles 118(4), 224.

¹⁸³ ICC 2321/1974 (Preliminary), (1976) 1 YCA 133, 135.

erroneous: the arbitral award, and thus indirectly the actions of an arbitrator, may be subject to court scrutiny.

The primacy of the arbitration agreement was asserted in a different form in ICC 4695/1984. The tribunal had to rule on an objection to its jurisdiction based on the alleged non-conformity of the arbitration clause to provisions of the Brazilian CCP, national law of the respondent, on the composition of arbitral tribunals. It held:¹⁸⁴

The fact that the ICC Rules are *not officially issued* by a public authority is irrelevant, since their source of validity lies ... in the choice of the parties. The specific and explicit choice of the ICC Rules in respect of those procedural matters which concern the constitution of the arbitral tribunal and initiation of proceedings, necessarily excludes, in respect of an international commercial contract, the application of certain procedural requirements contained in the [CCP], which are incompatible with the ICC Rules and *were obviously designed to apply only to purely Brazilian or domestic arbitrations.*

The statement is in many ways qualified and not straightforward. In one sense, the statement on party supremacy is, strictly, a *dictum*, for the crucial factor is that Brazilian law does not apply even by its own terms. And further down the tribunal reasoned that '*it would have been* [French law as the law of the seat] which would provide the legal foundation for the choice made by the parties in favour of the ICC Rules'.¹⁸⁵ There is some intentional ambivalence in the words '*it would have been*', which imply that the tribunal does not really espouse a strict attachment to the law of the seat, but accepts it nonetheless on a precautionary basis. In sum, the better view would be that, although the award is not conclusive evidence either for or against party autonomy *qua* the *lex arbitri*, it does provide clear authority for the proposition that arbitrators must above all conform to the will of the parties.

Similar facts were at issue in an ICC arbitration in Paris, opposing a Bermudan claimant and a Spanish respondent. An objection to the jurisdiction of the tribunal was made on the basis of Article 57 of the Spanish Law of Civil Procedure which entails the prohibition of alternative fora. The tribunal held, without reference to any of the connected laws, that the specific reference to the ICC Rules in the agreement '*converts such rules into the source of law governing the arbitration agreement, excluding other procedural rules*'.¹⁸⁶ It is interesting to note, however, that despite a clear statement that the '*principle of the freedom of will of the parties*' allowed for the '*contravention of the laws of the forum*',¹⁸⁷ the tribunal made a reference to Articles 1492-1497 of the NCPC '*to make sure that the award is enforceable at law*', according to Article 26 of the 1988 ICC Rules.

In another recent award, the respondent objected to the reception of witness statements, arguing on Indian law.¹⁸⁸ The proceedings were being held in London, and it would presumably suffice for the umpire to dismiss the objection on a statement, correct under English law, that English law governed the proceedings. He chose to make a sweeping statement, that an arbitrator is only bound by '*certain fundamental evidential precepts*' and '*rules of natural justice*'.¹⁸⁹ Although the respondent was, it seems, a state entity, the arbitrator did not reason that municipal law was ex-

¹⁸⁴ ICC 4695/1984, (1986) 11 YCA 149, sub [6] (emphasis added). Cf ICC Award of 1970, (1980) 5 YCA 174.

¹⁸⁵ *ibid* sub [9] (emphasis added).

¹⁸⁶ ICC 5485/1987, (1989) 14 YCA 156, sub [13].

¹⁸⁷ *ibid* sub [27].

¹⁸⁸ The first Indian judgment to endorse the notion that Indian law governs when it is the proper law of the agreement to arbitrate was made on the same case but later; see Chapter 1, text to note 73.

¹⁸⁹ *The Western Co of North America v Oil & Natural Gas Commission* (1988) 13 YCA 5, sub [23] (interim, ad hoc, 1985).

cluded by international law (for which there was no evidence in the circumstances). The statement was intended to be of general validity.

Finally, mention should be made of ICC 1512/1971, an award made by Professor Lalive in Geneva under the 1955 ICC Rules.¹⁹⁰ The learned arbitrator stated that it was an accepted principle of international law, and reflected in Article V(1)(d) of the New York Convention, that party autonomy was the law of arbitration. The suggestion has been criticized above; suffice it therefore to say that in the event the arbitrator found, under Article 16 of the 1955 ICC Rules, that the parties had submitted the arbitration to the ICC Rules and the law of the Canton of Geneva. His was a finding on the *Grundlegung*, the foundation of the faculty to exclude municipal law, a faculty not exercised in the circumstances.

In conclusion, the little evidence that exists to point to an unlimited party autonomy is at best inconclusive. The statements discussed above were *dicta* and severely circumscribed at that. In the submission of this thesis, general party autonomy in contract law is the true basis of international arbitration practice, insofar as it has to be found in party agreement. The law will intervene at a later stage. Whether the parties and the tribunal, in exercise of the authority granted to it by the parties, wish to remain outside the bounds of municipal law is a matter for them, and a legitimate decision—entailing, however, the risk of annulment.

III. GENERAL PRINCIPLES OF ARBITRAL PROCEDURE

This section discusses the genesis, usefulness, and content of certain basic principles of arbitral procedure. The list of principles provided below does not purport to be exhaustive. While certain principles (such as that on the allocation of the burden of proof) are so widely accepted and deeply rooted in legal practice, the minutiae of their application may well differ from one arbitral system to another. Moreover, a number of principles are in reality statements of good practice, and intended not to be immutable but rules of guidance and bases for the development of more concrete practice rules. Indeed, it is part of the concept of ‘principle’ that, by contrast with a rule, it is so widely formulated that itself embodies the exceptions to its application.¹⁹¹ For instance, the principle *ei incumbit probatio qui dicit* must remain idle when neither party is in a position to provide enough evidence to shift the burden of proof to its opponent.¹⁹² Further, most of the procedural principles are dispositive, that is, subject to contrary party agreement and/or the tribunal’s discretion. Finally, all of them are subject to the imperative provisions of the controlling forum(-a).¹⁹³ These observations go to show that no procedural principle is ‘inherent’ in the arbitral procedure; but they also demonstrate that arbitral practice is capable of hammering out basic rules of conduct tailored to its needs.

A critique often raised against the flexible, incomprehensive, and lacking in detail procedural regulation in the various arbitration rules is that it is conducive to uncertainty and leaves too much leeway to the arbitrators—which leeway, injudiciously used, may frustrate the legitimate expectations of the parties.¹⁹⁴ On the other hand, there are three countervailing considerations. First, had the international business and legal community wished for more detailed rules, the arbitral institutions would have catered for such need.¹⁹⁵ Secondly, the arbitrators are the appointed judges of the

¹⁹⁰ Above, note 4.

¹⁹¹ See Dworkin, *Taking Rights Seriously* (1978) ch 2.

¹⁹² *Frontier Dispute*, ICJ Reports 1986, 554, 587-8.

¹⁹³ See IBA Evidence Rules, Article 2.1.

¹⁹⁴ See Ruhlmann & Gutkes, [1995] RDAI 437, and the references in notes 13-14.

¹⁹⁵ Holtzmann in *International Arbitration in the 21st Century* (1992) 3, 11-12.

parties and are consequently entrusted with judicial duties. It is part and parcel of such role that they should do everything to ensure a level playing field between the parties and that they will abstain from anything that would upset that. Detailed rules of conduct may then be formulated by the tribunal in the light of that overriding principle. Article 14.1(ii) of the LCIA Rules contains a concise formula to that effect: '[It is the general duty of the tribunal at all times] to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.'

A good example from practice is provided by a recent ICSID award. The question was whether the parties had the right to interview witnesses whose written statements had been introduced by its opponent. There being no specific or general provision in the ICSID Rules, the tribunal made a detailed procedural ruling on the point, allowing such interviews but accompanying them with restrictions ensuring that the equality of the parties and the integrity of the proceedings would not be frustrated.¹⁹⁶ The ruling was consistent with an emerging rule that interviews of witnesses by the party which proposes them are in principle allowed, subject however to limitations or conditions imposed by applicable law¹⁹⁷ and overriding considerations of equality.¹⁹⁸ Thus, if the legal representative of one of the parties cannot by the ethical rules of his bar interview a witness, and these rules are found to apply to the arbitration (and arbitrations generally), the tribunal may rule that witnesses should not be interviewed at all.

Finally, the indeterminacy of the procedural régime is the price for procedural autonomy. The responsibility to make procedural arrangements now shifts to the parties and their arbitrators. Hence the duty of the parties to co-operate in good faith with each other and the tribunal in order to formulate precise rules of conduct (eg, in the form of 'Agreed Procedural Directions');¹⁹⁹ and the arrangements under various rules for preliminary procedural meetings, pre-hearing conferences, Terms of Reference, and the like. The usefulness of such arrangements is indisputable. There are innumerable points of detail likely to have a bearing on a case: Must witness statements be sworn? How are procedural deadlines calculated and suspended? Must original documents be submitted and, if not, what sort of legalization and/or translation is required? The questions could be multiplied *ad nauseam*. The point is that there is no better formula than to suggest some sort of pre-trial conference, where the parties and the tribunal must strive to tailor-make precise rules of conduct.²⁰⁰

A question that arises is whether there should be a 'legal system of reference' from which the parties and the tribunal may draw inspiration. As has been seen in Chapter 2 above, modern arbitration statutes refrain from containing detailed procedural rules, being content to enunciate the imperative principles of equality and impartiality. Indeed, the legislator is faced with a dilemma. Providing for a set of dispositive rules, which the parties and the tribunal may adopt or draw upon, is a good idea, but providing too detailed rules would inevitably give colour of nationality to the rules, whereas one strives for neutral rules, intelligible and acceptable to as diverse a clientele as possible. On the other hand, providing only for the basics does not serve any useful purpose in the international arena, where resort may be had to ready-made arbitration rules of some sophistication. Hence the currently prevailing approach to leave detailed procedural regulation to the market forces, as it were. Where the tribunal and/or the parties seek inspiration from national law, they

¹⁹⁶ See *Azinian et al v Mexico* (ARB(AF)/97/2) (1999) 14 ICSID Rev-FILJ 538, para 56.

¹⁹⁷ LCIA Rules, Article 20.6.

¹⁹⁸ See IBA Evidence Rules, Article 4.3 *juncto* 9.2(g). See also IBA Working Party, [2000] BLI 14, 24.

¹⁹⁹ For the principle of co-operation in regard to the procurement of evidence see ICC 1434/1975, (1976) 103 JDI 978, 982; which was probably inspired by NCPC, Article 11.

²⁰⁰ See further Ruhlmann & Gutkes, above, note 194; Holtzmann, above, note 195, 16-20.

will have to look at statutes on court procedure, which are by definition ill-adjusted to the needs of international arbitration. Thus the application of any particular provision of municipal law which is not mandatory and imposed on efficiency considerations should require a further syllogism: is it appropriate for international arbitration and does it express a principle generally accepted?²⁰¹

To counter that difficulty, the International Bar Association has prepared a set of detailed, but suppletive, procedural rules on evidence.²⁰² The parties may either adopt them or draw upon them.²⁰³ The UNCITRAL has prepared a document of similar intent, essentially a check-list of issues of detail often arising in practice and on which the parties and the tribunal may want to make particular arrangements, together with brief commentaries of a comparative nature.²⁰⁴ Both documents have benefited from wealth of experience and should, resources permitting and circumstances justifying, be consulted by arbitrating parties. However, neither of the two documents, to varying extents, eliminates the need for pre-arbitral arrangements; indeed, this is part of the informality of arbitral justice: it is as formal or informal as the parties want it to be.

Hereunder follow certain principles of arbitral procedure which are believed to represent sound practice. Their precise mode of operation and limits vary from one set of rules to another, but the core idea behind each principle is believed to be widely accepted. Note that certain of them are accepted in, or derive from, the procedure before public international law tribunals.

- (1) The principle of good faith obliges the parties to abstain from acts unduly delaying the proceedings or which may prevent effective enforcement.²⁰⁵
- (2) Subject to contrary party agreement,²⁰⁶ the tribunal has the power to order provisional and protective measures, relating both to the arbitral process and to the underlying claim.²⁰⁷
- (3) Default of the respondent will neither obstruct the continuance of the case, neither will it be considered an admission of the factual allegations of the claimant.^{208 209} The tribunal is always

²⁰¹ See ICC 7544/1996 (Interim), (2000) 11:1 ICC Bull 56, 58-9 (on the requirements for provisional payment in the NCPC).

²⁰² The IBA Evidence Rules, first compiled in 1983 and substantially revised and extended in 1999.

²⁰³ See IBA Evidence Rules, Article 1.1-4. For an application see ICC 7170/1991 (Order), (1993) 120 JDI 1062.

²⁰⁴ The UNCITRAL Notes (which are however criticized as a matter of principle by Fouchard, [1994] Rev Arb 301). See similar checklists in Ruhlmann & Gutkes, above, note 194, s II; Holtzmann, above, note 195, 20-27.

²⁰⁵ ICC 3896/1982, (1983) 110 JDI 914, note Jarvin; ICC 6632/1993 (unreported).

²⁰⁶ In public international law, that has been described as an inherent power, attendant to any tribunal's duty to render justice: see Chapter 5 below, text to note 60. However, in commercial arbitration there will normally be at least one competent court, and there is no danger that the parties will be left without adequate protection.

²⁰⁷ ICC Rules, Article 23(1); UNCITRAL Rules, Article 26(1)-(2); LCIA Rules, Article 25.1; ICSID Rules, Rule 39; Stockholm Rules, Article 31(1); DIS Rules, § 20.1; CAS Rules, Rule 37; Zagreb Rules, Article 34(1); Milan Rules, Article 14(1); MMAA Rules, Rule 20.1. This is a relatively new development; in 1958 only 12 rules gave such power to the tribunal: UN Doc TRADE/WP.1/15/Rev.1 I (1958) 57. For an elaboration on the requirements of interim protection see ICC 8786/1996 (Interim), (2000) 11:1 ICC Bull 81, 83.

²⁰⁸ ICC Rules, Article 21(2) (and 8502/1997 (unreported), para 4.2, on the limits of the tribunal's duty); UNCITRAL Rules, Article 28; AAA International Rules, Article 23; ICSID Rules, Rule 42; Stockholm Rules, Article 28; DIS Rules, § 30.1. See also UN Doc A/CN.9/21 and Corr.1 (1969), (1968-1970) I UNCITRAL YB 260, paras 96-100; UN Doc TRADE/WP.1/15/Rev.1 I (1958) 61-2. The NAI Rules, Article 36(1), however, authorize the tribunal to treat default as admission of the allegations of the claimant. This is a general principle admitted in international law too: ICJ Statute, Article 53. See *Military and Paramilitary Activities in and against Nicaragua* (Merits), *ICJ Reports 1986*, 14, 24-45; and for a comparative analysis Donovan, (1999) 10:1 ICC Bull 57.

²⁰⁹ The same applies in principle to a non-appearing claimant (ICC Rules, Article 21(3); LCIA Rules, Article 15.8); but in the nature of things that party bears the initial burden of proof and thus dismissal of the claim is more likely.

bound to verify that the defaulting party had been properly notified and to examine the factual and legal sufficiency of the claim.²¹⁰

- (4) The procedure should be flexible, not strictly conforming to either the inquisitorial or the adversarial model,²¹¹ and should be adapted to the particular circumstances of the case.²¹² In particular:
- (a) extensive oral pleadings and full discovery should be discouraged;²¹³
 - (b) the tribunal retains full control over the hearings;²¹⁴
 - (c) as a principle, each party identifies the evidence on which it wishes to rely in its statement of claim or defence. The tribunal may upon request of a party require further disclosure, provided that the request identifies the evidence requested in sufficient detail and provides justification for their disclosure.²¹⁵
 - (d) the rules of conduct should be tailor-made to the special circumstance of the case; and
 - (e) the tribunal should not proceed to fix the particular rules of conduct without seeking the guidance of the parties.²¹⁶
- (5) Subject to contrary party agreement and upon party request, it will always be possible for a hearing to take place, for legal argument and/or presentation of evidence.²¹⁷
- (6) Each party must prove to the satisfaction of a tribunal²¹⁸ the factual veracity of its allegations.²¹⁹ (Indeed, this is a general principle of law, admitted as such in international jurisprudence.²²⁰) Further:
- (a) The parties have the obligation to co-operate in good faith in the presentation of evidence.²²¹

²¹⁰ See ICC 7701/1994, (1997) 8:2 ICC Bull 66. Note, however, that ICC tribunals are anxious to ensure that the proceedings will be fully adversarial, and thus deviate from time-limits in order to admit the late entry of the defaulting party to the proceedings; see ICC 6192/1992 (Partial), (1997) 8:1 ICC Bull 64, 65; ICC 6589/1992 (Partial), (1997) 8:2 ICC Bull 63.

²¹¹ For comparisons of the common and civil law solutions as pertain to arbitration practice see Wetter, (1985) 2:2 J Int Arb 7, at 7-27, 36-8; Rau & Sherman, (1995) 30 Tex ILJ 89; Pryles, (1998) 64 JCI Arb 106; Eijssvoogel, *Evidence* (1994).

²¹² See ICC 6401/1991 (Order), (1996) 126 JDI 1055, note Hascher.

²¹³ On discovery: Robert, (1976) 1 YCA 221, 224; Kerr, (1997) 13 Arb Int 121, s IV; Kemp in *International and ICC Arbitration* (1990) 111, 114; Thompson, *ibid* 254, 259-60.

²¹⁴ This principle follows from the mixture of the adversarial and inquisitorial models adopted in international arbitration; see ICC Rules, Article 21(3); IBA Evidence Rules, Article 8.1; LCIA Rules, Article 19.5.

²¹⁵ The IBA Evidence Rules, Article 3.1-8 codify oft-followed practice on the matter. See the Letter of the Chairman in ICC 6465, (1994) 124 JDI 1089, 1090.

²¹⁶ See ICSID Rules, Rule 20.

²¹⁷ WIPO Rules, Article 53(a); AAA International Rules, Article 20(6); LCIA Rules, Article 19.1; ICSID Rules, Rule 29.

²¹⁸ Subject to a contrary provision of the law applicable on the merits, the standard of proof is the balance of probability or 'conviction intime'; see Redfern/Reymond/Reiner, (1994) 10 Arb Int 317. Again this is the position in public international law arbitration.

²¹⁹ The principle is so widely recognized that few rules explicitly state it: UNCITRAL Rules, Article 24(1); AAA International Rules, Article 19(1); ICAC Rules, § 34.1. See ICC 7418/1995 (unreported), para 69. However, the rule may be modified by the law applicable to the merits; see Rome Convention on the Law Applicable to Contractual Obligations, Article 14(1); and ICC 9187/1999 (unreported), para 58.

²²⁰ On *actori incumbit probatio* see: *The Mavrommatis Palestine Concessions*, PCIJ, Series A, No 5, at 29; *Corfu Channel*, ICJ Reports 1949, 4, 13; *Part One of Category F Claims*, UN Doc S/AC.26/1997/6 (1997) para 60. Kazazi, *Burden of Proof* (1996) 53-117; Ripert, (1933-II) 44 RdC 565, 646-7.

In WTO proceedings, *prima facie* proof will shift the burden: *US-Shirts & Blouses*, WT/DS33/AB/R (1997) 15-16; Pauwelyn, (1998) 1 JIEL 227. And the same has in some cases been accepted by the Iran-US Claims Tribunal; see, eg, *Malek v Iran* (No 534-193-3) paras 111, 121 (1993). The practice is correctly criticized by Aghahosseini, (1999) 4 International Law Forum 208, 212.

²²¹ Jarvin in *Contemporary Problems* (1987) 50, 63 and the references.

- (b) The tribunal is not constrained by strict rules on the presentation, procurement,²²² and evaluation of evidence; it will evaluate the admissibility and relevance of the pieces of evidence presented to, or procured by, it.²²³ (This is again a principle admitted in international law procedure.²²⁴)
- (c) As a flexible proviso, documentary evidence will usually be accorded greater weight.²²⁵
- (d) The tribunal reserves the power to order the production of evidence not alleged by any party.²²⁶
- (e) Production of a written statement should not be a prerequisite for oral testimony by the witness.²²⁷ A witness who has provided a written statement should, however, be available for oral examination by both parties and the tribunal;²²⁸ failure to appear at the hearing entitles the tribunal to draw adverse inferences on, or even entirely to disregard, the written statement.²²⁹
- (7) Subject to contrary party authorization, the tribunal will give reasons for its award.²³⁰
- (8) It is for the tribunal to apportion the costs of the proceedings, in a reasonable manner and taking account of all the legal and other costs.²³¹ The apportionment will, subject to contrary party agreement, take account of the relative success of the claims of each party.²³²

²²² See ICC 7170/1992 (Order), (1993) 120 JDI 1083, para 2, note Hascher: the tribunal instructed that deposition should take place before an Italian notary, though notaries do not perform such functions in Italy.

²²³ ICC Rules, Article 20(1); UNCITRAL Rules, Article 25(6); LCIA Rules, Article 22.1(f); AAA International Rules, Article 20(6); ICSID Rules, Rule 34(1); WIPO Rules, Article 48(a); IBA Evidence Rules, Article 9.1; Stockholm Rules, Article 26(2); Euro-Arab Rules, Article 23(9), fourth indent; NAI Rules, Article 27; CMEA Uniform Rules, § 27(4); and UN Doc TRADE/WP.1/15/Rev.1 I (1958) 62-3. See further Ward, (1996) 13:2 J Int Arb 5. See ICC 5926/1988 (Decision), (1995) 125 JDI 1037: the tribunal may decline to hear a witness, to avoid unnecessary delay and subject to the parties' having fully addressed the issues otherwise.

²²⁴ *Corfu Channel*, ICJ Reports 1949, 4, 16-9; *Nicaragua* (Merits), ICJ Reports 1986 at 40, para 60; *US - Shrimp*, WT/DS58/AB/R (1998) paras 104-6; *Mexico - Fructose*, WT/DS132/R (2000) paras 7.33-7.34; *Part One of the First Installment of Category D Claims* (UN Doc S/AC.26/1998/1) para 72 (the lack of standardized evidence rules does not change the standard and burden of proof); *AAPL v Sri Lanka* (ARB/87/3) (1991) 6 ICSID Rev-FILJ 526, para 56; Bastid, (1957-II) 92 RdC 343, 437-8.

²²⁵ Robert, above, note 213, 223; IBA Commentary, above, note 198, 17; ICC 9187/1999 (unreported), para 16.

²²⁶ ICC Rules, Article 20(5); UNCITRAL Rules, Article 24(3); LCIA Rules, Article 22.1(d)-(e); AAA International Rules, Article 19(3); ICSID Rules, Rule 34(2); WIPO Rules, Article 48(b); IBA Evidence Rules, Article 3.9; CAS Rules, Rule 44(3), second indent; NAI Rules, Articles 28(2), 32, 33; SIAC Rules, Rule 25(h)-(f); Zagreb Rules, Article 31(2); Polish Rules, § 27(5); MMAA Rules, Rule 21.2. See ICC 5542/1988 (Order), (1996) 126 JDI 1049, note Hascher.

²²⁷ IBA Evidence Rules, Article 4.6; abrogating IBA Evidence Rules (1983), Article 5.1, 5.5, 5.12. See also UNCITRAL Rules, Article 25(5); ICC Rules, Article 20(3); AAA International Rules, Article 20(5); LCIA Rules, Article 20.3; UNCITRAL Notes, para 61.

²²⁸ IBA Evidence Rules, Article 4.7. See also WIPO Rules, Article 54; AAA International Rules, Article 20(2); LCIA Rules, Article 20.4; ICSID Rules, Rules 35-36.

²²⁹ This slightly modifies the IBA Evidence Rules, Article 4.8 and brings the position closer to the ordinary rule, Article 9.5; cf *International Technical Products Corp v Iran*, 9 Iran-US CTR 10 (Partial Award, 1985). But see for the stricter provision the ToR in ICC 10098, para 13; ICC 10032, para 6.2; ICC 10043.

²³⁰ UNCITRAL Rules, Article 32(3); LCIA Rules, Article 26.1; AAA International Rules, Article 27(2). Certain rules state the requirement as a non-derogable one: ICC Rules, Article 25(2); ICSID Rules, Rule 47(1)(d); Milan Rules, Article 19(1); CMEA Uniform Rules, § 32, eight indent.

²³¹ ICC Rules, Article 31; UNCITRAL Rules, Articles 38-39; LCIA Rules, Article 28.1-28.3; AAA International Rules, Article 31.

²³² UNCITRAL Rules, Article 40(1); LCIA Rules, Article 28.4; SIAC Rules, Rule 30.2. This may again reflect a principle of international law: Bastid, above, note 224, 481, note 8. It will not be thus when the parties have submitted to a municipal law providing for the contrary; cf ICC 9282/1999 (unreported): costs for the claimant, who requested the discontinuation of the case, on the basis of Spanish law. For the considerations relevant to the particular case where the case is discontinued on mootness see ICC 8877/1998 (unreported), paras 12-30.

- (9) The tribunal is obliged to address only the legal and factual arguments which are crucial to its reasoning and findings (*principle of arbitral economy*).²³³
- (10) A party which knowingly or with inexcusable negligence proceeds with the arbitration without raising an objection as to the constitution of the tribunal or the conduct of the proceedings is deemed to have waived its right to raise that objection in subsequent proceedings.²³⁴
- (11) The tribunal and the parties will treat as confidential the existence of the arbitral proceedings, any factual or legal disclosures during the proceedings, and the arbitral award; subject however to:
- (a) contrary party agreement;
 - (b) an obligation to disclose as a result of actions before competent courts or other authorities; and
 - (c) an obligation to disclose imposed on a party by municipal or international law.²³⁵

²³³ *Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ Reports 1958, 55, 62; *US - Shirts & Blouses*, WT/DS33/AB/R (1997) 18-9.

²³⁴ ICC Rules, Article 33; UNCITRAL Rules, Article 30; LCIA Rules, Article 32.1; AAA International Rules, Article 25; ICSID Rules, Rule 27; Stockholm Rules, Article 29; DIS Rules, § 41; SIAC Rules, Rule 34.1; Zagreb Rules, Article 6; Finnish Rules, § 30.

²³⁵ The author follows here the most complete statement on confidentiality available, WIPO Rules, Articles 73-76. See further Paulsson & Rawding, (1995) 11 Arb Int 303.

Chapter 5

Arbitrations involving a State or Analogous Entity: Their Procedural Régime and its Relevance

In this chapter we look at the peculiar problems posed by so-called 'mixed' arbitrations, that is, proceedings in which one of the parties is a state, a state-controlled entity, or an international organization. Their examination in a larger pool, as it were, does not of course signify that all three types of persons are in international, or even municipal, law treated alike. But it is legally material that those persons enjoy, in varying degrees, sovereignty and immunity from jurisdiction. (So a reference to 'state(s)' without distinction includes all three categories.)

I. DEFINING THE ISSUES

Commercial intercourse with states is like dealing with Janus: a state has full capacity to transact commercially, but it is after all a state, and may always decide to assert its sovereign regulatory power and its immunity from jurisdiction. The practical issues are immediately apparent. Commercial dealings and dispute resolution presuppose to some extent equal footing, but states are capable of (i) changing the legal framework of the deal and (ii) frustrating the dispute resolution process, either by influencing their own judiciary or by refusing to participate in proceedings in another forum. Issue (i) is the more pressing one, as it arises at the level of drafting and implementing the commercial agreement. One solution to it, which has created a vast amount of literature and conflicting opinions, is to subject the contract to general international law, general principles of law, or principles common to some laws—exclusively or in combination. This aspect of things is almost entirely discrete, but it does have some bearing on issue (ii). With respect to that latter issue, the solution invariably adopted is to resort to arbitration,¹ as an alternative to both the contracting state's courts (which the foreign private party is loth to accept) and third states' courts (which would be incompatible, politically speaking, with the dignity of the contracting state or even unlawful under the law of certain states).

The participation of a state in arbitration almost instinctively poses the question: does it make a difference? The short answer is, yes. One difference stems directly from the sovereign status of the litigant: a sovereign state cannot be legally coerced unless it has waived its immunity. This

¹ See below, note 368. Arbitration remains popular despite attempts by developing states, essentially in the 1970s, to impose their own courts on foreign investors; see, eg, Charter of Economic Rights and Duties of States, UN Doc A/RES/3281 (XXIX) (1974), Article 2(c); OPEC Declaratory Statement on Petroleum Policy in Member Countries (Res XVI/90, 1968). Under the Calvo doctrine, which used to be dominant in Latin American practice, the jurisdiction of state courts could not be ousted (see, eg, Constitution (Venezuela), Article 127), and a number of concession agreements were subject to those courts and law.

consideration plays equally before and during the proceedings and at the stage of enforcement. The object of the inquiry here, however, is the more limited issue whether the mere participation of a state in the proceedings makes the procedural régime escape from the ambit of national law, to be subject to international law. This is of course part of a wider question, namely whether tribunals sitting in disputes between private parties and states, state entities, or international organizations are tribunals whose *lex arbitri* is public international law. However, the procedural law applicable is, as will be seen in detail below, a very strong indication of the *lex arbitri* and, in any event, is the crucial characteristic for the legal consequences to be discussed.

Arbitration under international law has one ineluctable consequence that serves as an unmistakable trait for the observer. Though it physically takes place in the territory of a given state, it is legally outside its legislative and enforcement jurisdiction, because it is governed by international law; the acts of an international tribunal cannot therefore create international responsibility on the part of the host state. Whether this is the case or not is a matter of interpretation of the constitutive instruments of, and the headquarters arrangements for, the tribunal concerned. The matter becomes more complicated when there are no such instruments. It then arises for consideration whether as a matter of general international law a state is able to ‘elevate’ arbitral proceedings with a private party to international law status and, if so, how to ascertain such an intent.

The discussion proceeds from the more straightforward cases to the less so. The Iran – US Claims Tribunal (section II), will both serve as test-bed for the relevant internationality tests and provide a case-study on a tribunal whose nature has given rise to academic disputes and practical problems. Thereafter follows an analysis of ICSID and more generally investment treaty arbitration (section III). The chapter concludes with the two hardest cases, arbitrations involving international organizations and states, but not under treaty (section IV).

II. THE IRAN – UNITED STATES TRIBUNAL

The Iran – US Claims Tribunal (hereafter the ‘Tribunal’) was created by international agreement between those two states, as part of a wider settlement of the situation that resulted from the Iranian revolution in 1979.² The Tribunal was given jurisdiction over claims outstanding at the time of making of the Declarations between nationals (physical and legal persons) of each state against the other state, as well as inter-state claims between the two states.³ As will be seen below, Chapter 7, the awards of the Tribunal benefit from an exceptionally strong extra-judicial enforcement mechanism, which almost insulates the Tribunal from national law. However, probably because of the political circumstances surrounding its creation, the relevance of national law to the working of the Tribunal was not clarified in the constitutive instruments. Whether the Tribunal functions under Dutch law, the law of the seat, or not, may be relevant for enforcement—and this is a matter which for the balance of this thesis is examined in Chapter 7. But the question also came up for consideration in domestic proceedings; and, more generally, a discussion of the nature of the Tribunal is largely self-contained and important as a precursor to the remaining sections of this chapter.

² The agreement took the particular form of a set of declarations by a third mediating state; in the context of interest here see Declaration of the Government of the Democratic and Popular Republic of Algeria, (1981) 20 ILM 223 (hereafter the ‘GD’); Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, (1981) 20 ILM 257 (hereafter the ‘CSD’) (collectively the ‘Declarations’).

³ See CSD, Article II(1)-(3).

A. The International Law Foundations⁴

The question here is whether the Tribunal is an international tribunal in the full sense, that is, a tribunal established by and functioning under international law, to the exclusion of any municipal law and the law of the state of its seat in particular. As so often in the law, the answer largely depends on why the question is posed in the first place.⁵

It is important to recall at the outset the Tribunal's origins and purpose, outlined above. Moreover, the Tribunal was vested with the exclusive power of interpreting the Algiers Declarations.⁶ In the light of those considerations, the Tribunal itself has consistently held that it is 'clearly an international tribunal',⁷ 'subject to international law'.⁸ So though the Tribunal adjudicates, *inter alia*, private claims, and the individual claimants may themselves appear before it,⁹ the origins and precise attributes of its jurisdictional power are provided by international law.¹⁰ To quote its very words:¹¹

Under contemporary international law, the fact that an individual or a private entity is party to proceedings before a forum created by an international agreement does not deprive that forum and its proceedings of their international legal nature.

Though the Tribunal sits in fact in the Hague, Article VI(1) of the Claims Settlement Declaration provides that '[t]he seat of the Tribunal shall be in The Hague ... or any other place agreed by Iran and the United States'. It is clear that the precise physical location of the Tribunal was not crucial to the agreement of the parties, so long as it was convenient and neutral. This non-permanence and the reticence on the part of the Iranian government to enter any further agreement with the United States account for the fact that a headquarters agreement was signed only in 1990.¹² Even in the absence of such agreement, it is plain that as a matter of international law the Netherlands could not exercise any control over the judicial functions of the Tribunal. As a corollary, the Netherlands has no international responsibility for actions of the Tribunal, and the Tribunal's awards are not *prima facie* Dutch law awards.

⁴ There exist two detailed contributions on the issue: Caron, (1990) 84 AJIL 104, in particular at 129-151; Mohebi, *The International Law Character* (1999) chs 1-2. In view of the significant overlap of evidence between those works and this section no detailed rebuttal will be made here, but suffice it to say the following. Professor Caron argues that the parties intended to submit the Tribunal to Dutch law. (Accord: Sandrock, (1991) 29 AVR 104, 114-6; Berger, *International Economic Arbitration* (1993) 484, note 43 and the references.) The evidence on which he makes his case is indirect and to a large extent overtaken by Tribunal's pronouncements. Furthermore, Caron does not properly take account of the international responsibility point, below subsection II.A.1. On the contrary, Judge Mohebi's extensive monograph places excessive emphasis on the existence of a formal treaty, not even considering the possibility of submission of the Tribunal to Dutch law. It further fails to distinguish between the *lex fori* and the laws applicable to various aspects of the proceedings. Moreover, the analysis (at 97-102) is muddled in that it derives support for the international law character of the Tribunal, apparently cumulatively, from general autonomy under municipal law, theories of delocalization, and international law.

⁵ On the question whether the Tribunal is 'international' as pertaining to the application of diplomatic protection rules see Toope, *Mixed International Arbitration* (1990) 269-83.

⁶ See GD, para 17; CSD, Article VI(4).

⁷ *Iran v US* (32-A18-FT) 5 Iran-US CTR 251, 261 (1984).

⁸ *Anaconda Iran, Inc v Iran et al*, 13 Iran-US CTR 199, 223, para 97 (Interlocutory Award, 1986).

⁹ See CSD, Article III(3).

¹⁰ Thus, eg, Virally in *Le Tribunal des Différends irano-américains* (1985) at 50; Amerasinghe, (1992) 7 ICSID Rev-FILJ 290.

¹¹ See *Iran v US* (586-A27-FT) (1998) 13 Mealey's Int Arb Rep G-1, paras 57-58 (1998).

¹² Muller, *International Organizations* (1995) 49.

1. No International Responsibility for the Netherlands

The jurisprudence under the ECHR is in this respect particularly instructive. A particularly important aspect of that jurisprudence is that international responsibility extends to acts made or having effects beyond national boundaries, insofar as authorized agents exercise the jurisdiction of the state concerned, thereby bringing persons or property within the jurisdiction of that state in the sense of Article I of the Convention.¹³ By contrast, the Commission has always refused to assume *ratione personæ* jurisdiction when the respondent state had effectively no control over the functioning and acts of international organizations having their seat in its territory.¹⁴

The reasoning is perfectly sensible, but has the potential to create pockets of lawlessness within the aggregate area of jurisdiction (in a geographical sense) of the contracting states. It would be embarrassing to allow states to hedge their international responsibility through the medium of transfer of competences to international organizations.¹⁵ The solution adopted takes account of the practical need for international organizations to have an independent juridical personality and functioning on the one hand, and the effective protection of human rights on the other: states are bound to demand appropriate guarantees at the point of transfer of competences to international organizations.¹⁶

This jurisprudence, however, can only apply to competences which before the creation of the organization concerned were within the domain of the transferring state(s) (regardless of whether that state is at the same time the host state or not). It could of course be extended by analogy to acts of international organizations with which the respondent state has the mere geographical link of being the host state, so that it would be demanded of host states to extract a promise that human rights will not be violated. This, however, would be not only embarrassing, but also result in a double guarantee. For any joint responsibility that might arise in respect of the functioning of the organization must lie with the constituent states, which may control it, and not with the host state, which cannot.¹⁷ The question whether there can indeed be any such joint or several concurrent responsibility on the part of member states, above and beyond that of the organization proper, is beyond the ambit of this thesis; the point is, however, that the host state cannot without more incur responsibility.

This real impossibility of control over international instrumentalities merely having their seat in the territory has been emphasized by the Commission in its first Decision in such cases, which

¹³ See *Cyprus v Turkey* Applications 6780/74, 6950/75, (1975) 2 DR 125, 136; *X & Y v Switzerland* Applications 7289/75, 7349/76, (1977) 20 YB 372, 406. See also *Loizidou (Preliminary Objections)*, A 310.

¹⁴ See *Waite & Kennedy v Germany* (Judgment of 18 February 1999) paras 59-64; *Waite & Kennedy v Germany* Application 26083/94 (Report of 2 December 1997) paras 73-74 (complaint relating to acts of the European Space Agency). See also the case-law cited below, note 16.

¹⁵ See, eg, *Tête v France* Application 11123/84, (1987) 54 DR 52; *Fournier v France* Application 11406/85, (1988) 55 DR 130.

¹⁶ See *M & Co v FR Germany* Application 13258/87, (1990) 64 DR 138, 145 (a decision widely criticized on other grounds); *Matthews v UK* Application 24833/94 (Report of 29 October 1997), in particular the Dissenting Opinions of Weitzel *et al* and Schermers; *Heinz v the Contracting States party to the EPO* Application 21090/92, (1992) 76-A DR 125; *van der Peet v Germany* Application 26991/95 (Decision of 12 April 1996); *Lenzing AG v UK* Application 38817/97 (Decision of 9 September 1998); *Lenzing AG v Germany* Application 39025/97 (Decision of 9 September 1998).

¹⁷ On which issue see IDI Resolution on The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations towards Third Parties, (1996) 66ii Ann IDI 445. Further Higgins, (1996) 66ii Ann IDI 233; Amerasinghe, (1991) 85 AJIL 259; Seidl-Hohenveldern in *Études Ago III* (1987) 415; Singer, (1985) 36 Va JIL 53, 122-162; Seyersted, *Objective International Personality* (1963) ch V.

concerned the Supreme Restitution Court, a court established in the territory of the Federal Republic of Germany (as it then was) under the 1954 Paris Settlement Convention.¹⁸ Having looked at the provisions regulating the procedure of the Court, the nomination of its members, and the immunities accorded to the members of that court,¹⁹ the Commission concluded:²⁰

[T]he Supreme Restitution Court must be regarded as an international tribunal in respect of which the Federal Republic had no power of legislation or control; ... *in general a State does not have international responsibility for acts or omissions of an international tribunal merely by reason that it has its seat and exercises its functions on the territory of that State*

The italicized passage is undoubtedly expressive of a rule of general international law, as evidenced by the approval of the International Law Commission.²¹

The Netherlands government has expressly assented to the Iran – US Tribunal taking its seat in the Hague, and the commencement date for the privileges and immunities of the Tribunal (though not their precise content) were fixed by accord between the three governments concerned in November 1981.²² The host government two years later officially took the view that such privileges and immunities directly derived from international law, because this was a tribunal ‘established under ... international law’ in the territory of a state with the consent of that state;²³ in other words no comprehensive host state agreement was necessary.

This is in line with general international law. It is certain that tribunals constituted by treaty between states and functioning in the territory of a third state are agencies or instrumentalities of the creating states, and that internal tribunals of international organizations are subsidiary organs of those organizations. However, it is an open question whether for certain purposes (for instance their capacity to enter into commercial agreements concerning their functions), such tribunals should be treated themselves as specialized international organizations with distinct personality.²⁴ Be that as it may, it is plain that they do enjoy, as a matter of customary law and once consent by the host state is accorded, immunity from suit and inviolability in that state.²⁵ There are two elements in that consideration. First, the consistency of the specific provisions of the various *accords*

¹⁸ See Convention on the Settlement of Matters arising out of the War (1952, as amended), 332 UNTS 219, Chapter Three, Article 6(1).

¹⁹ See, eg, *ibid*, Chapter One, Article 8(b), and Annex.

²⁰ *X v FR Germany* Application 235/56, (1958-59) 2 YB 256, 294 (emphasis added). See also *X au nom de A, B, C et D v RF Allemagne* Application 2213/64, (1966) 20 Collection 61. Cf *The Salem*, 2 RIAA 1161, 1191-4 (USA v Egypt, 1932). Lagergren, (1997) 66 Acta Scandinavica 23, 31 relies on *X v Germany* but does not take a firm position.

²¹ See the ILC Draft Articles on International Responsibility (1996), Article 13; and see the commentary on draft Article 13: Report of the ILC, [1975-II] YBILC at 87-91.

²² See *Spaans v Netherlands* Application 12516/86, (1988) 58 DR 119, 120. See also Annexes VI and VII to the Annual Report of the Secretary-General, 4 Iran-US CTR 289 *et seq*; Explanatory Notes, below, note 88, 309.

²³ *Spaans*, *ibid* 120. The same analysis was followed in *Dallal v Bank Mellat* [1986] QB 441, 458-63. Of the same view, eg, Stein, (1984) 78 AJIL 1, 18.

²⁴ The European Commission of Human Rights avoids taking a stance by calling international tribunals ‘international bodies’; see *Spaans*, above, note 22. On Swiss practice see Imhoof, (1989) 49 ASDI 93, 112-4.

²⁵ Accord: Muller, above, note 22, 47-54; doubts by Nakamura, (1992) 35 Japanese Annual 116, 129. With regard to the Tribunal specifically see HR, 20 December 1985, 94 ILR 321; *affirming Arrondissementsrecht-bank, The Hague*, 9 July 1984, (1987) 18 NYIL 357.

de siège for international and quasi-international tribunals.²⁶ Second, the Swiss practice confirms that immunity and inviolability are customary and indispensable,²⁷ for the instruments for various ad hoc tribunals either reiterate the terms of the 1969 Special Missions Convention²⁸ or simply incorporate it by reference.²⁹ Moreover, the fact that the relevant agreements are entered into by the states concerned, and not the tribunal as a distinct entity (which as a principle it is not), confirms that the tribunals pertain to the collective jurisdiction of those states—in other words, international law.

Thus, the Tribunal is outside the jurisdiction of the Netherlands and consequently its acts (judicial or otherwise) do not engage the international responsibility of that state.³⁰ And if the Tribunal itself is outside the reach of Dutch law then its awards cannot be considered made within the confines of that law. So what remains to be seen is whether the parties to the Algiers Declarations intended to *subject* (though they needed not) the awards of the Tribunal to Dutch law,³¹ or whether the Tribunal, entrusted with the task of sovereign interpretation of those Declarations, has done so.

2. Interpretation of the Algiers Accords with Particular Reference to the Jurisprudence of the Tribunal

The object of the inquiry is to determine whether the *lex arbitri* of the Tribunal, as distinct from its origin and ‘intrinsic’ legal foundation, derives from Dutch law.

(a) International Tribunals: The Principles

The law applied to the merits of the disputes brought before the Tribunal will not supply any crucial traits. By the very nature of its jurisdictional mandate, contained in Article II of the Claims Settlement Declaration, the Iran – US Claims Tribunal applies both international and domestic law. But this is not extraordinary at all, for international tribunals will apply municipal law to issues governed by such law.³² Conversely, any domestic court or tribunal may administer (that is,

²⁶ See the documents relating to the International Court of Justice: *Acts and Documents on the Organization of the Court* No 3 (1977) 163-87; Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea (1997), UN Doc SPLOS/25.

The situation is legally the same for tribunals of one state functioning in the territory of another; see Agreement concerning a Scottish Trial in the Netherlands (18 September 1998); and the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (SI 1998 No 2251), reprinted in (1999) 38 ILM 926 and 942 respectively; Allied Powers (Maritime Courts) Act 1941, s 1. And see *X v RF Allemagne* Application 182/56, *Documents and Decisions 1955-1956-1957* 167, 169.

²⁷ cf the Agreement concerning the Legal Status of the CERN (1955), 249 UNTS 405, Articles 2 (referring to the immunities ‘usually granted’) and 25 (non-responsibility of Switzerland).

²⁸ See Convention on Special Missions (1969), 1400 UNTS 231, in particular Articles 24-30 and 31.

²⁹ For the former hypothesis see Agreement concerning the *compromis* of 11 July 1978 (1978), 1204 UNTS 53, Articles 11 and 12-15; for the latter see Exchange of Notes concerning the Tribunal of *La Bretagne* (1986), 1484 UNTS 112.

³⁰ *Spaans*, above, note 24, (1988) 58 DR at 120.

³¹ For instance, international organizations sometimes submit to the municipal law of the host state employment contracts, which are normally subject to international law (ie the internal regulations of the organization concerned), but this requires express reference. See *Guerra Ardiles v ESO* (ILOAT No 1311/1994) para 15; *Kock et al v EPO* (ILOAT No 1450/1995) para 19. It has been held that such reference justifies jurisdiction, at least concurrent, of the municipal courts; see *Hamouda et al v UPU* (ILOAT No 1451/1995) paras 22-29.

³² See below, notes 39-40.

apply and interpret) international law to determine a preliminary question involving international law.

It should be recalled that the ordinary arrangement for tribunals set up by treaty is for the constitutive instrument to set out the rules of the tribunal in general terms (which gives the tribunal considerable latitude in interpreting them) and/or for the tribunal to be empowered to supplement the rules within the terms and spirit of the treaty. It is accepted principle that the tribunal will be sovereign in the exercise of its power to supplement the agreement of the parties as regards the procedure and internal organization of the tribunal,³³ but exceptionally it will be subject to the contracting states' approval.³⁴ As a consequence, it is an unmistakable element of the justice administered by international tribunals that the procedure followed is flexible.³⁵ As the Permanent Court of International Justice (hereafter the 'Permanent Court' or 'PCIJ') has sought to clarify from its inception, it was 'not bound to attach to matters of form the same degree of importance which they might possess in municipal law'.³⁶ And in the same vein it added:³⁷

The Court ... is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.

The flexibility and autonomy of international courts and tribunals in matters of procedure (subject to the imperative general principles of impartiality and equality³⁸) is therefore part of the *lex fori* of such tribunals. This goes hand in hand with a similar freedom to identify the conflicts rules applicable in cases where the application of domestic law is necessary;³⁹ and this latter issue, which matters are governed by domestic law, also falls to be determined by an international conflicts rule. In the case of the *Serbian and Brazilian Loans*, the Permanent Court held that '[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country', this being a conflicts rule the court determined by reference to international law, not any domestic law.⁴⁰ The United States – Mexico General

³³ See ILC Model Rules on Arbitral Procedure, Articles 12(1), 2(2)(iv). Cf CSD, Article III(2), quoted below, text to note 49; and Final Tribunal Rules of Procedure (1983), 2 Iran-US CTR 403 (hereafter the 'Tribunal Rules'), Article 1(1). See also the compromise in *Diverted Cargoes*, 12 RIAA 51, 62 (ad hoc, 1955).

³⁴ This latter option was adopted, for instance, for the Austrian–German Arbitral Tribunal; see Seidl-Hohenveldern, *The Austrian–German Arbitral Tribunal* (1972) 69, note 336. And the same applied to the Tribunal of International Composition of the Saar; see *Règlement Interieur* (1956). See also Agreement concerning the International Arbitral Tribunal on the Gut Dam Claims (1965), 607 UNTS 141, Article VI.

³⁵ See Simpson & Fox, *International Arbitration Law* (1959) 152-3, 192-213; Hudson, *International Tribunals* (1944) ch VII, especially at 84-5; Lauterpracht, *The Development of International Law* (1958) 366.

³⁶ *The Mavrommatis Palestine Concessions* (Preliminary Objections), PCIJ, Series A, No 2, at 14.

³⁷ *ibid* 16 (discussing whether it was bound to make an interim judgment on jurisdiction).

³⁸ Thus, due process is read within the WTO procedural documents without specific reference in the text. Examples include the degree of specificity that a request should satisfy so as to enable the respondent adequately to make out its defence: *EC – Bananas III*, WT/DS27/AB/R (1997) para 3.8; *India – Patent Protection*, WT/DS50/AB/R (1997), paras 3.10-3.18; *Japan – Film and Paper*, WT/DS44/R (1998) para 10.8; and the evidentiary rules that ensure equality of litigants: *Argentina – Textiles*, WT/DS56/R (1997) para 6.55.

³⁹ For such 'international rules of conflict of laws' see, eg, Lipstein, (1942) 27 TGS 142, 144-56 (on the foundations of such rules); *id.*, (1944) 29 TGS 51, 61-76 (on the specific rules); and generally Jenks, *The Prospects* (1964) 569-585.

⁴⁰ *Serbian and Brazilian Loans*, PCIJ, Series A, No 20/21, at 41. Cf also *Anglo-Iranian Oil Co*, ICJ Reports 1952, 93, 112-3; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, ICJ Reports 1970, 3, 33-9, paras 37-58. This of course immediately raises the question of the modalities of proof of the content of the domestic law pleaded, which is outside the ambit of this thesis.

Claims Commission more explicitly held that the adjudication of claims before international tribunals necessarily involves the application of international law, even if it is only to find that a certain municipal law is *in casu* applicable.⁴¹ The basic idea is that the international tribunal can owe allegiance to no particular sovereign, because this would violate the sovereign equality of states. A tribunal under the auspices of the Permanent Court of Arbitration has stated this succinctly:⁴²

[The] Tribunal is ... a regular legal institution which possesses by consent of the two parties a compulsory jurisdiction, independent of the national courts of the parties.

The independence from national law is partly due to and partly expressed in the traditional rules of state immunity from jurisdiction. Thus, awards of international tribunals cannot be challenged in national courts, for this would indirectly violate the immunity of the states that have established them.⁴³

The *lex fori* is thus provided exclusively by international law—that is, its constituent treaty and general international law to the extent it does not conflict with that treaty.⁴⁴ That is what was meant by the somewhat overbroad statement of the Rumano-German Mixed Arbitral Tribunal that:⁴⁵

N'appartenant à aucun État et siégeant où leur bon semble, les tribunaux mixtes n'ont pas de lex fori; le droit national des parties ne pourrait, ainsi, se heurter qu'à des règles d'ordre public international.

The rules determining particular procedural matters give an even clearer indication of the complete separateness of international tribunals from municipal law. The early jurisprudence was adamant.⁴⁶

The Commission expressly decides that municipal restrictive rules of adjunctive law or of evidence cannot be here introduced [T]he greatest liberality will obtain in the admission of evidence As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure.

Or: '[I]t is clear that international courts ... cannot be bound by municipal rules in the receipt and admission of evidence.'⁴⁷

The soundness of the proposition at the level of the conflict of laws is confirmed in subsequent practice. A recent award of a tribunal constituted under the aegis of the International Centre for

⁴¹ See *Illinois Central Railway Co*, 4 RIAA 21, 23, para 6 (US-Mexico General Claims Commission, 1926).

⁴² *Norwegian Shipowners Claims*, 1 RIAA 307, 331 (PCA, 1922).

⁴³ cf Schermers, *International Institutional Law II* (1972) 638-9.

⁴⁴ See *Williams v Venezuela*, reprinted in Moore, *History and Digest IV* (1898) 4181, 4182 (US-Venezuela Commission, 1886) (the *lex fori* is provided by 'the treaty and the public law').

⁴⁵ *Negreanu & Fils v Meyer & Fils* (1926) 5 TAM 200, 211 (Rumano-German MAT) (emphasis added); cf *Findlay v William Graaf* (1925) 4 TAM 73, 75-6 (Anglo-German MAT); *Barthez de Monfort v Treuhander Hauptverwaltung der Staat- Schulden und Reichschuldenverwaltung* (1927) 6 TAM 806, 809 (Franco-German MAT).

⁴⁶ *Parker v Mexico*, 4 RIAA 35, 39, paras 5-6 (US-Mexico General Claims Commission, 1926). See further Feller, *The Mexican Claims Commissions* (1935) 260.

⁴⁷ *The Shufeldt Claim*, 2 RIAA 1080, 1083 (ad hoc, 1930).

the Settlement of Investment Disputes (hereafter 'ICSID') almost repeats the very words quoted above.⁴⁸

The above remarks do not, of course, exclude the possibility for Iran and the United States to have subjected the Tribunal to the law of the Netherlands. They do make it plain though that such subjection cannot be presumed. It is proposed therefore to look at the relevant practice, which consists of the Tribunal Rules, the jurisprudence of the Tribunal itself, and the practice of the states concerned.

(b) The Practice of and in connection with the Tribunal

The Claims Settlement Declaration reads, omitting unnecessary words, as follows:⁴⁹

[T]he Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) *except to the extent modified by the Parties or the Tribunal* to ensure that this Agreement can be carried out.

The words emphasized confirm that the contracting parties (that is, Iran and the United States) are the masters of the judicial process of the Tribunal. The UNCITRAL Rules, however, were designed expressly to yield to the mandatory rules of the 'law applicable to the arbitration'. But, as has been discussed in Chapter 4 above, in no way do the Rules prejudge which law is in fact the one applicable, let alone whether that law must necessarily be a municipal law. So the fact that Article 1(2) survived intact in the actual Rules adopted by the Tribunal⁵⁰ is not crucial, contrary to what is claimed by certain commentators.⁵¹ It is evidence against the interpretation here suggested, but not crucial evidence in any way, that the PCA Rules for arbitrations between states, though modelled on the UNCITRAL Rules, do not include Article 1(2). This, by contrast with the PCA Rules for arbitrations between states and private parties.⁵²

The most appropriate interpretation, in the light of the considerations examined above, would be that the 'law applicable' is in fact the constituent instruments of the Tribunal, that is, the Declarations, and general international law to the extent that the Declarations do not derogate from it. Though there has been so far no analysis of that provision in the case-law of the Tribunal,⁵³ its judicial practice would lend force to that interpretation.

First, Article 33 of the Tribunal Rules reproduces *verbatim* Article V of the Claims Settlement Declaration, which Declaration is framed in terms more familiar to public international lawyers, providing for decisions 'on the basis of respect for law, applying such *rules* of commercial *and*

⁴⁸ See *AAPL v Sri Lanka* (ARB/87/3) (1991) 6 ICSID Rev-FILJ 526, 549-50: 'Rule (K)'. The relevant part of the award was cited with approval and applied extensively in *Tradex Hellas SA v Republic of Albania* (Merits) (ARB/94/2) (1999) 14 ICSID Rev-FILJ 197, in particular at 219-21, paras 73-84.

⁴⁹ CSD, Article III(2).

⁵⁰ See Tribunal Rules, Article 1(2).

⁵¹ See van den Berg, (1984) 12 IBL 341, 342-3.

⁵² Contrast the PCA State-State Rules and PCA State-Organization Rules with the PCA State-Individual Rules and PCA Organization-Individual Rules.

⁵³ See, however, *DIC of Delaware, Inc et al v Tehran Redevelopment Corp et al*, 8 Iran-US CTR 144, 161 (1988) (implicitly); *The First National Bank of Boston v Iran et al* (83-202-2) (1989) 14 YCA 362 (1988), Sep Op Khalilian, Part II. See further note 75 below.

international law as the Tribunal determines to be applicable'.⁵⁴ By contrast, the corresponding provision of the UNCITRAL Rules is appreciably stricter, directing the tribunal to apply the law 'determined by the conflict of laws rules which it considers applicable' in default of a choice by the parties. The substitution is in itself a certain, if indirect, confirmation that the Declaration is indeed the 'applicable law' in Article 2(1) of the Rules. The Tribunal has explored the full latitude of its wide mandate,⁵⁵ to such an extent that its case-law has been criticized as inconsistent and unprincipled.⁵⁶ In the only case where Dutch law has been pleaded (as applicable to limitation of claims, on the basis of the Dutch seat of the Tribunal), the Tribunal declined to apply it, but reasoning that all the laws connected with the dispute contained the same limitation period of one year.⁵⁷

Furthermore, the Tribunal consistently applies international law directly to the determination of issues arising out of dual nationality as a matter affecting the procedural capacity of the claimant. The stated reason was that there is no municipal *lex fori* is binding on the Tribunal.⁵⁸ Generally in jurisdictional matters, the Tribunal has construed jurisdictional clauses in accordance with principles established for international tribunals rather than by reference to any domestic law.⁵⁹ A particularly interesting aspect of the jurisprudence is that the power to order interim protection was discovered not in the Tribunal Rules (Article 26), but in an 'inherent power' possessed by tribunals established by international treaty.⁶⁰ Moreover, when the Tribunal Rules do not contain a provision in point, the Tribunal resorts to international law guiding principles,⁶¹ and in this context interprets the Declarations using treaty law rules⁶² and general principles of international law.⁶³

⁵⁴ CSD, Article V (emphasis added). The wide formulation of 'respect for the law' comes from the Convention for the Pacific Settlement of International Disputes (1899), 189 CTS 410, Article 15 and the Convention for the Pacific Settlement of International Disputes (1907), 205 CTS 234, Articles 37(2) and 73.

⁵⁵ See, eg, *CMI International, Inc v Iran*, 4 Iran-US CTR 263, 267-8 (1983). As Bahrani-Ahmadi J has put it, Article V of the Declaration is there because 'the Tribunal cannot, as an international forum, apply the choice of law rules of that state in which it has been convened, even in commercial claims ...': *FMC Corp v The Ministry of National Defence et al*, 14 Iran-US CTR 261 (1987). The first President of the Tribunal had foreseen this development; see Bellet, (1984) 16 L & P Int Bus 667, 672-4.

⁵⁶ See *Harnischfeger Corp v Ministry of Roads and Transportations et al*, 8 Iran-US CTR 119, 140-41 (1985) (Diss Op Mosk). For detailed and trenchant syntheses of the relevant practice see Crook, (1989) 83 AJIL 278; Toope, above, note 5, Chapter IX, in particular at 375-80.

⁵⁷ See *Carolina Brass, Inc v Arya National Shipping Lines, SA*, 12 Iran-US CTR 139, paras 20-21 (1986). But see *Craig v Ministry of Energy of Iran et al*, 3 Iran-US CTR 280, 287 (1983) ('municipal statutes of limitation have not been considered as binding on claims before an international tribunal').

⁵⁸ See *Esfahanian v Bank Tejerat*, 2 Iran-US CTR 157, 166 (1983); *Golpira v Iran*, 2 Iran-US CTR 171 (1983).

⁵⁹ See *Grimm v Iran*, 2 Iran-US CTR 78, 80, (1983); *Watkins-Johnson Company et al v Iran et al*, 22 Iran-US CTR 218, 296, para 56 (1989) (Diss Op Noori), and the references there.

⁶⁰ *E-Systems, Inc v Iran et al*, 2 Iran-US CTR 51 (Interim Award, 1983) and the Concurring Opinions. On general international law see *Nuclear Tests, ICJ Reports 1974*, 253, 259-60; Caron, (1986) 43 ZaöRV 465, 476-7.

⁶¹ See, eg, *Re: Refusal to Accept the Claim of Raymond International (UK)*, 1 Iran-US CTR 394 (1982) and the Joint Dissenting Opinion of Holtzmann, Aldrich, and Mosk JJ (on whether substitution of the claimant amounts to the filing of a new claim); *Bendone-Derossi International v Iran*, (1989) 14 YCA 385, paras 11-15 (1988) and the Dissenting and Concurring Opinions (on whether a claim can be based on an ICC award in the same matter as between the same parties).

⁶² See, eg, *US v Iran* (12-A1-FT) 1 Iran-US CTR 189, 190 (1982); *US v Iran* (32-A18-FT) 5 Iran-US CTR 251, 259-61 (1984).

⁶³ See *Karubian v Iran*, (1997) 22 YCA 541, para 161 (1996) (the Tribunal will not allow a manipulation of its jurisdictional rules that would lead to abuse of rights).

The general approach of the Tribunal in regard to procedural matters has been to adopt a solution based on the Rules, interpreted in the light of 'general principles of procedural law',⁶⁴ or even directly to refer to such general principles of law⁶⁵ or to a general rule of flexibility of procedure in international tribunals.⁶⁶ Some Dissenting Opinions even refer to 'fundamental' principles of procedure, conceived as directly derived from international law, such as the equality of parties and the right to be heard.⁶⁷

By way of illustration, the Full Tribunal lent its support to the flexible approach of individual chambers on the evidence required to prove the nationality of a corporation, this being a question not expressly dealt with in Article 24(1) of the Tribunal Rules.⁶⁸ Judges Ansari, Bahrami, concurring on this point, elaborated as follows:⁶⁹

In principle, evidence adduced in substantiation of claims, subsumed under adjective law, is subject to the law of the forum. However, in entering into the Claims Settlement Declaration the two Governments did not intend that the *lex fori* of the Tribunal's *situs* should govern in this instance

They went on to qualify this statement by referring to overriding 'basic principles' underpinning the technical rules of evidence, such as that presumptions are admissible only in the absence of other means of evidence.

Another example is provided by a combination of civil and common law traditions purporting to allow parties to produce as 'party representatives' persons whose evidence would not under certain civil law laws be admissible as witness testimony,⁷⁰ such as officers and employees of the corporations involved.⁷¹ Though this practice would not be contrary to Dutch law, there is no evidence that Dutch law was consulted at all; rather, it seems like a creation of practice seeking to create a legal conduit for the admission of evidence from persons closely acquainted with the facts of the case.⁷² And, finally, the Tribunal's adoption of 'recognized principles' of international evi-

⁶⁴ See, eg, *Miller Aryeh v Iran* (581-842/843/844) (1997) at note 38 (on Article 24 of the Rules and burden of proof); *Lockheed Corp v Iran*, (1989) 14 YCA 429 (1988) Partly Dissenting and Partly Concurring Opinion Khalilian, at paras 2-3 (on burden of proof, equal treatment of the parties, and the duty of a tribunal accurately to report the facts of the case); *Re Judge N Mangård*, 1 Iran-US CTR 509, and the document attached as Attachment IX (1982).

⁶⁵ See, eg, *Woodward-Clyde Consultants v Iran et al*, 3 Iran-US CTR 239, at para 16 (1983) (a general rule of the law of evidence that 'contradictory statements of an interested party should be construed against that party'); *American Bell International Inc v Iran et al*, 12 Iran-US CTR 170, at para 16 (general principle that contradictory interpretations placed on record by the same party are inadmissible).

⁶⁶ See, eg, *Ji Case Company v Iran et al*, 3 Iran-US CTR 62 (1982) Diss Op Holtzmann, at note 2 (hearsay evidence admissible because the Tribunal is not bound by strict rules of evidence); *PepsiCo, Inc v Iran et al* (260-18-1) (13 October 1986) Diss Op Ameli, at para 33 (wide discretion of international tribunals in the admission and evaluation of evidence).

⁶⁷ See, eg, *Phillips Petroleum Co, Iran v Iran et al*, 1 Iran-US CTR 487 (Interlocutory Award, 1982) Diss Op Shafeiei, Parts (B)-(C) (discussing principles of international procedural law).

⁶⁸ See *Iran v US* (45-A20-FT) 11 Iran-US CTR 271, 274-5, paras 10-12 (1986). The Tribunal went on to hold that statistical sampling on surveys of shareholders might in certain cases be an appropriate means to establish the nationality of a corporation: *ibid* 275-6, para 14.

⁶⁹ *ibid* 279-80 (Sep Op Ansari, Bahrami, Mostafavi).

⁷⁰ The NCPC, Articles 184-198, provides for 'comparution personnelle'.

⁷¹ These persons are not examined under oath. See generally Brower, (1990) 224 RdC 123, 227-30 and the references there.

⁷² Brower, (1997) 6 JTLP 189, 192.

dentiary law in determining the weight to be accorded to expert witness reports is a further confirmation of the thesis advanced here.⁷³

Summing up: though the Tribunal has never disputed the abstract proposition that questions of procedure are subject exclusively to the *lex fori*,⁷⁴ such authority as there exists would not support the proposition that the Tribunal's *lex fori* is provided by Dutch law. In fact, there is virtually no reference to Dutch law in the jurisprudence of the Tribunal. There are, however, two considerations said to support the contrary conclusion, which should now briefly be discussed.

The first relates to Articles 32(7) and 34(3) of the Tribunal Rules, directly descending from the UNCITRAL Rules, which provide for compliance by the arbitral tribunal with any requirement of registration imposed by the law of the state where the award is made.⁷⁵ It has been appositely remarked that such requirement is inimical to an international award in the full sense of the term advocated here.⁷⁶ And it is understood that the Tribunal does in fact register its awards with the authorities in the Hague.⁷⁷ It is submitted with respect that the argument should fail, in view of the more direct evidence examined above. Further, registration is in itself a very weak indication: registration with an international body is provided for proceedings which clearly take place under international law⁷⁸ but also for proceedings explicitly subjected to municipal law.⁷⁹ In any event, and despite the terms of the relevant provisions which seem to contemplate a validity requirement, registration is not a prerequisite of validity.⁸⁰ Submission for registration, which is what the provision provides for, is a mere preparatory act that cannot conceivably prejudice the intrinsic validity of an award.⁸¹ It is a mere formality designed to facilitate the exercise of post-award remedies (setting aside and enforcement) by providing a certain *dies a quo* from which the relevant procedural deadlines run.⁸² But such procedures are almost virtually pre-empted in this case by the special and exclusive provisions of the Declarations.⁸³

⁷³ See, eg, *Starrett Housing Corp v Iran*, 16 Iran-US CTR 112, 196-200, paras 263-275 (1987).

⁷⁴ See *PepsiCo, Inc v Iran et al* (260-18-1) (13 October 1986) Diss Op Ameli, at para 57, note 20 (where the proposition is used to counter the application of New York law).

⁷⁵ In fact, the wording of Article 32(7), 'If the arbitration law of the country where the award is made requires ...', lends further support to the argument that Article 1(2) does not necessarily point to the law of the same state; otherwise the reference would be again to 'the law applicable'.

⁷⁶ See van den Berg, above, note 51, 343.

⁷⁷ See Report of the Secretary-General, above, note 26, 298-99; Hardenberg, (1984) 12 IBL 337, 338.

⁷⁸ See the Rules of Procedure for Arbitration of the International Energy Agency Dispute Settlement Centre, (1981) 20 ILM 1307, Articles 43, 44 (these Rules are based on the UNCITRAL Rules).

⁷⁹ See WIPO Rules, Articles 59(b), 62(f),(g).

⁸⁰ Thus, a requirement of the arbitration agreement that the award be registered with a certain French court, and actual registration with that court, was held by French and Dutch courts not to entail submission to French law: Cass Civ 1re, 25 May 1983, [1985] Rev Arb 415; President, Rechtbank Zutphen, 9 December 1981, (1983) 8 YCA 399.

⁸¹ And the official commentary to the UNCITRAL Rules views it as a technicality rather than a strict condition of validity: UN Doc A/CN.9/112/Add.1, (1976) 7 UNCITRAL YB 166, 178.

⁸² cf *The Continental Corp v Iran et al*, 1 Iran-US CTR 403 (1982) Sep Op Kashani, at para 2 (considering the requirement as a formal prerequisite of enforcement, in accordance with the then in force Article 642 of the Netherlands CCP). This is in fact a matter for the law concerned to determine, but the presumption should be that registration is a material act only; see, eg, Paris, 30 March 1995 (unreported); *Tidewater Marine International Inc New Orleans v Consolidated Oil Lagos* [1996] FHCLR 324, 326 (Nigeria).

⁸³ See CSD, Article IV(1), as interpreted in *Iran v US* (586-A27-FT), above, note 11, para 63 (1998); and cf *Dallal v Iran*, 5 Iran-US CTR 74 (1984) (the Tribunal's awards cannot be appealed).

The second consideration arises from the attempts of Iran in the course of 1983 to have ten awards set aside in the Dutch courts for non-compliance with certain mandatory provisions of Dutch law, in particular provisions on the quorum and secrecy of deliberations.⁸⁴ The applications were eventually withdrawn, so that Dutch courts never pronounced themselves on the primary question whether the awards of the Tribunal relate to Dutch sovereignty at all. But the mere attempt to set aside is not conclusive evidence of anything in the affirmative to the question: the United States disputed the applicability of Dutch law in the first place and, more generally, the whole incident must be seen in the light of the very strained relations of Iran and the United States surrounding the functioning of the Tribunal in its early days.⁸⁵

A Bill was subsequently introduced in the Dutch houses of parliament that would explicitly subject the Tribunal's awards to Dutch law.⁸⁶ A second issue, in truth a corollary of the first, resulted from the fact that Dutch law before 1986 required an agreement in writing signed by the parties, and there were doubts whether that requirement was satisfied by the Declarations.⁸⁷ But this is not strong evidence either. For, first, it expressly purported to 'remove any doubts' as to the applicability of Dutch law; second, provided only two very limited grounds for annulment; third, mandated the application of select few provisions of Dutch law;⁸⁸ and fourth, was never passed, apparently because of reactions by the Iranian government.⁸⁹

A systemic look at the Tribunal as a whole would further corroborate its foundation in international law. It was created by states exercising diplomatic protection of their citizens and their resulting power to settle claims between their citizens and each other.⁹⁰ The treaty origin apart, all the usual pointers, outlined above, do in fact exist to show that it constitutes a self-contained dispute settlement mechanism at an intergovernmental level.

What is more, it should not be thought that 'self-contained' is an absolute notion. There is a minority view that municipal courts may intervene in ICSID proceedings to order interim and protective measures,⁹¹ and there is a converse minority view forbidding courts from intervening in New York convention arbitral proceedings to order such protection.⁹² In other words, it is not an

⁸⁴ For the details see Schwebel, *Three Salient Problems* (1987) 251-76; Lake & Dana, (1984) 16 L & P Int Bus 755, 759-64; Seifi, (1992) 8 Arb Int 41, 53-62. Articles 620-657 (old) of the CCP (Netherlands) are reprinted in 4 Iran-US CTR 299-304.

⁸⁵ See the US position in Schwebel, *ibid* 265-6. Note also that the Tribunal's position on the disputed issues did not take account of Dutch law; see, eg, *RayGo Wagner Equipment Co v Starline Iran Co*, 1 Iran-US CTR 411 (1982) and the opinions attached thereto.

⁸⁶ See Bill on Applicability of Dutch Law to the Awards of the Tribunal sitting in the Hague to hear Claims between Iran and the United States, 4 Iran-US CTR 306.

⁸⁷ See CCP (Netherlands), Article 623(1)(3) (old). For the view that it did not, *as a matter of Dutch law*, see *Dallal v Bank Mellat*, above, note 23.

⁸⁸ See Bill, above, note 86, ss 2-4. The Explanatory Notes to the Bill make it plain that the Bill had the limited purpose of removing practical obstacles and doubts of applicability of Dutch law to an organ whose jurisdiction was established by international law; see 4 Iran-US CTR 308, 209-11.

⁸⁹ See Lake & Dana, above, note 84, 783-7.

⁹⁰ See CSD, Article 1(3); and *Dames & Moore v Regan*, 453 US 654 (1981).

⁹¹ See ICSID Convention, below, note 98, Article 26 and ICSID Rules, Article 39(5); on which see Brower & Goodman, (1991) 6 ICSID Rev-FILJ 431, in particular at 437-8.

⁹² See, eg, *McCreary Tyre & Rubber Co v CEAT*, 501 F2d 1032 (3d Cir 1974); *Cooper v Ateliers de la Moto-becane*, 456 NYS 2d 728 (1982) (Article II of the New York Convention precludes pre-award interim protection).

essential element of the international nature of a tribunal that it be designed to operate in isolation from national courts.⁹³

A final point is that it would defy logic for Iran and the US to create a tribunal partly subject to the law of the Netherlands (for the claims between individuals and governments) and partly subject to international law (for the claims between governments).⁹⁴ In the latter type of disputes, sovereign immunity considerations are prominent. But it would on any view be absurd for two governments to create an exclusive forum for the liquidation of all disputes, a forum which in consequence takes precedence over any other forum,⁹⁵ and then proceed to subject it to the law of a third state—especially if account is taken of the fact that Dutch law at the time of making of the Declarations was under revision and did not, as it still does not, provide for a special régime for international commercial proceedings.

The facts would then suggest that the Iran – US Claims Tribunal is an international tribunal not subject to the laws of the Netherlands. This is therefore a tribunal subject to international law—not, as is sometimes erroneously averred, an ‘anational’, ‘delocalized’⁹⁶ or ‘*sui generis*’⁹⁷ tribunal. As a general nomenclature point, the term ‘anational’ only denotes that a legal act is removed from the ambit of national (that is, municipal) law, without prejudging where it belongs. The Iran – US Tribunal cannot be anational, for it never was within the ambit of national law.

III. FOREIGN INVESTMENT TREATY ARBITRATION

Arbitration between a foreign private investor and the investment recipient state may take two forms, of which one is under the ICSID Convention.⁹⁸ However, the vast majority of arbitrations related to foreign investment so far have been conducted either ad hoc or under the rules of the ICC. On the other hand, the share of ICSID proceedings has increased in recent years: in April 1999 twenty-four cases were pending before ICSID tribunals,⁹⁹ compared to a total of thirty-eight proceedings concluded by final award or settlement.¹⁰⁰

The following three subsections explore the propositions that bilateral and multilateral investment treaties generally say nothing on the procedural law of state – investor arbitration, whereas ICSID arbitration is independent of any and all national laws. It should be clarified at the outset, however, that this thesis is not concerned with arbitrations taking place in the context of a foreign investment guarantee programme. Such arbitrations are international in the sense that the private entity may be incorporated in a state other than the state participating in the proceedings (normally in the state where the investment was made) and also in the sense that the subject-matter is

⁹³ cf ICSID Convention, Article 35: ‘Consent of the parties to arbitration ... shall, *unless otherwise stated*, be deemed consent ... to the exclusion of any other remedy.’ (emphasis added)

⁹⁴ For the jurisdiction of the Tribunal over claims of the latter type see CSD, Articles II(3), II(2).

⁹⁵ See, eg, *E-Systems, Inc v Iran et al*, 2 Iran-US CTR 51 (1983).

⁹⁶ The following authors would seem to use the term, erroneously, as a descriptor of the lack of allegiance of the Tribunal to the Netherlands: see Avanesian, (1991) 8:2 J Int Arb 5, 15-23; Lake & Dana, above, note 84, at 779, 789-807; van Hof, *Commentary* (1991) 6-11; Pelonpää & Caron, *The UNCITRAL Arbitration Rules* (1994) 20-36; Shindler, (1986) 102 LQR 500, 502-4.

⁹⁷ Thus Fouchard in Virally in *Le Tribunal des Différends irano-américains* (1985) 27.

⁹⁸ Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 18 March 1965), (1966) 575 UNTS 159 (hereafter the ‘ICSID Convention’).

⁹⁹ See Parra, below, note 103 (one of the cases he includes has meanwhile been concluded by final award). At the end of 1998 there were eighteen pending cases; see *ICSID Annual Report 1998*, 6.

¹⁰⁰ See List of Concluded Cases, <<http://www.worldbank.org/icsid/cases/conclude.htm>> (1998).

international, but they are idiosyncratic. Though formally or ostensibly international, they concern a municipal law on foreign investment guarantees, arise between a state and an entity whose beneficial interests are in that same state, and the jurisdiction of the tribunal may derive from an arbitration provision, possibly compulsory, of the relevant law.¹⁰¹

A. Bilateral Investment Treaties

The 1990s have witnessed the proliferation of a relatively new type of instrument, the agreement for the mutual encouragement and protection of investment (Bilateral Investment Treaty, or 'BIT').¹⁰² BITs are the specialized successors of Friendship, Commerce and Navigation ('FCN') treaties, which until recently typified the bilateral foreign investment legal framework. There exists at the time of writing a network of more than 1500 BITs,¹⁰³ laying down detailed provisions on the definition and treatment of foreign investment and its proceeds, and specifying dispute settlement procedures both as between the investor and the host state and as between the contracting states.

Of the 1300-odd BITs in force, approximately 950 provide for ICSID arbitration.¹⁰⁴ Though a number of prototype treaties would make ICSID arbitration the exclusive means of dispute resolution as between the state and the investor, this is in fact the case for a small minority of treaties only. That arrangement is dominant in UK practice,¹⁰⁵ and also followed in some older French treaties¹⁰⁶ and some recent Latin American¹⁰⁷ and Swiss treaties too.¹⁰⁸ The most common arrangement, however, is a combination of ICSID and ad hoc arbitration, usually under the UNCITRAL Rules.¹⁰⁹

Though the dispute settlement practice under BITs resists generalization except at the most abstract level,¹¹⁰ the important point here is that arbitration *provided for by* treaty is not necessarily arbitration *proceeding under* treaty. The utility of a BIT is threefold, in the context relevant here, and neither does it relate to procedure nor does it seek to secure absolute finality for the award.

¹⁰¹ cf Foreign Assistance Act, 1961, 22 USC § 2395(i); and the AAA awards made under it: *Revere Copper and Brass, Inc v OPIC*, 56 ILR 258 (1978); *Anaconda Company & Chile Copper Company v OPIC* (1975) 14 ILM 1210, (1976) 70 AJIL 135; *IT&T Corp, Sud America v OPIC* (1974) 13 ILM 1307; *International Bank of Washington v AID* (1972) 11 ILM 1216; *Valentine Petroleum & Chemicals Corp v AID* (1970) 9 ILM 889.

¹⁰² The first BIT was between Germany and Pakistan (1959). However, in 1990 there existed only around 350 BITs. See also Doc ICSID/17 (1997).

¹⁰³ At the end of 1997 1513 BITs had been signed in total: Doc UNCTAD/WIR/1998 (Overview) 12. Approximately 1300 BITs were in force in mid-1999: Parra, (1999) 16:1 News from ICSID 5, 7.

¹⁰⁴ Parra, above, note 103.

¹⁰⁵ See Denza & Brooks, (1987) 36 ICLQ 908, 920-1; UK Prototype BIT (1985), *Compendium* 3, 185, Article 8. But see the examples cited by Dolzer & Stevens, *Bilateral Investment Treaties* (1995) 149, 228.

¹⁰⁶ eg: France-Pakistan BIT, Article 8, second indent; France-Paraguay BIT, Article 8; France-Jordan BIT, Article 8; France-Liberia BIT, Article 8. The French Prototype BIT (*Compendium* 3, 159, Article 8) provides primarily for ICSID.

¹⁰⁷ See Escobar, (1996) 11 ICSID Rev-FILJ 86, 91-2; and the treaties reproduced *ibid*, 94 *et seq*. Also the 1994 Chilean Prototype BIT: *Compendium* 3, 143.

¹⁰⁸ For instance, the BITs with Moldova, Laos, FYROM, Pakistan, Slovenia, Zambia (all post-1994). This is consistent with the 1986/1995 Swiss Prototype BIT (*Compendium* 3, 177), Article 8. The more usual arrangement, however, is to include ICSID as one of the options; see, eg, Switzerland-Estonia BIT, Article 11(3). See generally Dominicié in *FS Schindler* (1989) 457.

¹⁰⁹ See, eg, 1994 US Prototype BIT, *Compendium* 3, 195, Article IX. The prototype arrangement is absolutely dominant in recent US practice. See also World Bank Guidelines on the Treatment of Foreign Direct Investment, (1992) 31 ILM 1363, Article V(2)-(3).

¹¹⁰ See, eg, Paulsson in *Economic Development* (1996) at 236.

The objective is always to give the option of a neutral forum to the investor. To ensure that resort to that forum will be effective and binding *vis-à-vis* the signatory states, provisions may be contained to (i) create *ipso facto* consent to arbitration;¹¹¹ (ii) formally render the provision equivalent to an agreement in writing for the purposes of Article II of the New York Convention and/or the ICSID convention, as the case may be;¹¹² (iii) lay down a mechanism for the appointment of arbitrators¹¹³ to avoid embarrassments such as those created in the *Anglo-Iranian Oil Company* case;¹¹⁴ and (iv) ensure that the states cannot avail themselves of a sovereign immunity defence. Additionally, BITs place on the inter-state plane the arbitration obligations of the state. None of these characteristic provisions, if at all extant, would lead to the conclusion that the procedural régime of ICC,¹¹⁵ UNCITRAL, IACAC,¹¹⁶ or ad hoc BIT arbitrations should differ from that of ordinary proceedings in which a state is a party (on which see subsection IV.B below). Thus, BITs are only a vehicle, with certain strings attached, for some type of arbitration, whose nature is not affected or determined by the BIT.

ICSID arbitration put aside, the procedural framework (or, to use the more general term, the ‘law of the arbitration’) for investor – state proceedings is not international law.¹¹⁷ This statement must be qualified as follows. Whether an arbitration is within the scope of a BIT depends exclusively on the BIT concerned. Thus, a treaty will define what is an ‘investor’ or ‘investment’, and which disputes are subject to, and what type of, arbitration. Therefore, in the unlikely case where the only jurisdictional basis is a BIT, that treaty becomes the sole determinant of jurisdiction, and relevant treaty rules apply.¹¹⁸

Jurisdictional matters, however, will often have a procedural manifestation or ‘flavour’. For instance, an ad hoc tribunal seised in parallel to or after ICSID proceedings as between the same parties and the same investment will decide whether there is a jurisdictional obstacle to such concurrence by interpreting the treaty, and not by reference to any national law or even the rules of the arbitration. The treaty may explicitly or by necessary implication incorporate general principles, eg that of non-cumulation of remedies, but that does not detract from the general proposition

¹¹¹ See, eg, UK-Hungary BIT, Article 8(1); and UK-Sri Lanka BIT, Article 8(1): ‘consents to submit any dispute’; Greece-Albania BIT, Article 10(4): ‘shall be submitted for settlement’. For an example from practice see *Amco Asia Corp et al v Indonesia* (Jurisdiction) (ARB/81/1) (1984) 23 ILM 351 (annulled on other grounds). For a general typology see Broches, *Selected Essays* (1994) 447, 448-51; (1985) 2:1 News from ICSID 12, 13-6; and further Paulsson, (1995) 10 ICSID Rev-FILJ 232; Sornarajah, *The International Law on Foreign Investment* (1994) 267-9, with further references.

¹¹² The recent US BITs (and the Canadian BITs modelled on them) contain a provision to that effect. See BITs with Bolivia, Croatia, El Salvador, Georgia, Estonia, Honduras, Jordan, Trinidad and Tobago, Ukraine, Nicaragua, Azerbaijan (all concluded between 1994 and 1999).

¹¹³ Switzerland-Albania BIT, Article 11(2)(b) (the President of the ICC, though the procedure is ad hoc); Denmark-China BIT, Article 8(4) (the Chairman, International Arbitration Institute of the Stockholm Chamber of Commerce, though the procedure is ad hoc).

¹¹⁴ See *Anglo-Iranian Oil Co*, *ICJ Reports 1952*, 93; *ICJ Pleadings, Anglo-Iranian Oil Co*, 118-21. The appointment procedure was remedied in the subsequent Iran-Consortium Oil Agreement (1954) Article 44.C: *OPEC: Iran, pre-1966*, 153. And on the case as relates here see Johnson, (1953) 30 BYIL 152.

¹¹⁵ The US-Haiti BIT (not in force), Article VII(3), is the only US BIT to provide for ICC arbitration only, Haiti not being an ICSID state. ICC arbitration is rare in BIT practice, and then only as one of the options or as a fall-back mechanism; see, eg, France-Syria BIT, Article 8; Switzerland-South Africa BIT, Article 10(2)(b).

¹¹⁶ See, eg, US-Panama BIT, Article VII(2), where IACAC arbitration is mentioned amongst other options.

¹¹⁷ Accord, without specific explanation: Parra, (1997) 12 ICSID Rev-FILJ 287, 300-05. Thus seemingly Sacerdoti, (1997) 269 RdC 251, 482.

¹¹⁸ See *Ceskolovenska Obchodni Banka, AS v The Slovak Republic* (Jurisdiction) (ARB/97/4), (1999) 14 ICSID Rev-FILJ 252, 264-8.

that we are still within the scope and realm of the treaty. These are jurisdictional matters, even if they are dealt with by procedural motions, such as a *lis pendens* objection.

The question came up for consideration, in different but comparable circumstances, in the second *Pyramids* proceedings. The contract in question provided for ICC arbitration, and an award was rendered and subsequently attacked in France. Whilst annulment proceedings were on foot, the investor initiated ICSID proceedings on the basis of a provision of domestic investment law of the respondent state, which constituted (it was alleged by the claimant and confirmed by the tribunal) an offer to arbitrate under the ICSID Convention. An objection by the respondent that the ICSID Convention did not allow duplication of proceedings was handled by the tribunal under Article 26 of that convention. It was held that the exclusion of multiple remedies intended to ensure that the parallel processes ‘do not produce more than one enforceable remedy’.¹¹⁹ Had there been an umbrella BIT there, the same solution would have been adopted as a matter of sensible co-ordination of the various options under it. And such an approach would be adopted by any type of arbitral tribunal, under the ICSID Convention or not.

To return to the main question, the intention *not* to take arbitration proceedings to the realm of international law is confirmed by a mere comparison between the inter-state and state – investor arbitration provisions of the various treaties.¹²⁰ Another indication is afforded by clauses providing that arbitration will take place only in a New York Convention state. More directly, this author has found nothing in a sample of BITs to suggest that the procedural régime of the arbitration proceedings will differ from an ordinary arbitration under the relevant rules of arbitration. That would be the case if at least one of three indications existed, namely if a BIT directly established a special procedural régime,¹²¹ or provided some form of special enforcement procedure, or, finally, if there was language to suggest that the arbitral award was entirely unassailable and valid from its making in any court. Treaties often speak of ‘binding and final’ awards,¹²² but this only means that the award is ripe for enforcement, not that it is automatically enforceable.¹²³ Merely to indicate the opposite ends of the spectrum, certain treaties cross-refer to the ‘relevant treaties regarding enforcement of arbitral awards’,¹²⁴ while others refer to the domestic law of the contracting state.¹²⁵ So even as between the signatories, the ordinary arrangements suggest that awards are subject to challenge in national courts,¹²⁶ and thus susceptible to the defences under Article V of the New York Convention.

There is one exceptional arrangement worth mentioning to illustrate a serious difficulty in creating an autonomous arbitration régime. The France – China BIT expressly states that:¹²⁷

[A]rbitration [on the amount of compensation for expropriation] shall be carried out in accordance with the laws of the Party in [which] the investment was made and in accordance with the provisions of this Agreement.

¹¹⁹ See *SPP (Middle East) Ltd v Egypt* (Jurisdiction) (ARB/84/3), 3 ICSID Rep 112, 122-3.

¹²⁰ See, eg, Australia-Vietnam BIT, Annex B.

¹²¹ Specific provisions on, say, the availability of interim protection cannot in themselves qualify as such a régime; examples in *Sacerdoti*, above, note 117, 448.

¹²² See, eg, Switzerland-Argentina BIT, Article 9(8).

¹²³ See *Iran v US*, below, note 176, para 10.

¹²⁴ Older US BITs contained such language; see, eg, US-Panama BIT, Article VII(2).

¹²⁵ See Denmark-China BIT, Article 8(4).

¹²⁶ cf *Peters*, (1991) 22 NYIL 91, 147, note 163.

¹²⁷ See France-China BIT, Annex, Article 4(c), second indent.

Leaving aside the interesting question whether ‘and’ makes the BIT or the national law of the party concerned prevail (the former probably being the better interpretation), a general problem with arbitrating in a third state under treaty is precisely that that state is not bound to observe the arrangements in the treaty: *pacta tertiis nec nocent nec prosunt*.¹²⁸ Consequently, such arrangement could be effective only if based on a rule of general international law that makes the bilateral arrangement prevail. That is, a rule that would render an arbitration between a state and a private individual amenable to international law, and thus not subject to the laws of the state of the arbitration.¹²⁹ This fundamental question is explored below in section IV.

B. Multilateral Investment Treaties

MAIs contain provisions similar to, albeit more elaborate than, those found in BITs. Thus the Energy Charter Treaty (‘ECT’) closely follows modern US BITs, *ipso facto* creating consent of the signatory states to ICSID Convention/ICSID Additional Facility¹³⁰/UNCITRAL/Stockholm Chamber of Commerce arbitration, in that order.¹³¹ A similar provision appeared in the now abandoned project of unification of investment treaties by a Multilateral Agreement for Investment (‘MAI’).¹³² The NAFTA contains more elaborate provisions, detailing arbitration under the ICSID Convention/ICSID Additional Facility/UNCITRAL Rules.¹³³ Similar arrangements are found in other instruments.¹³⁴

Applying the methodology adopted in the previous subsection, similar results would be yielded here too. This seems to be confirmed by the first NAFTA/UNCITRAL award, where the tribunal considered the ‘suitability of the law on arbitral procedure’ a relevant consideration for the determination of its seat.¹³⁵ However, NAFTA, Article 1120(2) provides that ‘[t]he applicable arbitration rules shall govern the arbitration except to the extent modified by ... section [B of NAFTA]’,¹³⁶ and there are certain provisions in that section that do have a bearing on the procedural and jurisdictional aspects of arbitration. Insofar as the arbitration is not an ICSID arbitration, where national law is irrelevant, at least one of the provisions—Article 1134 enabling the tribunal to order interim protection—may contravene national law. On the other hand, it is stipulated that enforcement may proceed under the New York and Panama conventions.¹³⁷ These conventions would in turn give effect to an annulling judgment of the courts where the arbitration took place, and such annulment may take place if interim measures jurisdiction is prohibited by that law. Interesting issues of conflicts of treaties would then arise. If the state of the arbitral proceedings is

¹²⁸ See Convention on the Law of Treaties (Vienna, 22 May 1969), (1980) 1155 UNTS 331 (hereafter the ‘Vienna Convention’), Articles 34, 35.

¹²⁹ But see below, text to note 140.

¹³⁰ ICSID Additional Facility arbitration is not ICSID arbitration; for details see Golsong in *Essays Riphagen* (1986) 35.

¹³¹ See Energy Charter Treaty (1994), (1995) 34 ILM 509, Article 26(2).

¹³² MAI, OECD Doc DAFFE/MAI(97)1/Rev.2 (May 1997), Article 60(2); OECD, *The MAI Negotiating Text (as of 24 April 1998)* 70-2 (Article D(2)). See Kodama, (1999) 16:3 J Int Arb 45.

¹³³ See NAFTA, (1993) 32 ILM 605, Articles 1115-1138.

¹³⁴ See Agreement for the Promotion and Protection of Investment in the framework of ASEAN (1987), (1988) 27 ILM 612, Article X; Article 9(4) of the Colonia Protocol (Doc MERCOSUR/CMC/Dec No 11/93) to the Treaty establishing the Mercosur; Treaty on Free Trade (1994), Article 17-18 and Annex to Article 17-16.

¹³⁵ See *Ethyl Corp v Canada* (1999) 16:3 J Int Arb 141, 144. The criterion quoted comes from the UNCITRAL Notes, para 22(a).

¹³⁶ See also NAFTA, Article 1126(1).

¹³⁷ NAFTA, Article 1136(6).

not party to NAFTA, it is very doubtful whether it (that is, its courts) can be bound indirectly by NAFTA provisions.¹³⁸ In the same vein, it would be strained to argue that the dispute resolution provisions of the NAFTA establish an objective régime opposable to third states as well.¹³⁹ It is suggested that a reasonable result obtains if the enforcement state, which will by definition be a NAFTA signatory, considers the NAFTA provisions a *lex specialis* and *posterior*, superseding Article V(1)(e) of the New York Convention.¹⁴⁰ It is acknowledged that this is not a perfect construction, for the NAFTA and the New York Convention provisions do not conflict head-on. So the necessary gloss must come from the paramount duty to implement a treaty in good faith.¹⁴¹

A more general argument comes from Professor Waelde. His concern is to prevent parallel litigation as between the various types of proceedings possible under the ECT, and his response to that is to use the bar of *lis pendens* as a general principle of international procedural law.¹⁴² A reply that suggests itself is that whilst general principles of law have no normative value but as part of international law, they will by definition be found in all or almost all national laws, and therefore this point is not a good test-bed for the proposition on which his argument is predicated. Further, it has been argued above that this is an issue properly classified as jurisdictional, to which the relevant treaty applies directly.

It would be more problematic to reconcile imperative provisions of the arbitration law of the state in which proceedings are held. This is difficult to occur, but suppose this example for the sake of argument. Arbitration under the Cartagena treaty aims to ensure that ‘the guarantees of a hearing and defense can be duly exercised on the basis of due process before an impartial tribunal’.¹⁴³ What must a tribunal do if it finds that an imperative provision of the local law consecrating an irrebuttable presumption as a matter of law of evidence conflicts with the treaty overarching principle? Should reconciling the two provisions or distinguishing away domestic law fail, the tribunal must follow what it perceives to be commanded by the treaty. In the event that local courts annul the award, the construction suggested above could be adopted.

C. ICSID Arbitration

1. Self-contained Character

The ICSID Convention and Arbitration Rules form a permanent institutional framework for arbitration panels. The distinctive trait of ICSID arbitration is its explicitly self-contained character—or, as Broches puts it, the ‘complete, exclusive and closed jurisdictional system, insulated from national law’ within which it takes place.¹⁴⁴ This is the result of the following provisions. Article 44 subjects the proceedings to the rules of the ICSID Convention without reference to any domes-

¹³⁸ Above, text to note 128.

¹³⁹ cf *Reparations for the Injuries suffered in the Service of the United Nations* (Advisory Opinion), *ICJ Reports 1949*, 174, 185.

¹⁴⁰ See Vienna Convention, Articles 30 and 41; and New York Convention, Article VII(1).

¹⁴¹ See Vienna Convention, Article 26.

¹⁴² See Waelde, (1996) 12 *Arb Int* 429, 459-61.

¹⁴³ See above, note 134, Article 17-16.

¹⁴⁴ Broches, (1987) 2 *ICSID Rev-FILJ* 287, 288. See also Arbitration (International Investment Disputes) Act 1966, ss 2(1)-(2), 3; Arbitration Act 1952 (Malaysia), s 34(1). And for proposals antedating ICSID, but of similar import, see ILA Draft Statutes of the Arbitral Tribunal for Foreign Investment, (1963) 50 *ILA Rep* 132; IBA Resolution on an International Arbitral Tribunal, analysed by Domke, (1962) 17 *Arb J* 129.

tic law.¹⁴⁵ Instead, gaps are to be filled by the parties or the arbitral tribunal. This is achieved by direct operation of an international convention, not in exercise of the freedom to organize the procedure under any municipal law or other international instrument.¹⁴⁶ The structure is completed by Articles 53 and 54:

Article 53

The award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided [in Articles 50-52 of the Convention].

Article 54

- (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award ... as if it were a final judgment of a court in that State. ...
- (2) ...
- (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Thus, ICSID awards are entirely outside the jurisdiction of municipal courts, and in that sense final,¹⁴⁷ and immune from municipal law. Note also that Article 54 conditions *enforcement* to no defence at all¹⁴⁸ and that only the material acts of *execution* are to be performed in accordance with some municipal law.¹⁴⁹ Thus, irregularities of execution performed in accordance with domestic law, and those only, can be attacked under that law and in the courts of that state.

Accordingly, the *Tribunal de Grande Instance* of Paris erred in stating that *exequatur* could be refused if an award 'contained provisions against the law or public policy'.¹⁵⁰ This was put right in the subsequent judgment of the *Cour de cassation* in the *SOABI* case,¹⁵¹ where the court wrote:¹⁵²

[The ICSID Convention] has instituted, in its Articles 53 and 54, an autonomous and simple system of recognition and enforcement which excludes the system provided for in ... the New Code of Civil Procedure and, in particular, the remedies therein provided
....

Similarly, in the line of decisions of United States courts in the *LETCO* case¹⁵³ the point was not disputed at all.¹⁵⁴

It is also noteworthy that the grounds for annulment are exhaustively enumerated in Article 52(1)(a)-(e), and there defined as material rules of law, that is, without reference to domestic law. This does not mean that they bear no substantive resemblance to their domestic law or New York

¹⁴⁵ Details in Schreuer, (1997) 12 ICSID Rev-FILJ 523.

¹⁴⁶ cf, erroneously, TPI Geneva, (1986) 3:2 News from ICSID 5, 6.

¹⁴⁷ *Maritime International Nominees Establishment v Guinea* (Annulment Proceedings) (ARB/84/4), 4 ICSID Rep 79, 84, para 4.02.

¹⁴⁸ See Broches, above, note 144, 310-7 for a detailed history of the provision.

¹⁴⁹ On this see van den Berg, (1987) 2 ICSID Rev-FILJ 439, 448-9.

¹⁵⁰ See TGI Paris, 23 December 1980, [1982] Rev Arb 205, 206; *affirmed*, TGI Paris, 13 January 1981, (1981) 108 JDI 365; *reformed on other grounds*, Paris, 26 June 1981, (1981) 108 JDI 843.

¹⁵¹ *SOABI v Senegal* (ARB/82/1) (1990) 117 JDI 192.

¹⁵² Cass Civ 1re, 11 June 1991, (1991) 118 JDI 1005.

¹⁵³ *LETCO v Liberia* (Award and Rectification) (ARB/83/2) (1987) 26 ILM 647.

¹⁵⁴ *Liberian Eastern Timber Corp v Liberia* (1987) 2 ICSID Rev-FILJ 187 (SDNY 1986); *affirmed*, 650 FSupp 73 (SDNY 1986); *affirmed*, 854 F2d 1314 (2d Cir 1987).

Convention counterparts. It does, however, mean that the 'proper constitution' of a tribunal or whether it 'manifestly exceeded its powers' or departed from 'a fundamental rule of procedure' are to be determined by reference to the ICSID Convention, directions by the parties, the ICSID Rules, and general international law (in that order). By ineluctable inference from the inclusion of 'fundamental' procedural rules, an ICSID tribunal must respect the minimum standards of due process, namely equality of the parties and the right to be heard. The blanket reference to these rules and their qualification as 'fundamental' signifies two things. First, that not all the provisions of the ICSID Convention or the ICSID Rules are fundamental.¹⁵⁵ Second, and inversely, the minimum standards above are imported from general international law,¹⁵⁶ but because the convention itself incorporates them by reference. Thus, Hirsch is technically wrong in suggesting that they would be implied by force of law in any event,¹⁵⁷ but the point is academic, for due process is probably part of *ius cogens* even as between sovereign states. An ICSID tribunal has confirmed the views above, when it referred to the principle of equality of parties as codified in the UNCITRAL Model Law, Article 18, and stated that not all of the ICSID Rules are fundamental in the sense of Article 51 of the ICSID Convention.¹⁵⁸

Naturally, annulment proceedings too are conducted under international law. An ad hoc annulment committee has stated the law clearly and correctly:¹⁵⁹

The ad hoc Committee, having been established under the provisions of an international instrument—ie, the Convention—believes that the proceedings before it are governed by the relevant Articles of the Convention and by the [ICSID] Rules of Procedure Problems of interpretation or *lacunæ* which emerge have to be solved or filled in accordance with the principles and rules of treaty interpretation generally recognized in international law.

In view of the clear provisions of the ICSID Convention it is unnecessary to labour the point further. If further support were required for the propositions here advanced, the practice of ICSID tribunals would provide that.¹⁶⁰ However, fundamental procedural questions do not arise often in ICSID proceedings, since parties do not derogate from, or exclude altogether, the ICSID Rules. These Rules in turn supply a set of fairly detailed rules so that lack of agreement or co-operation between the parties will not frustrate the proceedings.¹⁶¹

¹⁵⁵ The convention contains certain non-derogable provisions (the ones not labelled 'except as the parties otherwise agree'). Articles 44 and 51 combined, however, suggest that those provisions are not necessarily 'fundamental'.

¹⁵⁶ See ICSID, *Documents* II:2 (1968) 460, 480, where Broches stated that 'fundamental rules' had a 'wider connotation' than simply the convention's rules. It had been suggested that the term be replaced by 'fundamental principles of justice'.

¹⁵⁷ See Hirsch, M, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (1993) 113-5, where he refers to the 'public policy of the international community'.

¹⁵⁸ *MINE*, above, note 147.

¹⁵⁹ *Amco Asia Corp et al v Indonesia* (Annulment Proceedings) (ARB/81/1) (1985) 25 ILM 1439, 1445, para 18; cf *Atlantic Triton Co Ltd v Guinea* (ARB/84/1), 3 ICSID Rep 13, 34-7 (both decisions are criticized on other grounds).

¹⁶⁰ See, eg, *Ceskolovenska Banka*, above, note 118, at 268, para 47 (discussing estoppel as a generally accepted principle of international law).

¹⁶¹ Report of the Executive Directors (1965), 1 ICSID Rep 23, para 34.

2. Incorporation

An interesting question is whether ICSID arbitration can be ‘contracted in’ by incorporation in an agreement between a non-ICSID state and a private party.¹⁶² At one level the answer is positive: the special mechanism of the ICSID Additional Facility exists precisely for non-contracting states.¹⁶³ Outside that option, however, the practical interest of the question is that if contracting in amounts to incorporation only, the mandatory provisions, supervisory mechanism, and remedies under the ICSID Convention will not apply.¹⁶⁴ And it becomes relevant to certain, but by no means all,¹⁶⁵ BITs concluded by China before 1993, that is, before China acceded to the ICSID Convention.¹⁶⁶ Those BITs stipulate that the tribunal determines its own procedural rules taking ‘guidance’ from the ICSID Convention.¹⁶⁷ At least one treaty, that between Germany and China speaks more directly of arbitration ‘in accordance with’ the ICSID Convention.¹⁶⁸ This may only be contractual incorporation, not veritable submission.¹⁶⁹ This can be put on the narrow ground that the intention of China, as manifested in the Chinese Prototype BIT and other BITs, is only a supple incorporation of the ICSID Rules rather than the ICSID Convention itself.¹⁷⁰ In other words, the intention is to furnish some non-binding model on which to fashion detailed procedural rules for the proceedings. This is proved by other Chinese treaties, which contain similar language, referring not only refer to the ICSID Convention or Arbitration Rules but to other arbitration rules as well.¹⁷¹

The wider point, however, is that a contractual incorporation, certainly possible as a matter of contract not only as between a state and a private party but also as between two private parties, will not be sufficient to hoist in the complete ICSID framework. In technical terms, ICSID has no jurisdiction in accordance with Article 25 of the ICSID Convention.¹⁷² Thus, the self-contained character of the convention, which is based on the complementary tenets of insulation from municipal law and a complete but internal system of remedies will be defeated. And, more importantly, the process would result in an unsupervised award, which no state would be prepared to enforce as an ICSID award, and properly so.

¹⁶² Obviously, incorporating the ICSID Rules in an entirely private or an inter-state arbitration is of no legal significance in terms of the *lex arbitri*; see respectively Cass Civ Ire, 15 June 1994, [1995] Rev Arb 88; and *Heathrow Airport User Charges*, 102 ILR 216.

¹⁶³ See above, note 130.

¹⁶⁴ cf Cass Comm, 4 February 1992, (1992) 91 RCDIP 495.

¹⁶⁵ See Netherlands-China BIT, Article 9(3) (no details as to the arbitration mechanism); Sweden-China BIT and exchange of notes (same); Australia-China BIT, Article XII(4) (ICSID arbitration if the contracting states have become party to ICSID when the dispute arises); UK-China BIT, Article 7 (UNCITRAL Rules).

¹⁶⁶ It is also relevant to the Brazilian debt rescheduling contracts, which contain arbitration clauses incorporating certain ICSID Convention provisions; see Cremades in *Contemporary Problems* (1987) 279, 284.

¹⁶⁷ See, eg, Denmark-China BIT, Article 8(4); Switzerland-China BIT; and cf Switzerland-Vietnam BIT, Article 9(2)(b)(iii).

¹⁶⁸ See Protocol to the Germany-China BIT, Article 4(c). Other examples in Koa, (1991) 24 NYU JILP 439, 479, note 209.

¹⁶⁹ cf (1985) 2:1 News from ICSID at 15.

¹⁷⁰ See Chinese Prototype BIT, *Compendium* 3, 151, Article 9.

¹⁷¹ eg: Argentina-China BIT, Article 8(5) (‘guidance’ from ICSID or UNCITRAL); Protocol to the Belgium-Luxembourg Economic Union – China BIT, Article 6(3) (‘with reference to’ ICSID or Stockholm Rules).

¹⁷² See Dolzer & Stevens, above, note 105, 138-9. And cf *Amco (Jurisdiction)*, (1984) 23 ILM at 357-61 (on Article 25(2)(b)).

3. Recapitulation

By way of summation and comparison, ICSID proceedings are conceptually no different to proceedings between sovereigns or, which is the same, any proceedings where the 'law of arbitration' or *lex arbitri* is international law (mixed claims commissions or WTO proceedings for example). It is useful at this point to compare ICSID arbitration with the Iran – US Claims Tribunal and the similar, though less well known, arrangement contained in the instruments providing for the settlement of disputes arising between French concessionaires and the Algerian state out of the exploitation of the Algerian Sahara's hydrocarbons.¹⁷³

These tribunals:

- (i) are designed to operate as exclusive dispute resolution mechanisms;¹⁷⁴
- (ii) produce final and binding awards endowed with exceptional strength in terms of finality and enforcement procedures;¹⁷⁵
- (iii) produce awards which create a direct international law obligation on the signatory parties to recognize and enforce the awards;¹⁷⁶
- (iv) produce awards expressed to be enforceable in the courts of third states;¹⁷⁷
- (v) are mandated to apply international law in one way or another.¹⁷⁸

Though differences between the specific arrangements do exist,¹⁷⁹ their common trait is that they are designed to be self-contained and operate on the intergovernmental plane. And, again, whenever one is in the presence of an international law arrangement, it is valid to speak of 'delocalized',¹⁸⁰ or 'transnational',¹⁸¹ arbitration only in a rather promiscuous and non-technical sense.

IV. AD HOC PROCEEDINGS INVOLVING STATES OR INTERNATIONAL ORGANIZATIONS

We have thus far examined more or less straightforward cases of arbitral tribunals established under treaties. They were straightforward in that they were specific applications of the well-established rules that the procedure of a tribunal established (a) under international treaty (b) in

¹⁷³ See Declaration of Principles on Co-operation (1962), Preamble (2), Title I.A, Articles 1-7, and Title IV ('Arbitration'). The Declaration was implemented by a further Accord en matière d'Arbitrage (1963) and further amended by an Agreement concerning the Settlement of Questions relating to Hydrocarbons (1965); see in particular Article 46 and Articles 157-178 of the Protocol annexed as Annex I to the Agreement, which confirm and detail the arrangements under the previous agreements. And it was finally supplemented by an Exchange of Notes (1983).

¹⁷⁴ Compare GD, para 11, final sentence, as qualified by the CSD, Article II(1), with the ICSID Convention, Articles 26 and 35, and the 1962 Declaration, Title IV and the Agreement on the Settlement of Questions, 1965, Article 46.

¹⁷⁵ Compare CSD, Article IV(1), as interpreted in *Iran v US* (586-A27-FT), above, note 11, para 63, with the ICSID Convention, Article 53(1) and the Protocol to the Agreement on the Settlement of Questions, 1965, Article 176(2): '*Les sentences s'imposent aux parties sans aucun recours possible.*'

¹⁷⁶ Compare *Iran v US* (62-A21-FT) 14 Iran-US CTR 324, 330, paras 14-15, with the ICSID Convention, Article 54(1), and the Protocol to the Agreement on the Settlement of Questions, 1965, Article 178, first sentence.

¹⁷⁷ Compare CSD, Article IV(3), with the ICSID Convention, Article 54(3), and the Protocol to the Agreement on the Settlement of Questions, 1965, Article 178, second sentence.

¹⁷⁸ Compare above, text to notes 54-57, with the ICSID Convention, Article 42(1), and the Agreement on the Settlement of Questions, 1965, Article 46(4) (the latter referring to general principles of law).

¹⁷⁹ For instance the Sahara tribunal is dispensed from applying any municipal law and its awards are enforceable without resort to municipal courts.

¹⁸⁰ cf Bruno, <<http://www.law.harvard.edu>>, at 87.

¹⁸¹ cf Burdeau, [1995] Rev Arb 3.

the territory of a third state with the consent of that state is normally subject to international law. Absent either of those two elements, we are faced with the fundamental question whether there exists a rule of international law allowing tribunals sitting in disputes between states and private parties to be subjected to international law and, if that is the case, how that intent is manifested.

A. The Case of International Organizations¹⁸²

1. Legal and Practical Considerations: General Observations

At first blush, the practice here is limited but coherent. International organizations—general and specialized, universal and regional—routinely enter arbitration agreements for their contracts of a ‘private law nature’.¹⁸³ The conceptual/legal foundations and the practical reasons behind such practice form one whole and purport to safeguard the autonomy of the organization *vis-à-vis* states.¹⁸⁴ First, consent to arbitration is not an explicit waiver of immunity from suit.¹⁸⁵ Second, the dominant practice for private law contracts of international organizations is either not to specify the law applicable to the contract or to refer to international law, most often in the form of general principles of law. Such choice-of-law provisions are more likely to be given effect to by arbitral tribunals.¹⁸⁶

It is noted, however, that the practice on private law contracts is not of universal applicability. Contracts of employment are subject to the internal regulations of the organization concerned, general principles of the international law of civil service and, if and to the extent explicitly referred to, municipal law of the host state.¹⁸⁷ Acts which must take legal and material effect through domestic law, such as passing of property, will normally be subject to the *lex rei sitae*¹⁸⁸ or the *lex loci*. Finally, tortious or criminal acts committed by individuals against the organization are of course governed by the applicable municipal law.¹⁸⁹

There is a reason of political sensitivity for applying international law on the merits and choosing arbitration as a forum, namely avoiding insulting the sovereign equality of member states.¹⁹⁰ Additionally, the choice of international law as governing law undoubtedly relates to its being the proper law of the organization. International organizations have a ‘functional’ personality, that is, juridical personality granted for the fulfilment of their corporate purpose.¹⁹¹ By contrast with states, which have *ipso iure* (*de plein droit*) personality in domestic and international law, theirs is

¹⁸² This thesis does not deal with internal administrative tribunals of international organizations, other internal judicial organs with competence over third parties, and tribunals adjudicating disputes between the host or member states and the organization.

¹⁸³ The term, borrowed from the practice of the UN, signifies transactions which may also be concluded by private persons in their ordinary commercial dealings, such as contracts of sale, charterparties, leases, and contracts of services.

¹⁸⁴ Thus Duffar, *Contribution* (1982) 83.

¹⁸⁵ But see *International Tin Council v Amalgamet Inc*, 524 NYS2d 971, 975 (1988).

¹⁸⁶ See *Balakhany (Chad) Limited v FAO* [1972] UNJYB 206 (ad hoc, 1972).

¹⁸⁷ See above, note 31.

¹⁸⁸ See, eg, Protocol concerning the Transfer of Certain Assets of the League of Nations (1946), 1 UNTS 131.

¹⁸⁹ See generally Legal Opinion, [1976] UNJYB 159; Study, UN Doc A/CN.4/L.118 Add 1 & 2 (1967), [1967-II] ILCYB 154, 216-7.

¹⁹⁰ See, eg, McKinnon Wood, (1944) 30 TGS 141, 144.

¹⁹¹ See, eg, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion), *ICJ Reports 1996*, 66, 74-5; and UN Charter, Article 105(1).

a personality *by and primarily in* international law. Their distinct personality on the municipal law plane is invariably stated in the relevant treaties, in terms similar to the ones adopted for the UN in Article 104(1) of the UN Charter. The convention implementing that provision reads in pertinent part:¹⁹²

Section 1. The United Nations shall possess juridical personality. It shall have the capacity:

- (a) To contract;
- (b) ...;
- (c) To institute legal proceedings.

The surveys of practice of the United Nations and the specialized agencies are consistent and clear that the preferred mode of dispute resolution for contracts of a private law nature is arbitration.¹⁹³ The UN use standard AAA, IACAC, ICC or ad hoc clauses, depending on the geographical provenance of their counter-party.¹⁹⁴ The ad hoc clauses invest the President of the ILO Administrative Tribunal with appointing authority.¹⁹⁵ The clauses utilized by other international organizations are similar, save that some of them designate a judicial authority of the state of their headquarters as appointing authority.¹⁹⁶

Arbitration is used not only for isolated private law transactions, but also for private law claims that may arise out of peace-keeping or civilian operations in a member state. The 1990 Model Status-of-Forces Agreement establishes a standing claims commission, for which the President of the ICJ is given appointing authority.¹⁹⁷ It is noteworthy that the awards of that committee are to be 'final and binding' without further qualification or provision for enforcement, which presumably means that they are to be enforced by diplomatic means. Thus, both the content and the operation of the provision militate for arbitration under international law.

There is no doubt that entering arbitration agreements is within the scope of Article 104 and the implementing provisions thereof, and thus opposable to the member states, certainly the ones that are signatory to the Privileges and Immunities Conventions. Section 29 of the UN Privileges and Immunities Convention¹⁹⁸ clarifies that by providing:

Section 29. The United Nations shall make provision for appropriate modes of settlement of:

- (a) Disputes arising out of contracts of a private law character to which the United Nations is a party;
- (b) ...

¹⁹² Convention on Privileges and Immunities of the United Nations (1946), 1 UNTS 15, s 1. See also Convention on Privileges and Immunities of the Specialized Agencies (1947), 33 UNTS 261, s 3.

¹⁹³ See UN, *Repertory of Practice of United Nations Organs V* (1955) 232-3, para 32, 165, para 131; *id*, Supplement 1:II (1958) 417-8, para 10; *id*, Supplement 4:II (1982) 376, para 2; and above, note 189.

¹⁹⁴ Examples in [1976] UNJYB at 169; [1967-II] ILCYB at 209.

¹⁹⁵ *ibid*.

¹⁹⁶ Examples in Valticos, below, note 201, 78-9.

¹⁹⁷ See Model Status-of-Forces Agreement, UN Doc A/45/594 (1990), Article 51. The model agreement applies provisionally in emergencies; see, eg, SC Res 1270 (1999) para 16. The precursor seems to have been the Agreement concerning the Status of the UN Emergency Force in Egypt, 260 UNTS 261, Article 38.

¹⁹⁸ Above, note 192.

The provision purports to balance the legal situation: the UN is exempted from the jurisdiction of state courts but still has contractual capacity and potential liability. Thus seen, arbitration is the almost natural means of dispute resolution.¹⁹⁹

Nonetheless, the nature of such arbitration is not clarified in the text. Arguing from principle does not resolve the question. Though it would be reasonable to assume that domestic law arbitration implies the competence of that law and courts, that consideration would in itself and as a matter of principle be insufficient to defeat the general rule of immunity from jurisdiction. We thus turn to practice.

2. Immunity and Internationalization: Communicating Vessels

(a) Practice

Much of the authority available is consistently equivocal. The first point to be made is that international organizations do not seem to have, as a general rule, specifically dealt with the question of the nature of arbitration to which they submit. The clauses themselves do not permit any conclusions on that front. In particular, a study commissioned by WHO almost thirty years ago indicated that the application of the procedural law of the seat of the proceedings would be of some help, as it would remove uncertainties as to the procedural framework of the proceedings.²⁰⁰ However, these and similar assertions have been made on the presumption, resisted in what follows, that submission to domestic law would not prejudice the possibility of the organization to assert its immunity.

The second point is that such an incoherent state of practice has not permitted the formulation of a coherent theory or evaluation. Judge Valticos, in a survey conducted in 1977, concluded that, with the exception of standing international tribunals (below, subsection IV.A.3), arbitration with private parties '*pencherait plutôt du côté du droit privé*'.²⁰¹ The majority of the doctrine would seem to rally to such a tentative conclusion, tentativeness being permissible on the premise that the issue is mooted by the jurisdictional immunity enjoyed by international organizations.²⁰² It is also averred, along the same lines, that the law of arbitration and immunity are entirely distinct matters.²⁰³ Nonetheless, Dr Mann has offered the conclusive view, consistently with his views on mixed arbitrations, that the participation of a private party necessarily makes arbitral proceedings subject to a national law.²⁰⁴

Arbitral and court jurisprudence is usually neglected but more useful. The first award of precedential value was made in 1958 in a dispute opposing the UN Relief and Works Agency for Palestinian Refugees (UNRWA) to a private party. An arbitration clause was included in the General Conditions of Contract of the Agency. The clause made the President of the ICC Court of Arbitration the appointing authority should one of the parties refuse to nominate its arbitrator. Professor

¹⁹⁹ See, eg, Council of Europe, Explanatory Report to Privileges and Immunities of International Organizations (1970) para 42; Jenks, *International Immunities* (1961) 41-5; IDI Resolution on Contracts concluded between International Organizations and Private Persons, (1977) 57ii Ann IDI 334, Article 7. Examples from constituent instruments and headquarters agreements in Muller, above, note 22, 178-82.

²⁰⁰ See Valticos, below, note 201, 77.

²⁰¹ Valticos, (1977) 57i Ann IDI 1, 84.

²⁰² cf, eg, Bowett, above, note 182, 337; Seyersted, (1967-III) 122 RdC 427, 519.

²⁰³ Glavinis, *Les Litiges* (1990) 130-2.

²⁰⁴ See Valticos, (1977) 57i Ann IDI 132, 148.

Batiffol was appointed as sole arbitrator, and as a preliminary question he ruled on his jurisdiction, in the following terms:²⁰⁵

[T]he stipulation of an arbitration clause, implied by [UNRWA's capacity to contract], derives its legal basis from an instrument of public international law and is valid under that law without any need in that respect for reference to a national law, as would be the case for private parties, who to this day are subject to the authority of a State and hence to a national legal system

Though nothing was said of procedural law, it must follow that the arbitration as a whole derives its force from international law.²⁰⁶ The reason adduced is that an international organization acquires its legal status from international law and operates on that plane. Consequently, the organization's participation elevates, as it were, the proceedings to international law.²⁰⁷

A later award is inconclusive evidence. The claim was for damages for the destruction of a leased aircraft in Congo.²⁰⁸ The *compromis* read: 'Except for the conduct of the case and the procedure indicated in this agreement, the law applied by the arbitrator shall be the codes and legislation of the Belgian Congo'²⁰⁹ Evidently, the purpose of the provision was to eliminate the possible application of domestic law in matters of competence and procedure. The UN objected to the jurisdiction of the tribunal on the grounds that the claimant lacked standing to sue because it had been succeeded by another corporation. It was advanced that by 'universally recognized rule of law', a claim must be pursued by the person who is entitled to it ('*nul ne plaide par procureur*').²¹⁰ The arbitrator endorsed the objection, apparently classifying it as a procedural and jurisdictional matter, and dismissed the claim. He referred extensively to Belgian law and jurisprudence, authorities pleaded by the UN. It is, however, unclear whether the arbitrator was using Belgian law only as an illustration of a general principle of law, namely that the respondent should always be able precisely to identify its opponent in order to mount an adequate defence or whether he was using Belgian law *tout court*.²¹¹

More clearly, in an ICC arbitration in Paris the arbitrator considered that, whilst it was plain that the arbitral clause was invalid in French law, that law was inapplicable, the governing law being international law.²¹² And in 1991 an unreported award was made on a claim for price adjustment of a contract concluded between the European Organization for Nuclear Research (CERN) and a consortium. The tribunal was directed to apply 'general principles of civil procedure'.²¹³ The proceedings related to that award conveniently introduce the important questions.

²⁰⁵ *UNRWA v The General Trading and Transport Company* (unreported, 1958), quoted extensively in [1967-II] ILCYB at 208. (The translation here is from [1976] UNJYB at 171.) Glavinis, above, note 203, 189-94, quotes from and comments on the holding on substantive law.

²⁰⁶ In a passage quoted by Seyersted, above, note 202, 518 and Glavinis, above, note 203, 133-4, it was held that the supervisory jurisdiction of national courts is excluded, for the arbitration 'does not derive from (*ne relève pas de*) a national legal system but international law' and this solution is the only one compatible with the organization's immunity.

²⁰⁷ This is possibly what Adam (below, note 226, 215-6) means by qualifying, misleadingly, arbitration as 'internal'.

²⁰⁸ *Starways Limited v UN*, 44 ILR 433, [1969] UNJYB 233 (extracts) (ad hoc, 24 September 1969). Harpignies, (1971) 7 RBDI 451, quotes extensively from the award.

²⁰⁹ Quoted in [1976] UNJYB 166.

²¹⁰ Harpignies, above, note 208, 464.

²¹¹ *ibid* 466-8.

²¹² See ICC 2091/1974, [1975] Rev Arb 252.

²¹³ See TF, 118 Ib ATF 562, 567.

CERN's headquarters agreement contains an article 24(a)²¹⁴ identical to s 29(a) of the UN Privileges and Immunities Convention, and CERN's General Conditions for Contract (1975), Article 33, provides for ad hoc arbitration. The General Conditions further entrust the President of the ILO Administrative Tribunal with appointing authority, fix a deadline for the making of the award, contain a waiver of setting aside remedies, and direct the tribunal to apply the Zurich ZPO to all procedural issues not directly dealt with by them.²¹⁵ On this particular case, however, the parties probably opted for ICC arbitration, as is deduced from the fact that the parties drew Terms of Reference ('ToR'). The ToR derogated from the standard Zurich law clause and referred instead to the 'general principles of civil procedure'.²¹⁶

An award was made in Geneva in 1991 and subsequently challenged.²¹⁷ CERN pleaded immunity. The *Tribunal fédéral* was faced with the question whether the organization's immunity from jurisdiction disappeared in the case of disputes arising out of transactions of a commercial nature (though not object); and, if not, whether waiver of immunity could be deduced from submission to arbitration. It ruled that immunity of international organizations, as opposed to states, was absolute and did not disappear even in acts *iure gestionis*.²¹⁸ As regards the latter tenet of the question before it, the court's methodology corresponds to the approach of the arbitral tribunals above: it assumes that international organizations do have by general international law the right directly to subject to international law arbitrations with private law entities. Interestingly, the court's premise was *not* that Swiss law would normally apply, but for the mere fact that the participation of an international organization made international law applicable and excluded Swiss law and jurisdiction.²¹⁹ The case was put, it seems, at an anterior level of 'admissibility', preceding jurisdiction. The objection to that is that jurisdiction is in reality a matter prior to admissibility, for admissibility is a bar to jurisdiction already established.²²⁰ Even if it be considered that (in)admissibility designated the subject-matter incompetence of domestic courts, or non-justiciability, the issue was simply whether a jurisdictional bar applied.²²¹

At all events, the end judicial reasoning did not differ. The court rightly required an implicit or explicit submission to Swiss law, such implicit submission to be ascertained by reference to the procedural law of the arbitration. The court wrote:²²²

[B]y contrast with states, submission to an arbitration agreement by international organizations does not imply ('*ne vaut pas*') waiver of their immunity. The arbitration ... remains immune from the interference of any state[']s court] jurisdiction, except if the organization waives its immunity, or the headquarters agreement provides otherwise, or

²¹⁴ See above, note 27.

²¹⁵ See above, note 213.

²¹⁶ *ibid.*

²¹⁷ See LDIP, Articles 190(2), 191(1).

²¹⁸ See 118 Ib ATF at 564-5. This is correct insofar as the organization's immunities are not strictly circumscribed by reference to its core activity; see eg Morgenstern, *Legal Problems* (1986) 38.

²¹⁹ See LDIP, Article 176(1)-(2); 118 Ib ATF at 568.

²²⁰ If authority were required cf *Border and Transborder Armed Actions* (Jurisdiction and Admissibility), *ICJ Reports* 1988, 69, 95.

²²¹ In French law, there is a similar question whether sovereign immunity excludes jurisdiction altogether or simply excludes the competence to act on jurisdiction already established, the latter being the better solution. The consequences attached relate to the time as to which the exception must be raised. Details in Girard in *Recherche sur l'Arbitrage* (1997) 63, 91-3.

²²² 118 Ib ATF at 566 (citation omitted).

the organization accepts to submit the arbitration to a domestic law, generally that of the seat.

The court is beyond reproach in suggesting that if there has been express waiver, the arbitration is perforce subject to domestic law. Though not conceptually impossible, no municipal legal system accepts jurisdiction to control an award on the merits to apply a law other than its own substantive law. In other words, if jurisdiction might be assumed as a result of waiver, control on the merits would proceed on international law *to the extent that* it is consonant to mandatory provisions of the law of the forum. This may alternatively be formulated as follows. If the organization has waived its immunity, international law will only provide procedural rules by contractual incorporation, whilst domestic law will control; conversely, if domestic law is made applicable, waiver is implied.

In the case at hand, having found no express waiver of immunity and no submission of the arbitration to Swiss law by the headquarters agreement, the court went on to examine the indications that might establish an implicit submission. It considered that the provision on the appointing authority (*'une tierce personne de niveau élevé'*) was crucial,²²³ thereby implying that even if the original Zurich law clause was utilised, it would signify a mere incorporation of procedural rules and thus be legally irrelevant. Evidently, the organization benefits from a presumption that is rebuttable only by direct and conclusive evidence, though not necessarily an express choice of arbitration law.

In stark contrast to the decision above stands a decision of the Paris Court of Appeal. An employment contract between the Aerial Navigation Security Agency for Africa and Madagascar (ASECNA)²²⁴ and a member of staff on detachment from a national authority submitted all disputes to a sole arbitrator to be designated by the President of the *Tribunal administratif* in Paris. The employee sought to appeal the award on the merits (*'appel en réformation'*) in the French courts. The court dismissed the appeal on substantive grounds. It did, however, uphold its jurisdiction, reasoning that the arbitration clause imported French law by implication since the place of arbitration should take place in France.²²⁵ Taken in itself, the reasoning is banal and merits no comment. Note, however, that the court did not consider any presumption that the arbitration was wholly outside the ambit of French law by virtue of one of the parties being an international body. ASECNA is an idiosyncratic body falling under the general rubric of 'intergovernmental corporations' (*'établissements publics internationaux'*), that is, specialized organizations that may have the status of a domestic law corporation or public authority assorted with certain privileges and immunities strictly related to their core functions.²²⁶ This may have forced the court entirely to disregard the possibility of an international law arbitration,²²⁷ although the court did state that a designation of seat in Paris should be taken (under the law as it stood) as an indication of submission to French law. The decision can therefore be distinguished on that ground. Nevertheless, the better position is that such organizations may possess rights akin or equivalent to those of international organizations proper, and this is a matter of degree to be

²²³ *ibid* 568. The term is borrowed from Valticos, above, note 201, 81.

²²⁴ See Convention relative à l'ASECNA, [1960] JO 5416. (The Agency is now defunct: [1995-96] 1 Yearbook of International Organizations 40-1.)

²²⁵ See Paris, 25 November 1977, (1979) 106 JDI 128.

²²⁶ See generally Adam, *Les Organisations Internationales Spécialisées* I (1965).

²²⁷ See Loquin, Case-Note, above, note 225, 136-7. See the ASECNA Convention, above, note 224, Articles 4 and 8.

tional organizations proper, and this is a matter of degree to be ascertained by reference to the relevant treaty,²²⁸ an exercise to which the court did not indulge.

(b) Discerning the Principles

Contrasting the two decisions above puts in relief the function of immunity. Both ASECNA and CERN are specialized organizations and both can therefore be classified as *établissements internationaux*. Both benefited from immunity, to varying extents. The French court's approach, as far as it can be discerned in its summary judgment, was to look at the fundamental nature of the organization: can it operate/arbitrate at the international law level? For the Swiss court, immunity created a presumption that the organization not only was capable of, but had in fact arbitrated pursuant to international law.

This poses a logical problem with practical implications. The better approach to immunity from jurisdiction, advocated by Judge Sir Lauterpracht and Professor Brownlie in the context of state immunity, is to look at the notion as a negation of state competence which would otherwise exist, because the subject-matter is governed by international law.²²⁹ (This, the subject-matter itself being in the realm of international law, is a distinct hypothesis from the act of state doctrine, where the court refuses to sit in judgment of acts of another sovereign in its internal sphere;²³⁰ in that latter case, it is only the foundation of such abstention that is provided by international law.) This is the only proper exegesis and foundation of limited immunity as nowadays conceived. Thus, immunity will be justified only if the arbitration is subject to international law, and will result from that fact, not vice versa. The rule has the virtue of giving consistent results even in cases of lack of headquarters agreement or arbitrations in the territory of a non-member state.²³¹ The rule does not, however, address policy issues, which will be discussed in the next subsection.²³²

Returning to the two court decisions, whilst the approach of the French court seems more cogent, that of the Swiss court is on balance practically preferable. One is confirmed in advancing this proposition by the fact that the *iure imperii – iure gestionis* distinction (if at all valid) cannot as such apply to persons with limited capacity; provided, however, that immunity could only serve as the foundation of a presumption that the organization has not submitted to municipal arbitration law. In other words, the burden of proof is on the applicant to show that immunity disapplies because the arbitration at hand was submitted to municipal law.²³³ On that premise, and based on the *CERN* case, nothing short of an explicit submission to national law or equivalent indication will be sufficient to found competence of municipal courts and law, even for an organization whose all-purpose international law status is disputable.²³⁴

Such indications are a rare find. This author has been able to find only one such case, in the constitutive instruments of the European Space Agency. The ESA is obliged to arbitrate all non-employment disputes by 'private arbitration', where the procedure 'shall be that of the ... country

²²⁸ See Brownlie, *Principles* (5th edn, 1998) 67-8.

²²⁹ See Lauterpracht, (1951) 28 BYIL 220, 236-41; Brownlie, (1987) 62i Ann IDI 45.

²³⁰ See, eg, *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964); *Buttes Gas and Oil Co v Hammer (Nos 2 and 3)* [1982] AC 888 (HL).

²³¹ But cf *Dominicé*, below, note 234, 199.

²³² Below, subsection IV.B.3.

²³³ Thus ICC 9744/1999 (unreported).

²³⁴ See *Dominicé*, (1984-IV) 187 RdC 145, 204-5 (who is, however, unclear as to whether submission should be express or implied); with hesitations on policy grounds: Reinisch, *International Organizations* (2000) 226-9.

[of the proceedings]’.²³⁵ It may also be accepted that standard institutional or ad hoc clauses will not without more import domestic law.²³⁶

What is more debatable is whether entrusting a municipal (and usually judicial) authority with appointing functions is evidence of submission to the law of that authority. The Swiss court implied that it is, contrary to previous jurisprudence of lower courts,²³⁷ whereas the French court seemed undetained by any such consideration. This author shares the view expressed by Dr Mann, who in a different context has convincingly expressed the view that such clauses are *intuitu personæ*²³⁸ and on that premise inconclusive. The practice in that respect would further confirm the point; the purpose seems to be to designate a person who will be impartial to the parties and conveniently situated.

In the light of the analysis above, the sweeping statement by the Swiss supreme court that submission to arbitration by international organizations does not amount to a waiver of immunity must be qualified: it does not amount to waiver or, that is the same, to submission to municipal law, when the procedural law is international law. Conversely, if the substantive contract and/or the arbitration agreement specify that nothing therein shall be construed as a waiver of immunity, the law of arbitration and procedure is international law. Any application of domestic law is in such cases by incorporation and not submission. Contrary to what the court said, the same rules apply to states, despite the fact that in their case a contrary presumption applies.²³⁹

2. Particular Arrangements: Standing Tribunals

Three particular dispute-resolution arrangements are worth mentioning. The first is the facility under the Statute of the ILO Administrative Tribunal to submit to the tribunal disputes arising out of contracts to which the ILO is a party.²⁴⁰ It is reported that ILO routinely uses this facility in its contracts,²⁴¹ but no awards have been made yet.²⁴² Second, and similar, is the jurisdiction of the administrative tribunal of the International Institute for the Unification of Private Law (UNIDROIT).²⁴³ The third and practically more interesting one is the arbitral jurisdiction of the the European Court of Justice (‘ECJ’). Article 238 (ex 181) of the EC Treaty reads:²⁴⁴

The Court of Justice shall have jurisdiction ... pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law.

²³⁵ See Convention for the Establishment of ESA (1975), 1297 UNTS 161, Annex I, Article XXV. The predecessor of ESA, ELDO (European Launcher Development Organization, see 1297 UNTS 402) had the same obligation; see Protocol on the Privileges of ELDO (1964), 605 UNTS 370, Article 25.

²³⁶ Article 1(2) of the AAA and IACAC Rules, as well as Article 1(3) of the PCA Organization-Individual Rules, copy Article 1(2) of the UNCITRAL Rules and thus the observations made above, text to note 53, apply.

²³⁷ See, eg, TC Vaud, (1958) 106 JdT III 107.

²³⁸ See Mann, *Studies* (1973) 256, 287-93; but see *Sapphire v NIOC*, below, note 283, 35 ILR at 166-7.

²³⁹ See below, subsection IV.3.B.

²⁴⁰ See Statute of the Administrative Tribunal of the ILO (1946, as amended), <<http://www.ilo.org>>, Article II(4).

²⁴¹ Valticos, above, note 201, 85.

²⁴² An award has been made in *Rebeck v WHO* (ILOAT No 77/1964), but the case was referred on the basis of Article II(5) of the Statute.

²⁴³ See Statute of the UNIDROIT (1940, as amended), 15 UST 2494, Article 7bis.

²⁴⁴ EC Treaty, Article 238.

The Court of First Instance ('CFI') was upon its creation invested with Article 181 jurisdiction at first instance.²⁴⁵

The facility is used for, amongst others, private law contracts concluded by EC institutions, for example services contracts subject to the law of the a member state.²⁴⁶ Moreover, it is understood that an ECJ arbitration clause is included in the majority of European Investment Bank ('EIB') contracts.²⁴⁷ The practice applies both to EC and non-EC borrowers. It is not followed, however, in contracts with states or state institutions which cannot by their own law submit to the jurisdiction of the courts of another *state*, such as Brazil.²⁴⁸ In such cases, ad hoc arbitration clauses are inserted, in respect of which the general position above applies.

That the ECJ is a tribunal set up under treaty does not create *stricto sensu* jurisdictional problems, because Article 238 is formulated in terms that allow the court to assume jurisdiction over any litigant that has entered a forum agreement with a Community institution. The problem, however, lies in the fact that an ECJ clause is more in the nature of a *prorogatio fori* than a *compromis* to submit to a tribunal to be established between the parties, and that forum 'belongs to' the EC and the member states. This is undoubtedly why Brazil is hesitant to accept ECJ jurisdiction: it is 'foreign'.

Enforcement of ECJ awards is a question unresolved by the EC Treaty. The most obvious solution would be to apply the New York Convention, with the modifications proposed in Chapter 7 below. Another would be to apply by analogy Article 256 (ex 192)—in virtue of Article 244 (ex 186)—of the EC Treaty, according to which:

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision
....

Although this would be consonant with the status of the ECJ as an international court, the option would be fraught with problems. For sovereign counter-parties an ECJ clause may possibly be deemed to import Article 256 as a necessary appendage. On the other hand, it is more than arguable that Article 256 should only bind states which have participated in the formulation of the Rules of Procedure and the Statute of the ECJ—in other words, such participation is a necessary condition for finality and automatic enforceability. Insofar as private counter-parties are concerned, there is no way, it is submitted, that their courts can give effect to that provision.

3. Conclusions on International Organizations

This subsection therefore concludes as follows. Though international organizations may operate equally on the international and domestic law planes, dispute settlement by arbitration will be exclusively subject to international law, unless otherwise explicitly or implicitly (but based on concrete indications) provided. This is in part due to and in part reflected in the rule that the organiza-

²⁴⁵ See Council Decision 88/591, [1988] OJ L319/1 (and amendments).

²⁴⁶ See recently Case T-203/96 *Embassy Limousines and Services v European Parliament* [1998] ECR II-4239, paras 4, 44.

²⁴⁷ The EIB is a lending institution established under the EC Treaty; see EC Treaty, Articles 4, 266, 267, and Protocol 10 (1957).

²⁴⁸ Interview with Mr Roderick Dunnett (EIB), 10 November 1999, who indicated that EIB dispute resolution policy is currently under review, partly for the reasons mentioned below.

tion will have jurisdictional immunity in respect of the arbitration proceedings. In effect, international organizations may, and normally do, elevate arbitration proceedings to international law level.

This leaves us with policy issues and a conceptual question. It is certainly arguable that arbitrations not pertaining to the core functions of public nature of an international organization should not be subject to international law and covered by immunity. On the other hand, we are here concerned with the control over the dispute settlement method, as distinct from the underlying dispute, and it is not immediately clear why the latter should carry along the former to the realm of municipal law. To a large extent, the previous subsection has been able to sidestep the issue by hiding behind, as it were, the functional personality of international organizations and their attendant blanket immunity. This was with a view to isolating the legal issues as presented in the relevant practice and laying the ground for next subsection, where the same policy questions are discussed.

B. The State as Arbitrating Party²⁴⁹

The issues discussed in subsection IV.A above present themselves with more urgency and force in respect of states. This is because states, by contrast with international organizations, possess *ipso iure* juridical personality on both the international and municipal levels. From an international law perspective, therefore, their immunity is unjustified if the activity concerned is cognizable in domestic law, and policy reasons concur to that result. It is useful to recapitulate the questions: Is the participation of states a factor which may raise arbitral proceedings to the international law plane? (the 'Permissibility Question') If so, is that faculty reserved to proceedings related to certain types of disputes only? (the '*Ratione Materiae* Question') And, further, how is the relevant intention ascertained? (the 'Evidence Question')

1. Arbitral Practice is Inconclusive

(a) The Exception: Express Choice and its Modalities

It is wise to start with the uncontroverted proposition that the parties in a mixed arbitration may expressly submit it to a municipal law.²⁵⁰ The arbitration agreement in the *Aminoil* case provided in pertinent part:²⁵¹

IV

- (1) Unless otherwise agreed by the parties, and subject to any mandatory provisions of the procedural law of the place in which the arbitration is held, the Tribunal shall prescribe the procedure ... on the basis of natural justice and of such principles of transnational arbitration procedure as it may find applicable
- (2) ...
 - (a) ...
 - (b) ...
 - (c) The *seat* of the arbitration shall be Paris.

²⁴⁹ For a bibliography up to 1987 see Center for Studies and Research of the Hague Academy of International Law, *Transnational Arbitration and State Contracts (Selective Bibliography)* (1987).

²⁵⁰ See the examples below, notes 379-380.

²⁵¹ *Kuwait v Aminoil* (1982) 21 ILM 976, 980-1 (ad hoc, 1982).

V

The final award ... shall be binding on both Parties who hereby expressly waive all rights of recourse to any court, except such rights as cannot be waived by the law of the place of arbitration.

The tribunal adopted its own Rules of Procedure consistently with the stipulations quoted above.²⁵² But it is interesting to note how it interpreted the arbitration agreement. It held that the parties had chosen the law 'governing the proceedings in the broadest sense' but that 'does not in the least entail of itself a general submission to the law of the tribunal's seat', because the parties conferred on the tribunal the power to determine the 'essential procedural rules'.²⁵³ And it continued that:²⁵⁴

5. Having regard to the way in which the Tribunal has been constituted, its international or rather, transnational character is apparent. It must also be stressed that French law has always been very liberal concerning the procedural law of arbitral tribunals, and has left this to the free choice of the Parties who, often, have not had recourse to any one given national systems [*sic*]. French law has thus befriended [transnational] arbitrations
....

The statement remains one of principle, for no procedural issues appear in the rest of the award. Even in isolation, nonetheless, the reasoning is enigmatic. It appears from the written pleadings that the parties specifically addressed the point of principle what law governed the proceedings as a whole, and possibly the tribunal felt obliged to respond to their argumentation.

That argumentation was however a spin-off of conflicting arguments on the law applicable to the merits. The government was arguing that the *lex fori* of any arbitration involving a private party was provided by the law of the 'seat'.²⁵⁵ Aminoil was resisting the implication that a domestic law (designated by French conflicts rule or at all) would apply: the parties' essential intention was to choose a neutral place. Aminoil was not supporting an arbitration subject to international law, but a 'transnational' or 'delocalized' arbitration.²⁵⁶ Kuwait responded by the general proposition that an arbitration cannot levitate above domestic law, and thus the law of the seat applied by its own fiat. Passing mention is also made to the fact that there was an express clause.²⁵⁷

One is unable to discern in the passage quoted above whether transnational arbitration is arbitration pursuant to international law (which is unlikely, given the express permission to apply to domestic courts) and, moreover, whether it derived its legal force from international or domestic law. It seems that the tribunal was saying that the Permissibility Question is resolved by international law, in the affirmative, and that French law would tolerate the result. No practical implications ensue, for in any event Kuwait had waived its immunity in Article V of the agreement, and in that event the French courts would apply French law, as for any other domestic law international arbitration. In short, the distinguished tribunal's construction was simply at odds with any reasonable interpretation the parties' agreement could bear. It is no good to justify the court's holding on a distinction between a transnational *lex fori* and a limited choice in favour of the law

²⁵² *ibid* 985-9.

²⁵³ *ibid* 999, paras 3-4.

²⁵⁴ *ibid*.

²⁵⁵ See Government Memorial (1980) paras 3.1-3.5.

²⁵⁶ See Aminoil Memorial (1981) paras 210-232; Aminoil Counter-Memorial (1981) para 15 speaks of a 'tertium genus' of proceedings and marshals an Opinion by Professor Dupuy: *ibid* Book 7, tab 34.

²⁵⁷ See Government Counter-Memorial (1981), paras 3.13-3.20. The point was finally conceded by Aminoil.

of the seat. This is undoubtedly what the tribunal was at pains to show, for it wanted to reconcile the non-application of French conflicts rules with the express submission to French procedural law.²⁵⁸ First, even Redfern, who accepts that distinction, has to accept that the legal materiality of the *lex fori* is essentially reduced to procedure.²⁵⁹ Second, although the tribunal's reasoning is intellectually valid, it is not honest. The parties expressly allowed appeals, which is a wholesale importation of French law. That French law does not in fact allow appeal on erroneous application of law is no argument to show that the *lex fori* is transnational. Whether the choice was made in exercise of autonomy conferred by international, 'transnational' or French law is for present purposes irrelevant;²⁶⁰ the point is that this was a straightforward case of choice of domestic law as a whole and should be seen as such.²⁶¹

A less clear situation prevails in a pending ICC case, ICC 7934, where the arbitration clause in a contract with a state entity and a foreign project contractor provides that '[t]he procedure in the arbitration shall be English' but the 'venue' will be outside England. The ToR further stipulate that even if hearings take place in other places the venue will remain the 'legal seat'. The tribunal did not have an opportunity to interpret these provisions in its partial award,²⁶² but there are two alternatives: either 'legal seat' has the limited purpose of confirming that the award will be deemed to have been made in that place,²⁶³ or it acts as a rider to and modification of the clause, subordinating English law and the ICC Rules to the mandatory provisions of the law of that place.

Here too the effect of a choice of certain arbitration rules poses interesting questions. Clearly, if there be a presumption that sovereign states (and state-controlled entities) arbitrate under international law, specific reasoning will be required to justify the application of municipal law. As shall be seen below, such reasoning is generally not to be found, which is an indication against a presumption. For example, in an arbitration in the Hague under the UNCITRAL Rules²⁶⁴ a very distinguished tribunal confirmed that the 'arbitral law' should be composed of those Rules, subject however to the mandatory rules of the Netherlands.²⁶⁵ What is not clarified is whether that law applied in its own right or as part of the choice of the parties (see UNCITRAL Rules, Article 1(2)). Nevertheless, and as has already been explained, the Rules cannot determine the 'law of the arbitration' in Article 1(2). The tribunal's assertion that it was municipal law could be based on either of the bases above, but the process of arriving at the concrete result was not spelt out.

Contrast this last-mentioned award with ICC 7110/1995, for example. A very distinguished tribunal was sitting in a dispute involving sales of military equipment and related services to a state. The arbitration was taking place in the Hague. The contractual clauses provided for arbitration and that any disputes be resolved in accordance with 'international' or 'natural' justice, which the

²⁵⁸ See *Aminoil*, (1982) 21 ILM at 1000-01.

²⁵⁹ See Redfern, (1984) 55 BYIL 65, 79-87. (Redfern was counsel for Kuwait.)

²⁶⁰ The question is not answered in *Technosystems SpA v Taraba State & Nigeria*, in Hamilton, *The PCA* (1999) 176 (PCA, 1996), where the clause provided for arbitration under Nigerian law.

²⁶¹ Mann's criticism (above, note 251) would concur in the result, but in his view the parties' freedom of choice was one within the French legal order anyway.

²⁶² ICC 7934/1995 (Partial, unreported) deals with a question of jurisdiction (whether the parties had a duty to negotiate before the proceedings) as a matter of interpretation of the clause and principle, without reference to any particular law.

²⁶³ See ICC Rules, Article 25(3).

²⁶⁴ The original agreements between the parties provided merely for ad hoc arbitration; see *OPEC 1973*, 165; *OPEC 1975/76*, 63.

²⁶⁵ See *Wintershall AG et al v Qatar* (1989) 28 ILM 795 (UNCITRAL); Partial Award, 1988, *ibid* 798 at 801, 811; Final Award, 1988, *ibid* 834 at 834-5.

tribunal correctly interpreted as a clear intention of effecting a so-called ‘negative’ choice, that is, an exclusion of domestic law. The tribunal referred to this as ‘delocalization’ of applicable law, and considered it particularly appropriate for state contracts. It accordingly proceeded to apply the UNIDROIT Principles of International Commercial Contracts as a codification of general principles of contract law.²⁶⁶ There are somewhat conflicting statements in the award, which do not permit conclusively to determine whether the tribunal reached that result through the ‘direct approach’ (*voie directe*), that is, an elimination of conflicts rules altogether, and/or as an implicit choice by the parties. Both approaches would seem to be valid under Article 1054 of the Dutch Code of Civil Procedure²⁶⁷ (though subject to strong objections of principle). The more interesting point is that the tribunal considered the reference to ‘natural justice’ as having a procedural facet too. No procedural instances are discernible in the award, but the statement seems at odds with the ToR for the tribunal, which subjected the arbitration to the ICC Rules and Articles 1020-1073 of the Code (ie, all the provisions of Book Four except for the ones on recognition and enforcement of foreign awards). Now this cannot possibly be construed as a mere incorporation of the rules of national law. For if this were so the parties would have excluded the provisions on annulment (Articles 1064-1065), which import by logical necessity all the mandatory provisions.

This affords a good and rare example of a situation where the law of the merits influenced procedural law. Arbitration clauses have in themselves (ie, independently of whether they were considered as leading to internationalized proceedings) been considered as an indication to make the contract escape any and all national laws as to the merits.²⁶⁸ The widespread use of arbitration nowadays probably trivializes the value of the comment. Moreover, the arbitration as a process is subject to different legal and policy considerations than those of the law governing the merits.²⁶⁹ The most that can be said is, it is submitted, that an arbitration clause may, in the circumstances, indicate the intention to exclude the application of the law of the contracting state, both on the substantive²⁷⁰ and procedural²⁷¹ level.

(b) The Rule: No Choice

The narrative of relevant cases starts with the *Alsing* case, which concerned an exclusive supply contract between a Swedish party and the Greek state.²⁷² Its peculiarity lies in the fact that the final arbitration proceedings were preceded by proceedings before a two-member tribunal which sat in Athens. That panel having been unable to reach agreement, the case was referred to an umpire, President Python of the *Tribunal fédéral*, who sat in Lausanne. Uncommonly, the parties appear to have laid down detailed procedural rules for both the tribunal and umpire stage, which were however subject to amendment by the umpire.²⁷³ The umpire applied the Geneva Protocol, to which the states of incorporation of the litigants and Switzerland as the territorial state were

²⁶⁶ ICC 7110/1995 (Partial, unreported).

²⁶⁷ cf van den Berg, National Report The Netherlands, *Handbook* (Supplement, 1987), ch V.5.

²⁶⁸ See, eg, Verdross, (1958) 9 ÖZöR 449, 454-6; Cohen-Jonathan, above, note 299, 464.

²⁶⁹ cf van Hecke, (1977) 57i Ann IDI 192, 201-2 (opinions).

²⁷⁰ cf Audit, *Transnational Arbitration* (1987) 80-81; ICC 7115/1995, above, text to note 266; ICC 3493/1983, below, text to note 324. *Contra*, El-Kosheri & Riad, (1986) 1 ICSID Rev-FILJ 257, 276.

²⁷¹ cf *The Western Co of North America v Oil & Natural Gas Commission* (1988) 13 YCA 5, 13-14 (ad hoc, 1985).

²⁷² *Alsing Trading Company, Ltd v Greece*, 23 ILR 633 (ad hoc, 1954). Schwebel, (1959) 8 ICLQ 320 is a detailed exposition of the case.

²⁷³ 23 ILR at 639.

parties, and concluded that within the Protocol party agreement was supreme in matters procedural.²⁷⁴ On reflection, this conclusion does not come as naturally as the actual report would suggest. For an international convention to apply two conditions must be met: the convention must be binding on the tribunal and the subject-matter must come within its scope of application. Now, an arbitral tribunal cannot be said to be bound by an international convention ratified by any state (including the state of the proceedings), unless it is assumed that the tribunal operates under that law just like a court of that state would. Apparently, the umpire made, but did not spell out, this assumption. At the subordinate level of scope, the holding that the Protocol is applicable dispenses with the possible objection that it does not apply to arbitrations involving the states parties to it. This is nowhere laid down in the Protocol, to be sure, but the Geneva Convention, whose field of application is demarcated by that of the Protocol, refers to awards 'between persons who are subject to the jurisdiction of one of the High Contracting Parties'.²⁷⁵ Thus, President Python made either of two assumptions: (a) that the Protocol's scope is not limited in the same way as the Convention's; or (b) that the sovereign litigant appeared as a 'subject' of the law in the proceedings. Both assumptions are to varying extents tenable, but the point to be made is that the umpire seemed unconcerned with the sovereign status of one of the litigants. This apparent laxness may be explained away by the fact that the parties were in accord with the umpire's course of action, including his decision to apply Swiss procedure to certain matters, presumably because reference to a developed legal system enhanced certainty and clarity.²⁷⁶ In all, *Alsing* does not provide a precedent either way. The umpire seems to have applied Swiss law exclusively to procedure and as a matter of convenience, whilst he also held that what the so-labelled 'lex fori' for the purposes of the law applicable was solely determined by the parties.²⁷⁷

The *Aramco* award contains a fuller consideration of the issues. Professor Sauser-Hall, who may be safely assumed to have written for the tribunal, ruled that the tribunal was unable either to draw an inference of submission to the law of the seat, Swiss law, or to hold that law applicable *tout court*. Swiss law would import the jurisdiction for the Swiss courts, which 'would constitute an infringement of the prerogatives of the State which is a Party to the arbitration. This would render illusory the award given in such circumstances.'²⁷⁸ Presumably, 'illusory' meant that if the courts had jurisdiction to control, and eventually annul, the award, this would violate the agreement of the parties to have a declaratory award. The tribunal's reasoning was not based on Swiss law. The holding that the *lex fori* was international law ensued directly from a rule of international law, namely jurisdictional immunity, and from the finding that the parties had not implicitly chosen Saudi or US law. Implicit in the award is thus a conception of sovereign immunity as a presumption, a presumption that no municipal law has been chosen unless there is concrete contrary evidence.

Presumably, the parties were taken aback by the radical holding, as they had not addressed the point in their written pleadings.²⁷⁹ The point did, however, serve as the foundation of the tribu-

²⁷⁴ Schwebel, above, note 272, 328. See the case-law cited below, Chapter 7, note 17.

²⁷⁵ Geneva Convention, Article 1, first para.

²⁷⁶ The umpire decided to apply the Federal Procedural Law to certain evidential matters, but that Greek law (the law of the merits) governed some procedural instances: Schwebel, above, note 272, 328-9. He applied the Swiss law on the permissibility of intervention: *ibid* 331.

²⁷⁷ 23 ILR at 637. This is of course subject to ample criticism in its own right.

²⁷⁸ See *Saudi Arabia v Aramco*, 27 ILR 117, 156 (ad hoc, 1958).

²⁷⁹ Except for a passing mention to the principle of *compétence de la compétence* in the Final Memorial of the claimant (1956) para 37.

nal's further excursion in the 'general doctrine of private international law'.²⁸⁰ But it is here that the internal contradiction becomes apparent: while it was held that the participation of a state in the arbitration of itself precludes appurtenance to municipal law, the participation of a private party in the contract means that municipal law governs the merits.²⁸¹ If, however, a private party can litigate in international law in respect of a commercial venture, why is it inconceivable that the substantive law relationship be internationalized too? The reference to *Serbian and Brazilian Loans* in support of the substantive law finding is not decisive, for the Permanent Court's holding in that case could easily be transposed to the procedural law plane as well. The inconsistency lies in the firm conviction with which the tribunal expressed itself and not in the legal plausibility of the award, but it does reduce the award's precedential value as authority on the Permissibility Question.²⁸²

Be that as it may, *Aramco* became a yardstick of all subsequent awards. In *Sapphire* Sole Arbitrator Cavin ruled that the procedure was governed by Vaudois law, where the proceedings were taking place. Interestingly, he reached that result by autonomously qualifying arbitration as a process and applying general precepts of the conflicts of laws:²⁸³

The judicial authority ... conferred upon the arbitrator necessarily implies that the arbitration should be governed by a law of procedure, and that it should be subject to the supervision of a State authority

He proceeded to hold that the 'doctrine and case law' subjected the law of procedure to that chosen by the parties, which in this case was exercised indirectly by giving the arbitrator the power to determine the place of arbitration. And even if the parties had not made any choice, lack of choice imported the law of the seat.²⁸⁴

There are two observations. First, the holding is only partially based on Swiss law, so that it is doubtful whether the arbitrator considered Swiss law the *lex arbitri* properly-so-called.²⁸⁵ Second, the fact that NIOC was conducting Iranian petroleum policy²⁸⁶ did not urge the arbitrator to consider the possibility of international law being the *lex arbitri*. Both points conflict with the arbitrator's holding on substantive law, namely that (a) he was not bound by Swiss conflicts rules because an arbitrator does not 'mete out justice' in the name of the state where he sits;²⁸⁷ and that (b) a concession contract has a 'quasi-international character which releases it from the sovereignty of a particular legal system' to be subject to general principles of law, whether that be a discrete source of law or not.²⁸⁸

²⁸⁰ 27 ILR at 157.

²⁸¹ *ibid* 165, citing *Serbian and Brazilian Loans* (above, note 40). The holding may be considered superfluous, for the arbitration agreement (quoted in Hambro, above, note 39, 43, note 81) was explicit and covered the reasoning of the tribunal.

²⁸² Accord: Lalive, above, note 144, 122-7.

²⁸³ See *Sapphire International Petroleum Ltd v National Iranian Oil Company*, 35 ILR 136, 169, (ad hoc, 1963) (citation omitted).

²⁸⁴ 35 ILR at 169.

²⁸⁵ The arbitrator, *ibid*, cited TF, 57 I ATF 295 (the 1927 Geneva Convention subjects the law of the arbitration as a whole (including the agreement to arbitrate) to the law of the seat in default of party agreement).

²⁸⁶ See Statutes of the National Iranian Oil Company (as amended in 1955 and 1968): OPEC, above, note 114, 131.

²⁸⁷ 35 ILR at 170.

²⁸⁸ *ibid* 172-5.

The next award to be considered is the first in the line of the Libyan nationalization cases.²⁸⁹ In *BP v Libya* Sole Arbitrator Lagergren was empowered by the arbitration clause to fix the place of arbitration and determine the procedure. He considered *Aramco* and dismissed it, considering that immunity did not suffice to remand the proceedings to international law.²⁹⁰ In a passage quoted in Chapter 7 below, Lagergren balanced any possible presumption against the state party's having relinquished its sovereign immunity with the intention of the parties to create an 'effective remedy'—which intention would be defeated if the proceedings were internationalized.²⁹¹ The reasoning is interesting but, as demonstrated in Chapter 7 below, not based on authority.

Lagergren does not definitively determine from which legal order, national or international, the tribunal derives its powers. In fact, he seems to accept that municipal law is not the *lex fori* of a tribunal sitting in a dispute between a state and a sovereign party:²⁹²

[T]he ad hoc international arbitral tribunal created under an agreement between a State and an alien ... at least initially has no *lex fori* which, in the form of conflicts of law rules or otherwise, provides it with the framework of an established legal system under which it is constituted and to which it may have ultimate resort. With respect to the law of the arbitration, the attachment to a designated national jurisdiction is restricted to what, broadly speaking, constitute procedural matters and does not extend to the legal issues of substance. It is erroneous to assume ... on the basis of the territorial sovereignty of the State where the physical seat of an international arbitral tribunal is located, that the *lex arbitri* necessarily governs the applicable conflicts of law rules.

The statement is powerful but ambivalent. It confirms, by negation, on the one hand that a procedural 'attachment' is a matter of prudence and convenience and, on the other, that the law of the seat does not have sufficient connections to be the *lex arbitri* proper. For the *lex arbitri* is either a catholic, all-embracing notion or not at all. As it happened, the arbitrator did apply Danish conflicts rules, as they did 'provide a wide leeway for the free exercise of party autonomy'.

An almost identical construction was put forward in an award made in similar factual and legal circumstances, by Professor Gomard, sole arbitrator in *Elf v Iran*. The arbitrator, by order, fixed the seat in Copenhagen and determined Danish law as applicable to procedure. Justifying and distinguishing the choice in his preliminary award, he wrote that:²⁹³

The reference in Art. 41, Sect. 5 [of the contract], to a particular place and procedure of arbitration, and of Danish procedural law²⁹⁴ does not warrant a limitation of the *lex contractus* in favour of Danish law in the fundamental questions of the arbitrator's compe-

²⁸⁹ For the main three cases see El Hajjé, *L'Arbitrage entre État et Personne Privée Étrangère* (Thesis Geneva, 1988); Stern, below, note 327; Greenwood, below, note 328; White, below, note 333; von Mehren & Kourides, below, note 333; Wetter, *The International Arbitral Process I* (1979) ch II; Lalive, (1983-III) 181 RdC 9, 83-113.

²⁹⁰ *BP Exploration Company (Libya) v Libya* (Merits), 53 ILR 297, 308-10.

²⁹¹ See below, Chapter 7, text to note 136. The arbitrator proceeded to apply Danish law to determine the procedure in case of default of the respondent: 53 ILR at 311-12. A subsequent challenge of the award before him was framed by the applicants and dealt with by the arbitrator exclusively in Danish law: *BP Exploration Company (Libya) v Libya* (Competence to re-open), 53 ILR 375 (ad hoc, 1974); and see the materials of the parties in Wetter, *The International Arbitral Process II* (1979) 560-609.

²⁹² 53 ILR 326 (citation omitted).

²⁹³ *Elf Aquitaine Iran v NIOC* (1986) 11 YCA 97, sub [7] (ad hoc, 1982). The arbitrator proceeded to determine his jurisdiction based on general international law and comparative arbitration law.

²⁹⁴ There was no mention of the sort; this was determined by the arbitrator, empowered to do so under Article 41(5) of the contract.

tence and the admissibility of a request for arbitration. It should be kept in mind that the link between this arbitration and Denmark, Copenhagen, and Danish procedural law, does not consist in any real connection with Denmark, but rather the opposite. ... The agreement of the parties is the basis of arbitration, and the parties cannot be presumed to have chosen any other law than that indicated in Art. 41, Sect. 5, second paragraph, as the law governing the fundamental question whether an arbitration requested in accordance with the terms of the agreement can or cannot take place. Danish procedural law is of importance only for the conduct of the pleadings in the arbitration.

A later award engages with the issues, albeit by way of mere affirmation rather than consideration. Sole Arbitrator Mahmassani was appointed by the President of the ICJ in accordance to an arbitration clause in a concession agreement and after the respondent failed to nominate its arbitrator. In an order, the arbitrator determined that 'in his procedure [he] shall be guided as much as possible by the general principles contained in the [Model Rules] on Arbitral Procedure of the International Law Commission ...'.²⁹⁵ But it was only in the final award that the arbitrator gave reasons for his holding. He started with the statement that:²⁹⁶

It is an accepted principle of international law that the arbitral rules of procedure shall be determined by the agreement of the parties, or in default of such agreement, by decision of the Arbitral Tribunal, independently of the ... law of the seat

In support of his proposition he cited a multitude of sources, all of which however consecrate substantive procedural freedom, not an unfettered autonomy in shaping the procedural régime and choosing a procedural law. The former autonomy plainly exists within a legal system, and that legal system was, it is presumed, international law. Subject to that ruse, the arbitrator in effect asserted that international law allows the parties to subject their arbitration (back) to international law and remove them, at least in their procedural tenet, from the law of the seat (*in casu* that of the Canton of Geneva).

The practical application of the holding seems to have been limited to a finding on the procedure in default of appearance of one party. The ILC Model Rules follow on this point Article 53 of the ICJ Statute, allowing the process to continue but obliging the tribunal to satisfy itself of its jurisdiction and the well-founded of the claim,²⁹⁷ which reflects general international arbitration law. Moreover, the position would be the same under Geneva law.²⁹⁸ Nevertheless, Dr Mahmassani's assertion should have been more laboured, in view of the debate surrounding the issue.

And this brings us to the mother of all international law awards. Sole Arbitrator Dupuy, in the last of the triad of Libyan cases, held that a state arbitration is wholly subject to international law. He wrote:²⁹⁹

The Arbitral Tribunal must now state precisely what law or system of law is applicable to this arbitration, it being understood that the parties themselves are entitled freely to determine the law of procedure applicable

²⁹⁵ See *Liamco v Libya* (1981) 20 ILM 1 at 5-6 (ad hoc, Preliminary Decision, 1975); 62 ILR 141, [1980] Rev Arb 132, (1981) 6 YCA 89 (ad hoc, 1977), noted by Rambaud, [1980] 26 AFDI 274.

²⁹⁶ (1981) 20 ILM at 42.

²⁹⁷ Compare ICJ Statute, Article 53 with the ILC Model Rules on Arbitral Procedure, Article 29.

²⁹⁸ The Concordat does not deal with the issue, so Federal Procedural Law would apply; see Concordat, Article 24(2); Loi fédérale de procédure civile fédérale, Articles 12(2), 40, 65(2); and *Sapphire*, 35 ILR at 170.

²⁹⁹ *Texaco / Calasiatic v Libya* (Merits), 53 ILR 389, 431, para 11 (ad hoc, 1977).

Professor Dupuy then suggested that *Sapphire* and *Aramco* contained simply two possible solutions. He distinguished the former on the ground that it did not involve a state, though he did acknowledge that NIOC was in fact 'only an emanation' of Iran. And in a simulated reply to *BP* he stated that no practical considerations would urge the arbitrator to apply municipal law, as the plaintiff had requested only a declaratory award. He went on to quote extensively and with approval from *Aramco*, and adduced the considerations that justified international law being the proper law of the arbitration in that specific case. First, the fact that the President of the ICJ was entrusted with appointing functions was an indication that the parties wished to place the proceedings 'under the aegis of the United Nations and, therefore, that the system of law governing this arbitration should be international law'.³⁰⁰ Second, it was held that the parties had chosen international law, or at least made a negative choice in respect of the law of the seat, which brought in international law.³⁰¹ The noteworthy point is that the arbitrator's essential ground was that sovereign immunity necessarily removed arbitral proceedings from national law. So internationalization was brought about by ineluctable inference from international law, which therefore is (to use Rabel's terminology in a different context) the predestined legal system, or more conventionally the *lex arbitri*.

It is important that the Libyan arbitration clauses were identical, all being based on the Libyan legislation then in force.³⁰² Clause 28 did not contain any crucial traits as to the law applicable to the proceedings themselves. It did contain an elaborate mechanism for the appointment of a sole arbitrator by the President of the ICJ should the respondent party fail to nominate its arbitrator. It also provided that the umpire or sole arbitrator be of neutral nationality. The only indication of the law applicable was the famous clause 28(7), according to which that law was 'the principles of the law of Libya common to the principles of International Law and in the absence of such common principles then by ... the general principles of law, including [those] applied by International Tribunals'.

An interesting variation is provided by the award made in a dispute between Sudan and a private enterprise.³⁰³ The parties, arbitrating in the Hague under a detailed *compromis*, used English counsel and solicitors and apparently resorted to full-fledged discovery. However, this appears to have been a matter of contractual incorporation of English procedure and not a straightforward submission to English law. On the other hand, Dutch law did not apply either. Sudan withdrew from the proceedings ordering its arbitrator to withdraw too, but the agreement allowed the proceedings to proceed the withdrawal notwithstanding. The validity of that stipulation seems doubtful under the then-in force Dutch law, and yet the tribunal applied it without questioning its validity.³⁰⁴

Some evidence is provided by a very recent award made by a distinguished tribunal (and presided over by Jan Paulsson), in which award the issue was whether an injunction of the courts of (legal) seat of the arbitration purporting to divest the tribunal of jurisdiction was binding on the

³⁰⁰ *ibid* 435, para 14.

³⁰¹ *ibid* 435-6, paras 15-16. See also paras 40-44, where the application of public international law on the merits is justified by the internationalization of the arbitral process; but see above, text to note 269.

³⁰² See Petroleum Act, No 25/1955 (Libya), Second Schedule, cl 28: *OPEC: Libya and Qatar, pre-1966*, 9.

³⁰³ *Turrif Construction (Sudan) Ltd v Sudan* (ad hoc 1970), recounted by Erades, (1970) 17 Neth ILR 200 (and summarized without the relevant parts by Hamilton, above, note 260, 164). (The arbitration was under the auspices of the PCA in the sense of Article 47 of the 1907 Convention, above, note 54.)

³⁰⁴ *ibid* 215, 217-8; and cf CCP (Netherlands), Article 628 (old) (see above, note 84).

tribunal.³⁰⁵ The tribunal did briefly mention that arbitrations involving states were subject to international law, but then laid emphasis on the fact that this was an international arbitration (in the conventional, commercial, sense) under the law of the seat, and finally rested its judgment on a rule of public international law that the state cannot unilaterally withdraw its consent to arbitration.³⁰⁶ One wonders why the tribunal buttressed its reasoning by interposing a wholly irrelevant consideration, the law of the seat on ordinary commercial proceedings, but on the whole the award is authority for the limited proposition that proceedings involving states may not be subject to domestic law and jurisdiction.

Finally, mention should be made of a recent decision made on a challenge of an arbitrator appointed pursuant to the UNCITRAL Rules in a dispute opposing a state to a private company.³⁰⁷ The Appointing Authority, sitting in Washington, DC, applied the relevant provision, Article 10(1) of the Rules, but interpreted it in the light of US federal law. The grounds for his holding were that it was ‘conceivable’ that a challenge would be entertained by the federal courts, and thus their law imposed itself as the *lex fori*.³⁰⁸ The ruling rests partially at least on prudential grounds in that it does not take a stance on whether those courts would have jurisdiction to hear the challenge. As will presently be shown, however, it was correct in the circumstances.

2. The Practical Needs

The record shows that the law applicable to the merits, the law determining the procedure, and the law resolving issues of jurisdiction follow different paths. The fact that the issues present are quite distinct has no doubt prevented, or dispensed, arbitral tribunals from expressing conclusive views on the *lex arbitri*; indeed, it is the contention of this thesis that there is no need for such a holistic concept, and this proposition would apply with more force here. The table below recapitulates the findings of important awards on the various aspects of conflicts of laws.

Table: Conflicts Rules in State Arbitrations

	<i>Lex Arbitri</i>	Procedure	Merits	Jurisdiction
<i>Alsing</i>	N/A	(As per (<i>semble</i>) seat law:) party instructions and Swiss law	(as per Greek conflicts rules:) Domestic law	(<i>semble</i>) seat
<i>Aramco</i>	(<i>semble</i>) International Law	International Law	Domestic law	N/A
<i>Sapphire</i>	(<i>semble</i>) International law	Seat	Non-domestic	N/A
<i>BP</i>	(<i>semble</i>) International law	Seat	Seat	N/A

³⁰⁵ See *Himpurna California Energy Ltd (Bermuda) v Indonesia* (2000) 12:2 WTAM 183, 284-91.

³⁰⁶ See below, note 317

³⁰⁷ See UNCITRAL Rules, Articles 6(2), 12(1)(c).

³⁰⁸ See Challenge Decision of 11 January 1995, (1997) 22 YCA 227, sub [13] (UNCITRAL, 1995).

Mixed Arbitration

	tional law			
<i>Liamco</i>	(<i>semble</i>) International law	International law	(<i>semble</i>) International law	N/A
<i>Texaco</i>	International law	International law	International law	N/A
<i>Elf</i>	(<i>semble</i>) non-domestic	Seat	International law	International law
<i>SPP (ICC)</i>	N/A	N/A	International law (as part of Egyptian law)	(<i>semble</i>) International law
<i>Himpurna (Interim)</i>	(<i>semble</i>) International law	Arbitration rules chosen	N/A	(<i>semble</i>) International law

Conflicts of laws rules are not crucial, for even if those of the law of the seat applied they would allow a very wide measure of autonomy, including the possibility to have recourse to international law, general principles of (international) law and the like. Moreover, and quite independently of the applicable law to the contract, it is both proper and feasible to import the principles of compensation of international law.³⁰⁹ This would be based on the proposition that relevant treaty or general international law rules are part of the law objectively applicable to a question of international responsibility,³¹⁰ and must therefore apply if such a question is cognizable by the tribunal.

A highlight of the priorities is provided by two major Iranian petroleum concessions. The Anglo-Persian concession stipulated that the procedure 'shall be that followed ... by the Permanent Court of International Justice',³¹¹ whereas the Consortium Agreement, which replaced it, simply referred procedure to the arbitrators.³¹² However, both agreements ensured that the substantive law would be internationalized, containing formulas later borrowed by the 1955 Libyan Petroleum Act.³¹³

Similarly, jurisdictional issues are hardly ever resolved on a *lex arbitri* basis. Arbitral tribunals have invariably resorted to principles allegedly forming part of the international law of arbitration to counter objections by the state party that the arbitration agreement to which it has consented is null by its own 'personal' law.³¹⁴ If according to that law the objection is not well-founded, the matter stops there, of course.³¹⁵ But even when the objection is impeccable as a matter of that law,

³⁰⁹ cf *Starrett Housing Corp v Iran*, 16 Iran-US CTR 112, 195, para 261 (1987).

³¹⁰ cf *Elettronica Sicula SpA (ELSI)*, ICJ Reports 1989, 15, 50-1, paras 71-73. See *AMOCO International Finance Corp v Iran et al*, 15 Iran-US CTR 189, 214, para 87 (1987); Jennings, *Collected Writings* 2 (1998) 852, 859-76.

³¹¹ Agreement between the Imperial Government of Persia and the Anglo-Persian Oil Company, Limited (1933), Article 22(E): Annex A to Application Instituting Proceedings, *ICJ Pleadings, Anglo-Iranian Oil Co*, 20.

³¹² See above, note 114, Article 44(D).

³¹³ Above, text to note 302.

³¹⁴ On subjective arbitrability and states generally see van den Berg in *Acts of State* (1997) 41, 44-7; Wetter, (1985) 2:2 J Int Arb 7; Reymond, [1985] Rev Arb 517; Hermann in *Contemporary Problems* (1987) 250; Lalive, *ibid* 289; Fox, below, note 392; Mann, above, note 238; and the cases cited below, note 325.

³¹⁵ See, eg, Cass Civ Ire, 2 May 1966, [1966] D 575; and, eg, ICC 1526/1968, (1974) 101 JDI 915.

arbitral practice has sought to hold the state to its agreement. Merely to flag a few devices,³¹⁶ it has been held that (a) by operation of a rule of international public policy the state is estopped from proposing the objection;³¹⁷ (b) the capacity to arbitrate is also a matter for the law applicable to the arbitration agreement proper; (c) there is a rule of general international law which supercedes national law and sustains the arbitration agreement;³¹⁸ (d) there is a rule of treaty law to the same effect.³¹⁹ This thesis makes no pretensions to settle issues of competence. But the point is that the application of international law, separately or on top of the law of the state concerned, is not through conflicts rules of any state, let alone unilateral rules of the forum.³²⁰

The view is not advanced here without qualification. Entirely disregarding the law of the court which will assert challenge jurisdiction leaves the award open to annulment. ICC 3493/1983 is a case in point. The facts are quite complex and reference is therefore made to the complete report.³²¹ For present purposes suffice to say that the issue before the tribunal sitting in Paris was whether an ICC clause not signed by the Egyptian state nevertheless bound it on other grounds; this being important because the entity which had signed the clause was insolvent. The tribunal ruled that it did, based on an a principle of international law that 'ensure[s] protection [of] the contractual rights of the private party vis-à-vis the sovereign state'.³²² Establishing jurisdiction on a protective principle did not impress the French courts, which found that there was no clause binding Egypt and annulled the award.³²³ It was held that Article 24 of the 1975/1988 ICC Rules, on waiver of recourse, could only operate within the limits permissible by law. The importance of the case lies precisely here. The tribunal felt confident in devising a solution consonant with international law, but the courts did not even consider the possibility that this might be an arbitration under international law (jurisdiction being determined *ex officio*).³²⁴ Internationalization of the *SPP* proceedings would exclude court jurisdiction, and it would be immaterial that Egypt had waived its sovereign immunity by initiating court proceedings. For internationality *ratione materiae* cannot depend on who invokes it and, conversely, must afford standing to both parties to invoke it. So the international or municipal law question persists.

³¹⁶ See generally Lalive in *Comparative Arbitration Practice* (1986) 257, 295-8; *contra*, von Hoffmann in *Staatsunternehmen im internationalen Privatrecht* (1984) 35, 53-4.

³¹⁷ This is now the position under the LDIP, Article 177(2). See also *Loan Agreement between Italy and Costa Rica*, in Hamilton, above, note 260, 202 (PCA, 1998); *Dipl-Ing Erich Benteler KG et al v Belgium* [1985] ECC 101 (ad hoc, 1983); *Framatome* (below, note 344) (1983) 6 YCA at 100-07; Paris, 17 December 1991, [1993] Rev Arb 281; Paris, 13 June 1996, [1997] Rev Arb 251. The same construction has been used in Greek law, on the basis of the general abuse of rights proviso in the Civil Code (Greece), Article 281: AP 565/1965, (1966) 33 EEN 666; AP 301/1992, (1993) 41 NoB 866; cf AP 1502/1995, (1996) 2 ΔΕΕ 846. Thus also TF, (1993) 11 Bull ASA 68.

³¹⁸ See IDI Resolution (below, note 329), Article 5; and cf *Amoco Iran Oil Co v Iran*, 1 Iran-US CTR 493 (Interlocutory, 1982). Cf also CFI Tunis, 22 March 1976, [1976] Rev Arb 268; ICC 2321/1974 (Preliminary), (1976) 1 YCA 133, 135.

³¹⁹ See *Benteler*, above, note 317. (European Arbitration Convention, Article I(1)(a).)

³²⁰ cf *Benteler*, *ibid*, where the tribunal only subsidiarily and tentatively referred to Swiss law.

³²¹ ICC 3493/1983, (1983) 22 ILM 752.

³²² (1983) 22 ILM at 769.

³²³ See Paris, 12 July 1984, [1986] Rev Arb 75; *affirmed*, Cass Civ Ire, 6 January 1987, [1987] Rev Arb 469. See also TF, 102 Ia ATF 574; TF, 120 II ATF 155; TF, [1989] Rev Arb 514.

³²⁴ Note that the tribunal was ambiguous on whether its proceedings were subject to international law. There are some references that could be construed to that effect, where 'domestic' arbitration under the then in force Egyptian Investment Law (Act on Arab and Foreign Investment 1974 (Egypt), (1974) 13 ILM 1500, Article 8) is distinguished from international arbitration, but it is reasonable to assume that the term 'international' was used rather loosely, to describe arbitration not subject to Egyptian law; see (1983) 22 ILM at 763-4.

Procedural questions, though less crucial to the efficacy of the arbitral process and its outcome, are likely to attract challenges more than any other and thus significant. This notwithstanding, there is little ground practically to test theoretical propositions. Prudent parties will try to resolve obstacles to the composition of a tribunal by contractual arrangement. Designating an appointing authority or opting for institutional arbitration will prevent frustration of the process by a recalcitrant sovereign litigant. Furthermore, and with the exception of interim protection, there is little scope for other support measures, eg discovery orders, because discovery is rarely used in international arbitration. The law must, however, cater for the cases where contractual arrangements are not made, and to a great extent the responses to crucial questions are identical for state and ordinary arbitrations alike. For instance, the same rules would apply to the validity of awards rendered by truncated tribunals and to the separability of arbitration agreements.³²⁵

3. Theoretical Considerations and Suggested Approach

(a) Returning to the Fundamental Questions

The most clear-cut position has been advanced by Dr Mann. In a seminal contribution, he has argued that arbitrations between states and individuals cannot be subject to international law.³²⁶ His argument is based on the two-pronged premise that enforcement would be impossible under the New York Convention and that such proceedings simply cannot escape the territorial reach of the law of the seat. As is demonstrated in Chapter 7.III below, the first premise is false. The second, however, cannot be dismissed lightly. Mann derives support for it from the proposition that an agreement to arbitrate amounts to a waiver of immunity. In view of state practice, that proposition must nevertheless be qualified. Although there is increasing support for the rule, the evidence shows that it applies in certain situations only, namely, if the proceedings are not under international law. This means that, contrary to Dr Mann's assertions, the Permissibility Question is answered in the positive. It further means that immunity itself is dependent on other grounds, that is, on whether international law has been chosen as applicable. Thus, the question to be answered is whether there is a presumption in favour of international law and what evidence is required to indicate a choice of municipal or international law. These are mixed questions of fact and law and depend on policy considerations examined below.

To return to the literature survey, there is a fair amount of inconclusive writing,³²⁷ but one may discern two larger schools of thought offering an answer to the Permissibility Question. One would be content to argue on the force of the general proposition that international arbitral pro-

³²⁵ Both issues are thorny in state arbitrations. For classic instances of frustration of the arbitral process by non-appointment or removal of arbitrators see *Lena Goldfields, Ltd v USSR*, annexed to Nussbaum, (1950) 36 Cornell LQ 31 (ad hoc, 1930); French Memorial, *ICJ Pleadings, Electricité de Beyrouth Company*, 47-8. For the allegation that the arbitration agreement is unlawful see *Losinger & Cie, SA*, PCIJ, Series C, No 78; and for the allegation that the cancellation of the main contract made the arbitral clause disappear too, see Iran's Preliminary Observations, *ICJ Pleadings, Anglo-Iranian Oil Co*, 281, 297; and cf *ICJ Pleadings, Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient*, 55, 68-9. On these issues see Schwebel, *Justice in International Law* (1994) 171, 191, and 196.

³²⁶ Mann, above, note 238. For a more cautious view in the same vein see Lipstein in *Essays Schwarzenberger* (1988) 177, 192; Peter, *Arbitration and Renegotiation* (2nd edn, 1995) 284-5. See also the opposing arguments of Switzerland and Yugoslavia in *Losinger & Cie, SA*, PCIJ, Series C, No 78, at 132, 133-4, 139, 146, 160, 311-12.

³²⁷ See Vedel, [1961] Rev Arb 116, 127-9; Stern, [1980] Rev Arb 3, 9-11; Bowett, (1986) 35 Cath ULR 929, 930, note 4; Carabiber, (1950-I) 76 RdC 217, ch V.

ceedings, even as between private parties exclusively, may escape the procedural law of the seat, and this may *a fortiori* apply to state arbitration.^{328 329} Similarly, objections have been raised as to the both the title and propriety of applying the law of the seat, or any domestic law for that matter, to mixed arbitrations.³³⁰ The considerations adduced in those writings are undoubtedly valid, but inconclusive, in that some legal order must at some point support the arbitration in one way or another. Moreover, to the extent that they would rely on the existence of a third, 'transnational', legal order from which mixed arbitrations may derive their force,³³¹ they could not be accepted here, for this proposition has been refuted in an earlier chapter.³³²

An altogether sounder and more conventional approach would support internationalization as a matter of international law. It is precisely here that immunity comes to fore, in a synergy between international and domestic law, to immunize the international law character of the proceedings. As will presently be analysed, there are simply no conceptual or common sense impediments to parties' internationalizing the arbitral process.³³³ One must however take issue with the proposition that the necessary and sufficient condition for internationalization is the existence of treaty with the host state.³³⁴ That proposition would be based on the premise that the formal criterion of treaty conclusively resolves the matter of jurisdictional exclusivity of the host state and, possibly, that it is a means of ensuring certainty as to the procedural régime of (and attendant competence of the host state over) the proceedings.³³⁵ These are forceful considerations, but they do not accord with practice as exemplified in the Iran – US Tribunal and may, furthermore, be addressed through other means, such as an adverse presumption, *viz* that the proceedings have *not* been internationalized. Thus, there would exist a rule of international law allowing internationalization of the proceedings when at least one of the arbitrating parties is a state, which renders the conclusion of a treaty superfluous.

³²⁸ Thus apparently ICC 7210/1994, (2000) 11:1 ICC Bull 49, 50 (whether tribunal may order interim protection against a state whose law prohibits that; yes, exclusively by application of ICC Rules). See Toope, above, note 5, ch II; Lalive, (1967-I) 120 RdC 569, 650-9; (1975) 11 RBDI 570, 576-8 (cautiously); Greenwood, (1982) 53 BYIL 27, 37; Vergopoulos-Michail, *Problèmes* (Thesis Paris II, 1978) 465-83. Professor Böckstiegel would concur in that view by arguing that ICC arbitration involving states is no different to ordinary ICC arbitration: Böckstiegel, *Arbitration and State Enterprises* (1984) 23-5.

³²⁹ The IDI Resolution on Arbitration between States, State Enterprises, or State Entities, and Foreign Enterprises, (1990) 63ii Ann IDI 325 is an authoritative statement of that sort, and is discussed in Chapter 1.V above.

³³⁰ See Bourquin, (1960) 15 Bus Law 860, 870-2, who concedes however that there must be some external assistance and control over the proceedings, but leaves the question open.

³³¹ See Rigaux, (1984) 67 Riv DI 489, 502; *id* in *Études Goldman* (1982) 261, 269-75.

³³² See above, Chapter 1.IV.A.

³³³ Thus Schwebel in *Planning Efficient Arbitration Proceedings* (1996) 562, 562-4; White, (1981) 30 ICLQ 1, 7-8 (arguing that municipal law is not 'sufficiently sensitive' to the sovereign status of one of the parties); Logie, (1965) 1 RBDI 392, 418-20 (arguing that state arbitrations should be final); Verhoeven, [1985] Rev Arb 609, 612-3; von Mehren & Kourides, (1981) 75 AJIL 476, 508-9 (suggesting that internationalization is acceptable if no developed procedural law is necessary in the circumstances); Delaume, (1983) 17 Int Law 687, 688-93 (same); Paasivirta, *Participation of States* (1990) 75-6 (arguing, *semble*, that it is permissible under domestic law); Paulsson in *La Formation des Normes* (1984) 333 (implicitly); Igbokwe, (1997) 14:1 J Int Arb 99, 101. Non-committal: Jiménez de Arechaga in *Mélanges Gidel* (1961) 367, 368-9, 377-9; Sacerdoti, (1996-1987) 7 It YBIL 26, 40-1. The 1962 PCA Rules, below, note 366, clearly contemplate proceedings independent of national law.

³³⁴ See Rousseau, *Droit International Public V* (1983) 382. Cf also Somarajah, *International Commercial Arbitration* (1990) 263-4; *id*, (1991) 8:2 J Int Arb 47, 59.

³³⁵ cf Mann, above, note 238, 263: awards by mixed tribunals have 'necessarily a national character and [do] not constitute an instrument created by public international law'.

Professor Mayer has suggested that the intent to internationalize arbitral proceedings must be ascertained by reference to the law governing the arbitration agreement.³³⁶ His thesis must be based on a conception of arbitration as a whole, or continuum, having an agreement at its foundation. Appealing as it may seem, it must be rejected. The dogmatic ground would be that the three essential laws of arbitration (jurisdiction, merits, procedure) do not proceed along the same strand. If the argument is that the agreement of the parties is the *lex arbitri*, and is manifested in the law of the agreement to arbitrate, the survey of arbitral practice above would not corroborate it, for most awards do not view the law of arbitration as holistic concept.³³⁷ Moreover, there is a presumption, hardly ever rebutted, that the law of the agreement to arbitrate is the same as the law of the merits, usually that stipulated by the parties. This, however, would lead nowhere in all those cases where the contract simply refers to 'rules of law' rather than a legal system. Further, even if it be accepted that the law of the substantive agreement could be international law, most authors would agree that this is by virtue of some municipal law foundation (or *Grundlegung*). Within that thesis, furthermore, it is highly disputed which types of contract may be internationalized in substance.³³⁸ And finally, the importance of the internationalization lies in determining whether any domestic courts have jurisdiction to supervise the award, which is essentially a procedural matter. One must thus concentrate on the procedural régime.

(b) Selective Immunity

One starts in a reverse, as it were, fashion. If state arbitrations are subject to the annulment jurisdiction of the host state, as ordinary arbitrations are, they are inescapably subject to the substantive law of that state too. One is careful to speak of annulment jurisdiction only, for practice and common sense dictate that support measures short of annulment (eg, securing the attendance of witnesses, conserving evidence, and so forth) do not impinge on the sovereign character of internationalized proceedings.³³⁹ Moreover, support measures may be ordered exclusively by domestic authorities only in accordance with, and to the extent allowed by, the law of the state of that authority. It will of course be a matter of contention whether a particular support measure will or will not offend against the sovereignty of the state litigant, but there must at least be a presumption that support jurisdiction is not per se repugnant to the sovereign character of the proceedings as a whole.³⁴⁰

Immunity and internationalization therefore play essentially at the stage of control over the proceedings. This is the crux of the matter: should mixed arbitrations be subject to the supervisory jurisdiction of state courts? As has been seen in an earlier chapter, there are two important aspects to such supervisory jurisdiction, namely control over the procedural fairness of the proceedings

³³⁶ Mayer, (1986) 113 JDI 5, 32-3.

³³⁷ But see for such a holistic approach, with emphasis on the law of the enforcement forum van Hecke in *Essays Wengler II* (1973) 357.

³³⁸ See below, note 404. However, Crawford, (1983) 50 BYIL 75, 87-8 seems to suggest that if the subject-matter of the dispute pertains to international law the proceedings may be internationalized; and similarly Suratgar, (1965) 3 Col JTL 152, 179-80. Garcia-Amador, below, note 373, 32-9 would contemplate a combination of subject-matter and procedural laws.

³³⁹ See, eg, Arbitration (International Investment Disputes) Act 1966, s 3(1)(b); and Foreign Assistance Act, 28 USC § 1782, which allow domestic courts to assist ICSID and international tribunals respectively. Cf also Restatement of Foreign Relations Law Third (1987) § 456(2)(b).

³⁴⁰ White, above, note 333, suggests however that any measure involving coercion (eg, a discovery order) would be impinging on the sovereign immunity of the state.

and over the propriety of the tribunal's having asserted jurisdiction over the parties and the dispute. This author can offer no comprehensive view in regard to the latter aspect, because the conflicts of laws and substantive rules applicable to questions of competence are outside the ambit of this thesis. Moreover, and merely to flag possible hard questions, a survey of practice would be required to determine whether public international law would differ from domestic law and the New York Convention, Article II, in its interpretation of the requirement of an agreement in writing (which is undeniably common to both).³⁴¹ Finally, supervision over arbitral competence might involve issues of arbitrability which would themselves be non-cognizable by domestic courts, under an Act of State or Political Question doctrine,³⁴² and for which, moreover, municipal law may not give a satisfactory answer.³⁴³ For instance, the assertion by the state defendant that a certain operation is not cognizable in arbitration by its own law may be valid under the law of the seat but not valid under international law.³⁴⁴ On the other hand, procedural control is largely divorced from such sensible matters, for it clearly concerns legal, and not political, questions and is, furthermore, outside the state party's exercise of sovereign powers. This is a question to which one returns below.

This author has sought to clarify above that internationalization is the cause, not the result, of immunity.³⁴⁵ In other words, immunity itself is a tool which must be justified on other grounds. Briefly to note the *modus operandi*, internationalization will be effected through a plea that the host state lacks jurisdiction to control the proceedings. The lack of jurisdiction would ensue from the fact that the local, as any municipal, court is simply not the proper forum to administer international law as the main subject-matter of judicial proceedings. This may be termed as *ratione materiae* immunity, and its consequent peculiarity is that it could be asserted not only by the state but by the individual concerned too. That is due to the fact that in the present state of arbitration law exclusion of remedies may be a benefit for the private law arbitrating party too, who is, moreover, part of the deal to exclude the application of national law and should be able to invoke such exclusion.³⁴⁶ However, its importance must not be exaggerated: internationalization should not be presumed.³⁴⁷ This is perhaps corroborated by the fact that courts assume jurisdiction over mixed arbitrations without considering immunity,³⁴⁸ if the state initiates the proceedings, but this may be on the basis of waiver by initiation of suit.³⁴⁹

³⁴¹ For example, would the *SPP* proceedings (above, text to notes 321-323) have withstood scrutiny under international law?

³⁴² Thus, US law does away with such problems by allowing courts to compel states to arbitrate, without being bound by the Act of State doctrine; see 9 USC § 15.

³⁴³ See Delaume, (1977) 71 AJIL 399, 418 on certain laws which regard public loans as sovereign operations; and further Ebenroth & Dillon, (1993) 10: 2 J Int Arb 5.

³⁴⁴ See *Framatome v Atomic Energy of Iran* (1983) 6 YCA 94, 114-5.

³⁴⁵ cf Bourel, [1982] Rev Arb 119, 124-5.

³⁴⁶ The classic rule, codified in all laws and international instruments, is that a state suing in domestic courts is thereby waiving its immunity: *Guaranty Trust Co of New York v US*, 304 US 126 (1938). The court apparently took that as a given in *Republic of Colombia v Cauca Co*, 190 US 524 (1903).

³⁴⁷ This only means that the court (*ex officio*: *Verlinden BV v Central Bank of Nigeria*, 461 US 480 (1983)) will only have to establish the arbitration exception, for this would *prima facie* defeat the presumptive immunity (cf *Saudi Arabia v Nelson*, 507 US 349, 355 (1993)); then the onus would shift to the defendant to prove that the proceedings were internationalized.

³⁴⁸ See, eg, the decisions of the Tribunal federal, above, note 323; and *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48.

³⁴⁹ Above, note 346.

This proposition would rest on considerations of equity, reasonableness, and fair play. The private arbitrating party can only rely on the normal panoply of municipal law and courts to obtain a workable arbitration. Another dimension to that argument was put forward by a recent judgment of the Paris Court of Appeal. That court held that it would amount to a denial of justice in the sense of Article 6(1) of the ECHR if the court endorsed a sovereign immunity objection proposed by an international organization who had acceded to an arbitration agreement but still refused to nominate its arbitrator.³⁵⁰ The matter can therefore be seen as a conflict of international law norms: human rights requirements will be defeated only by explicit agreement. One can read between the lines of the judgment an additional requirement, namely that the parties have provided for alternative (ie, by international or private institutions) arrangements for support and control of the proceedings.³⁵¹ There is no support for such proposition, however, either in practice or principle.

Moreover, in the current state of arbitration law, the usual arguments in support of the non-application of the law of the seat, namely that the intervention of that law is pervasive, become less persuasive. For as has been seen, municipal laws converge, in that procedural control concerns certain universally accepted mishaps. Such arguments thus offer no support to the countervailing, and more worthy of protection, consideration that the arbitral process must be effective. Further, while states can through diplomatic means obtain redress against malfeasance by an arbitral tribunal,³⁵² the individual can only resort to municipal courts. This is not to say that there must absolutely exist a definitive and *erga omnes* control of the arbitral award, as a matter of law or policy. As this thesis argues in various places, the New York Convention and all similar instruments are sufficient to stop improper awards. It is only to say that this must be part of the bargain of the parties,³⁵³ through an exclusion of municipal (or simply any) law. The arguments above find support in the fact that inter-state arbitrations are either subject to no remedy at all (which confirms that the states concerned may by agreement amend the award or resubmit it to another tribunal, or, simply, that finality takes precedence over propriety if the parties have so agreed³⁵⁴) or, increasingly, to the supervisory jurisdiction of the ICJ³⁵⁵ or similar body (which confirms that control over the outer boundaries of legality of an award is desirable). But even when there is no annulment mechanism proper, the tribunal itself may to some extent use its revision and interpretation powers to rectify an award.³⁵⁶

There is at least an emerging rule of international law that an arbitration agreement is deemed as a presumption that immunity has been waived insofar as the supervisory jurisdiction (but perhaps

³⁵⁰ Paris, 19 June 1998, [1999] Rev Arb 343.

³⁵¹ cf TGI Paris, 10 January 1996, (1996) 14 Bull ASA 319; TGI Paris, 26 November 1998, [1999] Rev Arb 131.

³⁵² For example, states can 'nullify' arbitral awards between them: examples in Schlochauer in *Encyclopedia I* (1992) 215, 226.

³⁵³ cf Delaume, (1989) 5 Arb Int 21, 34. On the principle of equality of parties as justifying restriction of immunity see Cosnard, *La Soumission des États* (1996) 275-6.

³⁵⁴ As is the case for instance with the Iran-US Claims Tribunal; see above, note 83.

³⁵⁵ See *Arbitral Award made by the King of Spain on 23 December 1906*, ICJ Reports 1960, 192; *Arbitral Award of 31 July 1989*, ICJ Reports 1991, 53. See also Model Rules on Arbitral Procedure, Article 37.

³⁵⁶ cf *Anglo-French Continental Shelf (Interpretation)*, 18 RIAA 3 (1978).

not the enforcement jurisdiction)³⁵⁷ of the courts of the seat (or whose law governs the proceedings) is concerned. The European Convention on State Immunity, an instrument taken to be expressive of state practice though not widely ratified, puts it unambiguously:³⁵⁸

- (1) Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:
 - (a) the validity or interpretation of the arbitration agreement;
 - (b) the arbitration procedure;
 - (c) the setting aside of the award,unless the arbitration agreement otherwise provides.

The United Kingdom³⁵⁹ legislation (and its followers),³⁶⁰ as well as Australian³⁶¹ and United States³⁶² law, contain provisions to the same effect. Moreover, the rule has the support of such prestigious bodies as the International Law Commission,³⁶³ the *Institut de Droit International*,³⁶⁴ the International Law Association,³⁶⁵ and the Permanent Court of Arbitration.³⁶⁶ Against this background, the rule can also be deduced from less direct provisions in terms of implicit waiver, such as those of Canadian law.³⁶⁷

³⁵⁷ The Cour de cassation has very recently reversed its jurisprudence, and now holds that the permissibility of enforcement follows the arbitration exception and implicit waiver by arbitration agreement: Cass Civ 1re, 6 July 2000, *Creighton Ltd v Qatar* [2000] Bull Civ No 1278. Similarly, the US Act explicitly provides for 'confirmation of awards' within the arbitration exception; see *Creighton Limited v Government of the State of Qatar*, 181 F3d 118 (DDC 1999) with further references. See to the same effect CA, Svea, 18 June 1980, *Libyan American Oil Co v Libya*, RH 76:81, (1981) 20 ILM 891, note Paulsson, 62 ILR 225, (1982) 7 YCA 359. The previous French jurisprudence was predicated on the *iure gestionis* exception, considering enforcement not merely incidental to the process but related to the substance of the dispute; see, eg, Cass Civ 1re, 14 March 1984, *Société Eurodif v République Islamique d'Iran* [1984] D 629, note Robert, [1984] JCP II 20205, note Synvet, (1984) 111 JDI 598, note Oppetit, (1984) 73 RCDIP 644, note Bischoff, [1985] Rev Arb 69, note Couchez. See also *Duff Development Company, Limited v Government of Kelantan et al* [1924] AC 797 (HL), noted by Cohn, (1958) 34 BYIL 260.

³⁵⁸ European Convention on State Immunity (1972), ETS No 74, Article 12.

³⁵⁹ See State Immunity Act 1978, s 9(1).

³⁶⁰ See Foreign State Immunities Act 1981 (South Africa), s 10; State Immunity Ordinance 1981 (Pakistan), s 10; State Immunity Act 1981 (Singapore), s 10.

³⁶¹ See Foreign States Immunities Act 1985 (Cmwth), s 17(1).

³⁶² See Foreign Sovereign Immunities Act, 1976, 28 USC § 1605(a)(6); on which see, eg, Kahale, (1989) 6:3 J Int Arb 57.

³⁶³ See Draft Articles on Jurisdictional Immunities of States and their Property, [1991-II] YBILC Part Two, ch II, Article 17. For commentary on Article 17 see [1985-II] YBILC Part Two 2, 63-4.

³⁶⁴ See Resolution on the Immunity of States, (1992) 64ii Ann IDI 389, Article 2(2)(g). The Report notes the lack of conclusive practice and concludes thus: 'At the least it can be said that there is no presumption of the incompetence of the courts of the seat of arbitration': Brownlie, above, note 229, 67.

³⁶⁵ See Draft Articles for a Convention on State Immunity, (1982) 60 ILA Rep 6, Article 2(b); Revised Draft Articles for a Convention on State Immunity, (1994) 66 ILA Rep 22, Article 2(b).

³⁶⁶ See PCA State-Individual Rules, Article 1(2); PCA Organization-Individual Rules, Article 1(2). By contrast, the 1962 PCA Rules contained no such provision and no reference to municipal law at all; see Articles 10, 19, 21.

³⁶⁷ See State Immunity Act 1982 (Canada), s 4(5). See also Draft Convention on Competence of Courts in regard to Foreign States, (1932) 26 AJIL Supp 452, 548, Article 8(c). And cf (1990) 64 ILA Rep at 311 (above, note 365); HR Rep No 1487, [1976] US Cong & Ad News 6604, 6617 (on 28 USC § 1605(a)(6)); Stevenson *et al*, *Law of Sovereign Immunity* (1983) 102-10 (for the situation prior to 1976); Delaume, (1987) 2 ICSID Rev-FILJ 403, 405-11. And see ICC 3879/1984, below, note 369, 80 ILR at 612.

Moreover, it would seem that in the vast majority of arbitrations involving states, internationalization is not a concern foremost in the thought of the state concerned. The relevant statistics invariably give a considerable percentage of arbitrations involving states under the aegis of the ICC,³⁶⁸ and there is nothing to suggest that their régime derogates from that of the general sample of ICC arbitrations.³⁶⁹ More significantly, ICC arbitrations are routinely challenged before domestic courts by state parties,³⁷⁰ where the court concerned would treat the awards as any other ICC award.

The rule must be elaborated upon. The first remark is that the application of national law is conditioned upon a contrary agreement, which means that submission to international law must be explicit or at least ensue with adequate certainty from the agreement to arbitrate, the ToR, or the procedural instructions to the arbitral tribunal. It is noted here that a survey of the published concessions, and oil contracts in particular, has revealed very few instances of internationalized arbitration clauses.³⁷¹ Short of explicit reference to international law,³⁷² a certain indication would be exclusion of annulment and remedies against the award.³⁷³ An equally positive indication is the dissociation from any procedural law.³⁷⁴ Agreements whereby the state party waives its immunity³⁷⁵ may also be construed as submission to the competent arbitration law, except if the waiver

³⁶⁸ Eisemann, [1975] Rev Arb 279 gives a figure of 7.21% of all proceedings. Böckstiegel, above, note 328, gives a figure of 29.7% for 1979-1980. Jarvin, [1985] Rev Arb 585 reports 96 and 84 requests for ICC arbitration involving states or state enterprises in 1983 and 1984 respectively, the total for those years being 291 and 296 cases respectively (Derains & Jarvin, (1984) 111 JDI at 908 and (1985) 112 JDI at 961). Between 1995 and 1998 the percentage fell, fluctuating between 5.4% (1996) and 14.1% (1995): (1999) 10:1 ICC Bull at 6.

³⁶⁹ See Böckstiegel, above, note 328. An example is ICC 3879/1984, (1984) 23 ILM 1071, 1087-8 (Interim), where the tribunal turned to Swiss law for guidance on a question of joinder (the award was partially annulled; see above, note 323).

³⁷⁰ In addition to other examples cited above see TF, 116 Ia ATF 154; and Cass Civ Ire, 16 March 1999, [1999] Bull Civ No 547.

³⁷¹ The Channel Tunnel Treaty, (1987) RGDIP 1395, Article 19, subjects inter-state and state-concessionnaire arbitration to the same rules but otherwise contains no pointer.

³⁷² See, eg, the agreement between Abu Dhabi and Mitsubishi (1968), Article 34(F): *OPEC 1968*, 45 (procedure determined by the referee, guided by the ICJ Rules), which was followed in at least two subsequent agreements, with Middle East Oil (1970) (*OPEC 1970*, 149) and Pan Ocean Oil (1970) (*ibid* 193).

³⁷³ eg: 'The parties hereby agree to exclude the jurisdiction of any domestic court save for the purposes of enforcement.' For such clauses see the contract between Liberia and the International African American Corporation (1955), quoted by Garcia-Amador, UN Doc A/CN.4/125 (1960) 32-3; the agreement between Sonatrach and Getty (1968), Article 32: *OPEC 1968*, 253.

³⁷⁴ See, eg, the agreement between Togo and Oceanic Resources (1976), Article 33.2, in *Fischer VII*, 243 ('the arbitrators are not bound by any rules of procedure in carrying out the arbitration'). The clause in *Socobelge* dispensed the tribunal from 'observing the ordinary forms of procedure' and directed it to apply 'the fundamental rules of the rights of defence': *Société Commerciale de Belgique*, PCIJ, Series A/B, No 78, 160 at 168.

³⁷⁵ In its widest possible form, a clause could be as follows: 'The [state party] agrees that in any legal action or proceedings against it or its assets in connection with this agreement no immunity from such legal action or proceedings (which shall include, without limitation, suit, attachment prior to judgment, other attachment, the obtaining of judgment, execution or other enforcement) shall be asserted by or on behalf of the [state party] or with respect to its assets. The [state party] irrevocably waives any such right of immunity which it or its assets now have or may hereafter acquire or which may be attributed to it or its assets and consents generally in respect of any such legal action or proceedings to the giving of any relief or the issue of any process in connection with such action or proceedings including, without limitation, the making, enforcement or execution against any property whatsoever, (irrespective of its use or intended use) of any order or judgment which may be made or given in such action or proceedings. The [state party] warrants that the above undertakings are consonant with its constitutional and other applicable internal law.'

concerns enforcement only, which does not prejudge the law of the arbitration.³⁷⁶ Of course, such exclusion agreement would be based directly on international law and not on any rule of municipal law.³⁷⁷ The fact that the agreement may be promulgated as formal law for the contracting state is irrelevant, for it is a mere solemnity which does not change the legal foundation of the limitation of sovereignty of that state.³⁷⁸ On the other hand, entrusting an international civil servant or member of an international court with appointing authority, as is often the case, is no indication of internationalization, for the parties merely wish to designate a by definition neutral party with requisite experience who will always be available and can be identified with certainty. Contrariwise, submission to municipal law is often explicit.³⁷⁹ But it may equally be inferred from provisions in the arbitration rules which refer to mandatory requirements of such law or an explicit submission to the jurisdiction of municipal courts.³⁸⁰ But, it is suggested, it cannot be inferred from references to marginal requirements, such as registration.³⁸¹ Thus, if no specific arrangement is made, as is most often the case,³⁸² municipal law and courts will be competent—if of course they have competence by their own law, for international law delegates these functions to municipal law.³⁸³

This brings us to the second contentious area, a determination of the competences conceded to municipal law. This is a balancing exercise between the countervailing considerations of involvement odious to state sovereignty and the efficacy of the arbitration process. It is submitted that functions aiming to ensure the viability and propriety of arbitration as a process must be presumed within domestic law competence.³⁸⁴ This test could apply to national enactments, such as the UK Act, which contain a blanket reference to ‘proceedings which relate to the arbitration’.³⁸⁵ It is further submitted that referral to arbitration by the courts (confirmation of arbitration agree-

³⁷⁶ Thus the agreement between Cerro Colorado (controlled by the state of Panama) and TexasGulf (1976), Clause 26: *Fischer III*, 32 (waiver of immunity for enforcement but awards, made under the IACAC Rules, to be treated ‘as if they had been rendered by Panamanian arbitral tribunals in accordance with provisions of law presently in force [in Panama]’ and thus subject to domestic remedies).

³⁷⁷ But see, erroneously, Report of the ILC, UN Doc A/46/10 (1991) at 130.

³⁷⁸ See, eg, Haiti-Société Franco-Haitienne de Mines (1976), Article 29(i): *Fischer II*, 353; Haiti-Société Minière d’Haiti (1976), s xv(i): *Fischer III*, 321.

³⁷⁹ For submission to the contracting state’s law see Sierra Leone-Sileti (1975), Article 9.2.1: *Fischer I*, 7; Haiti-Reynolds Haitian Mines (Amendment Agreement, 1980), Article 17: *Fischer IV*, 66; Ghana-Amalgamated Diamond (1976), Article 32: *Fischer IV*, 399; Lesotho-O’Kiep Copper Company (1976), Article 41(2): *Fischer IV*, 435; Fiji-Pacific Energy and Minerals (1978), Article 5: *Fischer VII*, 369; NIOC-Ultramar (1974), Article 22(11): *OPEC 1974*, 57. And see the examples quoted by Barberis, *Negotiating Mining Agreements* (1998) 232-3; and Verhoeven in *Le Contrat Économique* (1975) 115, 148-9.

³⁸⁰ See above, subsection IV.B.1(a). See also Papua New Guinea-Dampier Mining (1976), Clause 28.3: *Fischer III*, 131 (case-stated procedure, but perhaps not binding); Mauritania-FTCI (1976), Article 22(8): *Fischer I*, 97 (award challengeable in the courts with which registered). Cases where the parties relegate municipal law to a gap-filling function will be more contentious; see, eg, Concession Agreement between NIOC and Agip Mineraria SpA (1957), Article 44: *OPEC: Iran, pre-1966*, 67 (the clause was modified in the second supplemental agreement (1973), *OPEC 1973*, 37).

³⁸¹ See PCA State-Individual Rules, Article 32(7); PCA Organization-Individual Rules, Article 32(7); and text to notes 75-83 above.

³⁸² See, eg, Libyan General Petroleum Corporation-Aquitaine (1968), Article 43.V: *OPEC 1968*, 197 (‘The place of arbitration shall be Geneva. The procedure ... shall be determined by the arbitrators’).

³⁸³ See, eg, UN Draft, above, note 363: court ‘otherwise competent’; Preliminary Report on Jurisdictional Immunities of States and their Property, UN Doc A/CN.4/415 (1988) 104; IDI Resolution, above, note 364.

³⁸⁴ cf Audit, above, note 270, 117-8.

³⁸⁵ See State Immunity Act 1978.

ments) in no way offends sovereignty, as it is a simple corollary of the agreement to arbitrate.³⁸⁶ The same should apply to support functions, such as replacement and nomination of arbitrators³⁸⁷ and orders for the production of documents. Interim measures of support are in a more sensitive area but may also tentatively be accepted.³⁸⁸ Finally, the evidence is unanimous that the most drastic intervention, by action for annulment, can be entertained.³⁸⁹

Doubts may be entertained as to the requisite territorial nexus between the court and the tribunal. It is certain that the existence of a jurisdictional basis, usually territorial, in the *lex fori* is a prerequisite, but what is asked is whether *only* the courts of the seat are competent to intervene. From enactments such as the UK Act which contain no territorial connection it may be inferred that jurisdiction as per internal law is not only required but sufficient. On ordinary principles, this would be acceptable for jurisdiction to compel arbitration and to enforce,³⁹⁰ measures which require support with universal reach. Interim measures jurisdiction is here, as in general arbitration law, problematic. Jurisdiction to order simple support measures (by letter rogatory), which requires no territorial nexus,³⁹¹ may guide the interpreter. It is further clarified that international law delegates the supervisory functions to the municipal law of the seat of the tribunal.³⁹² This follows the principles discussed in earlier chapters, which did establish that the intervention of that legal system is justified from a policy perspective. The exception in favour of the state whose law governed the procedure by agreement of the parties is explicitly admitted by the European Convention, quoted above, but it will rarely play in practice, for reasons explained elsewhere.

The third point concerns the *ratione personae* scope of the exception, namely whether state corporations, as opposed to states proper, may internationalize arbitral proceedings. Reasoning from event to cause, that possibility may be deduced from the fact that such entities may benefit from jurisdictional immunity. The area is fraught with difficulties,³⁹³ but the principle must be that state agencies which exercise regulatory policy should be considered emanations of the state. The ILC Draft Convention includes in its definition of state 'agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State'.³⁹⁴ The principle is in other words that one is looking at the functions entrusted to the entity in question,³⁹⁵ regardless of a possible private law legal cloth over the entity itself.³⁹⁶ It will of course be a matter of appreciation whether in the circumstances the person in question does possess, and has exercised, state authority. It has thus been held that airline opera-

³⁸⁶ cf *JJ Ryan & Sons, Inc v Rhône Poulenc Textile, SA*, 863 F2d 315 (4th Cir 1988) (decided on 28 USC § 1330 *juncto* New York Convention, Article II(3)).

³⁸⁷ The Foreign States Immunities Act 1985 (Cmwth), s 17(1)(a) includes the case stated procedure, now abolished in Australian law.

³⁸⁸ cf PCA State-Individual Rules, Article 26(3); PCA Organization-Individual Rules, Article 26(3).

³⁸⁹ See notes 358-366 above.

³⁹⁰ Mann, 50 BYIL 43, 58 (on enforcement). And generally Fox, (1996) 12 Arb Int 89; Lalive in *Essays Rosenne* (1989) 369; Delaume, above, note 367, 405-11.

³⁹¹ There is evidence for that proposition in US law (above, note 339), which is, however, isolated.

³⁹² Thus explicitly US law, above, note 362. See also Fox, (1988) 37 ICLQ 1, 14.

³⁹³ General bibliography in Jennings & Watts, *Oppenheim's International Law* 1:1 (9th edn, 1996) 346-7, note 20. See also Böckstiegel, above, note 328.

³⁹⁴ ILC Draft, above, note 363, Article 2(1)(b)(iv); CSD, Article VII(3). See also, eg, European Convention, above, note 358, Article 27(1)-(2), which reverses the presumption of immunity however.

³⁹⁵ Thus, control and tutelage over the entity is not sufficient: Cass Civ Ire, 4 January 1995, (1995) 122 JDI 649.

³⁹⁶ Thus, US law expressly refers to 'corporate' persons: 28 USC 1603(b)(1). This is well known in certain municipal administrative laws, which classify acts of certain private law organizations as administrative acts.

tors³⁹⁷ and shipping companies³⁹⁸ could be equivalent to states for immunity purposes.³⁹⁹ The arbitral practice available is limited but would seem to confirm the principle *a contrario*. In two reported cases the matter did not even arise for consideration, presumably because it was clear that the entity in question was not exercising state policy⁴⁰⁰ or because the parties did not raise it at all.⁴⁰¹ This would tally with the presumption against internationalization suggested here.

The last point to be addressed is whether the option of internationalization is confined to certain arbitrations only. The submission of this thesis is that the subject-matter of the dispute is irrelevant to the possibility of internationalization.⁴⁰² For, first, arbitration has become a discrete area where immunity falls, and is thus divorced from general considerations of *iure gestionis* activities, or facets thereof.⁴⁰³ It follows that it is unnecessary to import in the arbitration exception the doubts and uncertainties over the question which subject-matters may by agreement be subjected to international law.⁴⁰⁴ Third, any activity in which a private party will be involved will by definition be, at least for that party, commercial, because that party can have no regulatory power.⁴⁰⁵ So even those laws which admit of an exception to arbitration only in relation to civil or commercial matters will have a very wide field of application in that respect. A number of those laws match the civil or commercial scope with a mandate to the courts to control the validity of the arbitration agreement.⁴⁰⁶ The implicit rationale would seem to be that the agreement to arbitrate is taken to the realm of municipal law along with the arbitral process. Taken in itself, this must be wrong, for the competence of domestic law and courts is based on grounds of reasonableness and functional expediency, which clearly have nothing to do with the agreement to arbitrate.⁴⁰⁷ This author has to concede, however, that the authorities would seem to go against that suggestion.⁴⁰⁸

V. CONCLUSIONS

The findings of this chapter may conveniently be summed up as follows:

- (1) Arbitral tribunals established and operating in the territory of a state under a treaty with that state will exclusively be subject to international law, whether they involve private parties or

³⁹⁷ See *Aguasviva v Iberia Lineas Aereas de España*, 937 FSupp 141 (D Puerto Rico 1996).

³⁹⁸ See *Re Rio Grande Transport, Inc*, 516 FSupp 1155 (SDNY 1981); *Cargill Intern. SA v M/T Pavel Dybenko*, 991 F2d 1012 (2d Cir 1993).

³⁹⁹ For other examples see 28 USCA 1603, § 19a. See also note 286 above.

⁴⁰⁰ See FTAC 109/1980, (1993) 18 YCA 92; and *Sojuznefteexport v Joc Oil* (1990) 15 YCA 384, 384-6 (CA Bermuda).

⁴⁰¹ See ICC 3099-3100/1979, (1982) 7 YCA 87, 88-9.

⁴⁰² But cf Fox, (1988) 37 ICLQ at 13.

⁴⁰³ Accord: Brownlie, above, note 229, 82; Hess, (1993) 4 EJIL 269, 275-6; Australian Law Reform Commission, Report on Foreign State Immunity (No 24, 1984) para 104; and see *Aramco*, in a passage quoted by Suratgar, (1965) 3 Col JTL at 181-2.

⁴⁰⁴ Part of the doctrine would admit internationalization of the substantive contract only for economic development agreements; see, eg, Hyde, (1962-I) 105 RdC 267, ch III; Bourquin, above, note 330. The concept remains elusive and contentious; see Pogany, (1999) ICSID Rev-FILJ 1. For other criteria and discussion see notably Mann, *Studies* (1973) 177; Lalive in *FS Lipstein* (1980) 135; Audit, above, note 270, 86-8; Mayer, above, note 336, 29-39; Weil in *Mélanges Reuter* (1981) 549; Wengler, (1971) 60 RCDIP 637; Delaume, (1985) 79 AJIL 319.

⁴⁰⁵ Similarly, Sornarajah, (1982) 31 ICLQ 661, 682-3 suggests a fiction whereby arbitration as a process is necessarily commercial.

⁴⁰⁶ See, eg, European Convention, above, note 358.

⁴⁰⁷ See also above, text after note 340.

⁴⁰⁸ See the cases cited above, notes 323, 370.

Mixed Arbitration

not; provided, however, that the parties and/or the tribunal have not subjected the proceedings to municipal law.

- (2) In cases such as (1) above, there is no strict requirement of a headquarters agreement.
- (3) Arbitral tribunals established under a multilateral treaty which purports to set out an autonomous régime (eg, ICSID tribunals) are subject to rules (1) and (2) above. Whenever such tribunals operate in the territory of a third state, internationalization is technically difficult to assert before the authorities of that third state. If that fails, annulment of the award by the courts of the third state should not be taken into account, at least by the authorities of the signatory states.
- (4) There is evidence that proceedings under Bilateral and Multilateral Investment Treaties are in principle subject to municipal law. If not, rules (1), (2), (3) apply *mutatis mutandis*.
- (5) Arbitral proceedings not under treaty and involving international organizations and states may be internationalized. This will essentially be reflected in and depend on the procedural régime chosen by the parties.
- (6) Mixed arbitrations involving states are presumed to be subject to the supervisory and support jurisdiction of the state of the seat of the tribunal.
- (7) There is authority for the view that the presumption under (6) above does not operate in arbitrations involving international organizations, at least the ones with general immunity from suit, possibly because of their functional international law personality. However, no policy or legal considerations may be adduced for not extending the adverse presumption under (6) above to such proceedings as well.

Chapter 6

Enforceability of Awards annulled in their State of Origin

This issue is important not only in the context of the New York Convention, but also in the context of other international instruments¹ and national law provisions modelled after the Convention,² and bilateral treaties that incorporate it by reference.³ It is the purpose of this chapter to analyse the two well-known cases, *Hilmarton* and *Chromalloy*, and other relevant case-law and offer a comprehensive analysis of the relevance of judicial decisions of the state of origin for purposes of enforcement under the New York Convention.⁴ In doing so, it is proposed to discuss both the technical aspects of the relevant provisions of the Convention, and in particular their inter-relationship, and the issues of legal policy that arise. It will be argued that an annulling decision of the forum of rendition normally is, as it should be, binding on the enforcement forum, subject to two exceptions that will be spelt out in detail and explained.

I. THE GENERAL CONVENTION FRAMEWORK

For some time, to propose that an award annulled⁵ by the competent courts of the state of rendition could nevertheless be enforced elsewhere would be an offence to the intelligence and fundamentals of legal thought of any lawyer. One of the leading drafters of the Convention has encapsulated the issue and his response in the following terms:⁶

If the award ‘has been set aside’ ... there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement.

The logic of the thesis seems irrebuttable. However, it is extrinsic to the Convention. Though based on an *a priori* precept of legal wisdom, it is not what the Convention says. Article V(1)(e) reads:

¹ See Inter-American Convention, Article 5(1)(e).

² See Arbitration Act 1996, s 103(2)(f); LDIP, Article 194; ZPO, § 1061(1). On the Model Law see below, text to note 158.

³ See, eg, 1969 Recognition Convention between Belgium and Austria, Article 6(2).

⁴ A summary of the issues in UN Doc A/CN.9/460 (1999) paras 128-144.

⁵ For the purposes of this section, ‘annulment’ will include ‘formative’ judgments (*‘Gestaltungsurteile’*) annulling or ‘vacating’ awards and judgments declaratory of the nullity of awards.

⁶ Sanders, (1959) 6 Neth ILR 43, 55. See also Thompson, (1982) 48 JCI Arb 105, 110; van den Berg in *International Arbitration in the 21st Century* (1992) 133, 161; Haight, *Convention on Recognition and Enforcement* (1958) 42. Cf Commonwealth Secretariat, *The New York Convention* (1981) 24.

Award Annulled in its State of Origin

1. Recognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(e) The award has not yet become binding on the parties, or has been aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

...

(emphasis added)

On its face, the Convention grants the enforcement forum⁷ a margin of discretion. The plain and unequivocal import of ‘may’ is here, as in any other legal text, enabling and not mandating.⁸ The enforcement forum may or may not, in its discretion, refuse enforcement. Thus put, the problem becomes one of determining the circumstances in which the discretion in refusing or granting enforcement should be exercised.

Nonetheless, the first issue to be settled is whether the Convention does indeed grant discretion, for admittedly ‘may only’ puts the stress on ‘only’ and not ‘may’. On this point, there is a well-known linguistic discrepancy between the French and English versions, two of the five authentic versions of the Convention.⁹ The French text, in the view of this author, neither excludes nor includes discretion. In material part it reads ‘*ne seront refusées ... que si ...*’. The three other authentic versions are neutral in that respect; their terms may be read both as ‘can be’ or ‘may be’.¹⁰ So the question is whether a comparison between the English text, which clearly allows a margin of discretion, and the other texts discloses any difference of meaning in the sense of Article 33(4) of the Vienna Convention on the Law of Treaties.¹¹ Leaving aside the Spanish, Mandarin, and Russian versions, which are not conclusive evidence either for or against the discretion reading, the English and the French versions doubtless differ with, but do not contradict, each other. Paulsson engages in some serious hair-splitting in analysing the semantic differences between the indicative ‘*ne seront*’ as opposed to a conditional ‘*ne pourront être*’,¹² but the heart of the matter is that as the text stands, in the indicative mode and its negative formulation, an element of discretion, as provided for by the English version, can be accommodated within its terms.¹³ This is essentially because the text does not provide ‘*auxquels cas elles [ie recognition and enforcement] seront refusées*’ at the end of Article V(1). A linguistic analysis thus shows that ‘may’ is comfortably within three authentic versions and not directly contradicted by the French version.

⁷ The term ‘enforcement forum’ is used as equivalent to the technical terms ‘state addressed’ or ‘*juge requis*’.

⁸ cf *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), *ICJ Reports 1996*, 226, 233, para 14.

⁹ See New York Convention, Article XVI(1). The other authentic versions are Chinese, Russian, and Spanish.

¹⁰ See Paulsson, (1998) 14 *Arb Int* 227, 229.

¹¹ Convention on the Law of Treaties (Vienna, 22 May 1969), (1980) 1155 UNTS 331 (hereafter ‘Vienna Convention’).

¹² See Paulsson, above, note 10, 228. The Spanish text in particular reads ‘*Solo se podrá denegar ... si*’.

¹³ *Contra*, Fouchard, [1997] *Rev Arb* 329, 344-5, para 27. Professor Fouchard’s opinion would seem to be corroborated by Article 27 of the Brussels Convention, which reads in English ‘shall not be recognized if and in French ‘*ne sont pas reconnues si*’. See also below, text to note 40.

The proposition finds support in the rule of interpretation of customary law contained in and evinced by the Vienna Convention on the Law of Treaties, Article 33(4).¹⁴ That provision requires the interpreter to make the meaning 'which best reconciles the texts' prevail, if an application of Articles 31 and 32 does not resolve the difference, and in this case, it is submitted, it does not. The *travaux préparatoires* of the Convention are of limited help in that they only indicate that the inclusion of the word 'may' was not accidental. In the original ICC draft the relevant provision, Article IV, read 'shall',¹⁵ which in the next draft prepared by the UN Economic and Social Council was replaced by 'may'.¹⁶ That second draft, however, included a draft Article III, which prescribed two threshold conditions for enforcement in addition to the ones contained in draft Article IV. One of those conditions was:¹⁷

(b) that, in the country where the award was made, the award has become final and operative and, in particular, that its enforcement has not been suspended.

The comments submitted by various Governments on that draft were largely approving of those changes,¹⁸ whereas the Federal Republic of Germany proposed that 'shall' be re-introduced in draft Article IV.¹⁹ However, a working party at the New York conference proposed the deletion of draft Article III in its entirety,²⁰ whereas a joint French-German-Dutch working party redrafted Article IV as it now stands.²¹ The preparatory work suggests then that the inclusion of 'may' was intentional and formed part of a wider drafting compromise, and there is thus no room to dismiss it *pro non scripta*. In order to link the linguistic analysis with subsequent legislative developments, it is remarked that the Model Law, which retains the language of Article V(1) in its Article 36(1), uses 'may', though for some time 'shall' and 'may' were both under consideration.²²

Moreover, there is no other discrepancy between the English and French texts where the Convention provides for some discretion. For instance, Article VI reads 'may' or '*peut*'. Equally importantly, a mandatory 'shall' is used in other provisions of the Convention, notably Articles II(1)-(3), III, and IV(1)-(2). This contradistinction, seen in the light of the preparatory work, suggests that *inclusio unius est exclusio alterius*. Finally, when there are more than one official versions, the point of reference should be the text which was the basis of negotiation; the other ver-

¹⁴ See, eg, *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility), *ICJ Reports 1984*, 392, 406-7, paras 31-2; 533, 537-9 (Sep Op Jennings); 558, 573-5, paras 21-3 (Diss Op Schwebel). See also *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 154, per Lord Wilberforce (HL); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 272, per Lord Wilberforce (HL).

¹⁵ See ICC, *Enforcement of International Arbitral Awards* (Publication No 174, 1953): Preliminary Draft Convention, Article IV.

¹⁶ See Draft Convention, UN Doc E/2704 and Corr.1 (1955, Original: English) 7, Article IV. For commentary see *ibid* paras 32-33. Such a provision would be even stricter than the similar Article 1(d) of the Geneva Convention, whereas a central motivation behind the New York Convention was to do away with that requirement of finality; see, eg, van den Berg, *The New York Arbitration Convention* (1981) 333-4.

¹⁷ See *ibid* Article III(b).

¹⁸ See Comments, UN Doc E/2822 and Add.1-6; see however *ibid* Add.6 (Netherlands).

¹⁹ See UN Doc E/CONF.26/L.34 (28 May 1958).

²⁰ See UN Doc E/CONF.26/L.43 (3 June 1958, Original: English).

²¹ See UN Doc E/CONF.26/L.40 (2 June 1958, Original: French).

²² Compare UN Docs A/CN.9/WG.II/WP.42 (1983) and A/CN.9/WG.II/WP.46 (1983): Articles XXVII and XXVIII. These provisions merged into what became Article 36 in A/CN.9/WG.II/WP.48 (1983), which used 'may'.

sions should as far as possible be made to bear the natural meaning of that text.²³ Only if that is impossible should the lowest common denominator prevail.

Further, there is an increasing body of authority clearly accepting that 'may' imports discretion for the court,²⁴ although the relevant decisions deal with sub-paragraphs (a)-(d), rather than sub-paragraph (e), of Article V(1).²⁵ The Hong Kong High Court in particular has had the opportunity to apply that 'residual', that is, exceptional, discretion²⁶ in a number of cases.²⁷ Moreover, there is authority for the view that 'may' in Article V(1) cuts both ways, in that it preserves the discretion of the court to defer enforcement in certain exceptional circumstances beyond those contemplated by Article VI and where such deferral would be warranted for foreign judgments or domestic awards.²⁸ If the interpretation accepted here is correct, then the terms of Article V(1) authorize, but do not mandate, the enforcement forum to refuse enforcement.²⁹

This reading would, however, seem at first deficient, if not leading to absurd results. The Convention contains no guidance as to when and how the discretion should be used. When international conventions grant a certain measure of discretion to the enforcing domestic authorities they seek to circumscribe it by prescribing limits for its exercise.³⁰ This is a matter of some complexity which is at the core of the debate and which will be discussed in detail below. Suffice it to say here that such a guidance function is provided by Article VII, which in material part reads as follows:

The provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

This provision, dubbed the 'most-favourable-right' provision by the leading commentator of the Convention,³¹ seemingly has a wider *ratione personæ* scope of application than Article V(1) in that it applies to rights which 'any interested party', rather than simply the award creditor, may

²³ cf *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa* (Advisory Opinion), *ICJ Reports 1955*, 67, 72; and *First Installment of E2 Claims*, UN Doc S/AC.26/1998/7 (3 July 1998) para 61.

²⁴ See *China Agrobusiness Development Corporation v Balli Trading* [1998] 2 Lloyd's Rep 76, 79.

²⁵ But there is an obiter in respect of sub-paragraph (e) in *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Lauro*, 712 F2d 50, 54 (3rd Cir 1983).

²⁶ See *Qinghuangdao Tongda Enterprise Development Co v Million Basic Co* [1993] 1 HKLR 173.

²⁷ For the relevant authorities and an extensive discussion see van den Berg in *Current Legal Issues* (1997) 327, 330-6. See also Moscow City Court, 10 February 1995, (1997) 22 YCA 294 (a decision on Article 34(2) of the Model Law).

²⁸ The two reported cases, *Far Eastern Shipping Co v AKP Sovcomflot* [1995] 1 Lloyd's Rep 520, (1996) 21 YCA 699; *Hewlett-Packard, Inc v Berg*, 61 F3d 101 (1st Cir 1995) deal with the question more as a matter of Article III (effect to be given to foreign awards), but in staying enforcement the courts have doubtless exercised their discretion under Article V(1). Note that in view of the exclusive character of the grounds for refusing and/or deferring enforcement under Articles V and VI the precedential value of the cases is controversial; for a discussion see Horning, [1997] Int ALR 3. See also *Resort Condominiums International Inc v Boldwell* (1993) 118 ALR 655 (and note that the Australian implementing legislation omits the word 'only').

²⁹ Accord: Paulsson, above, note 10, *passim*, and at 228, note 3, with further references.

³⁰ A good example is the ECHR, which contains such general guidelines in the second paragraph of Articles 7-11. These paragraphs have been held by the European Commission and Court of Human Rights to provide a 'margin of appreciation' to the domestic implementing authorities, but reviewable by the European institutions.

³¹ See van den Berg, above, note 16, 81.

have. Upon closer reading of Articles I and III combined this proves to be mistaken. 'Any interested party' is the party which may, according to the procedural rules in force in the enforcement forum, apply for recognition or enforcement of an award—that is, the same party contemplated by Article V(1).³² The best view would be that, simply, the lax drafting is the result of a copy-paste exercise from Article 5 of the 1927 Geneva Convention.

That provision makes it plain, however, that, if the enforcement forum's law, including international conventions, does not include the ground of V(1)(e) of the Convention as a ground for refusal of enforcement,³³ an annulled award may still be enforced there. So Article VII, seen in the light of 'may' in Article V(1), performs a twofold function. It points the enforcement court to more favourable provisions in its domestic law as a guide to the exercise of discretion and makes those domestic provisions prevail over the Convention, whereas the latter would normally prevail.³⁴

Again, the only way out of the combined effect of Article VII and local law described above would be to say that there is no award to enforce, it having been annulled *ab initio*.³⁵ The argument is, however, a *petitio principii*: it assumes that there exists no award, whereas the forum's law clearly says the contrary, since it takes no account of the annulment.

Finally, a word on the function of Article V(1)(e) in the Convention. That provision appears to be a stranger in the system of the New York Convention. Whereas sub-paragraphs (a)-(d) lay down grounds for the refusal of enforcement which are intrinsic to the award or the proceedings and call for consideration of the content of the award or the records of the proceedings, sub-paragraph (e) refers to an extrinsic factor, annulment by a court. Such annulment may have been premised on reasons identical or similar to the ones contained in sub-paragraphs (a)-(d), but not necessarily so.

In technical terms, the provision of Article V(1)(e) is a *lex specialis* on *res judicata*.³⁶ For such purposes, it specifies, first, that the court of the country of rendition and/or the country of the law under which the arbitration took place are internationally competent; second, the sort of proceedings that produce collateral effect, that is, annulment proceedings which resulted in an annulling decision; and, third, that if the enforcement forum applies V(1)(e), the special collateral effect is to refuse enforcement of the award. Naturally, such special collateral effect is limited to subsequent recognition and enforcement judicial proceedings in another forum, as prescribed in Article I on the scope of application of the Convention. The upshot of all this is that if the enforcement forum uses its discretion to grant enforcement under 'may' in Article V(1), or if Article V(1) dis-applies partially or in its entirety according to Article VII, no collateral effect is to be given in the enforcement forum to a decision of the courts contemplated by Article V(1)(e).³⁷

From another perspective, Article V(1)(e), by exhaustively defining the courts whose decisions may produce such collateral effect, builds on a rule of allocation of international competencies,

³² Van den Berg concludes that 'any party' will in practice be the party seeking enforcement: *ibid* 82-3.

³³ This is the case in French and Belgian law; see NCPD, Article 1502, CJ, Article 1723.

³⁴ Contrast Article V(2)(b), which directly authorizes refusal of recognition if it would be contrary to the public policy of the enforcement forum. On one view, however, Article VII would be superfluous if Article V(1) afforded discretion: Lastenouse, (1999) 16:2 J Int Arb 25, 29. However, Article VII authorizes a contracting state to disregard annulment altogether, whereas 'may' gives it discretion to treat annulment as binding or not.

³⁵ See for that view Samuel, *Jurisdictional Problems* (1989) 307-8.

³⁶ cf *Republic of Gabon v Swiss Oil Corporation* (1989) 14 YCA 621, sub [9] (Grand Court, Cayman Islands).

³⁷ Contrast Samuel, *Jurisdictional Problems* (1989) 301-2.

but does not itself create or spell out such rule.³⁸ The only, if any, 'primary' control of validity which is internationally current is the one effectuated by the courts mentioned in sub-paragraph (e); the enforcement court may only refuse or grant enforcement.

On the other hand, Article V(1)(a)-(d) authorizes the enforcement forum to examine afresh the regularity of a judgment, although that forum retains the residual discretion to grant enforcement if one of those grounds is found to exist in the case at hand. In that limited sense, V(1)(a)-(d) and V(1)(e) work in tandem, and their combination is a telling sign of the little-integrated legal context in which the Convention was designed to operate. In an ideal world of judicial economy, the enforcement forum would either have complete freedom in evaluating an award within the boundaries set by the Convention (that is, the grounds contained in V(1)(a)-(d) and V(2)) or be absolutely bound by a decision of the forum of origin, subject perhaps to the grounds contained in Article V(2). This suggests that the enforcement forum is itself a strong point of anchorage for a foreign award, that is, that the rendition forum does not have the sole legitimate connection. A further point is that the Conventions attempts an uneasy cohabitation between provisions reflecting different underlying philosophies. As will be seen in what follows, the question of the fate of annulled awards is a direct consequence of that legislative compromise.

The broad point here is that the Convention provides that recognition and enforcement *may* be refused if a ground contained in Article V is extant, but *only* in such case; whether a simple 'may only' properly conveys that meaning or not is left to the drafting instincts of each lawyer. The Model Law more accurately states the situation by prescribing that enforcement 'shall' be granted but 'may only' be refused in certain circumstances (which are lifted from Article V of the Convention).³⁹ After that broad overview of the relevant Convention provisions, one may proceed to examine some concrete cases where they have been applied.

II. THE CASE-LAW

A. The French Paradigm: Discounting Annulment through Article VII

At one time, the Paris Court of Appeal, the most experienced and innovative French court in matters of international arbitration, considered that Article V(1)(e) contains a command. Having held that the award in question was Swiss because Swiss procedural law applied '*à titre supplétif*' to the proceedings, it considered that the existence of an annulling decision of the Geneva *Cour de Justice* (the competent court of the country under whose law the award was made) precluded its enforcement in France.⁴⁰ This position was castigated by the *Cour de cassation* in its later judgment in the Franco-Austrian judicial saga of the *Norsolor* case. An ICC award made in Austria, awarded a Turkish company, Pabalk Ticaret, compensation against a French company, Norsolor, for which company the Turkish entity was acting as agent.⁴¹ The arbitrators based their decision on *lex mercatoria*. The Austrian *Oberster Gerichtshof* was first seised of the case on a procedural

³⁸ See Reisman, *Systems of Control* (1992) ch 4, 111-4 (arguing that the New York Convention sets forth a rule of international allocation of competence). See also below, text to note 45.

³⁹ See Model Law, Articles 35(1), 36(1). See also Arbitration Act 1996, s 103(1)-(2); South African Draft Arbitration Bill (1998), s 20(1)-(2).

⁴⁰ Paris, 20 June 1980, [1981] Rev Arb 424. Strictly speaking, the holding on the nationality of the award was superfluous.

⁴¹ ICC 3171/1979, [1983] Rev Arb 525.

motion to determine the Austrian court competent to hear a setting aside application.⁴² It held that because the parties had through the agency of the ICC Court of Arbitration chosen Austria as the locale of the proceedings the resulting award was domestic (*inländischer*).⁴³ The court fortified its conclusion by further founding its jurisdiction on Article V(1)(e) of the New York Convention.⁴⁴ It seems to have escaped the court's attention that the Convention does not apply to the setting aside of arbitral awards, but only to their recognition and enforcement.⁴⁵ An analogy may be drawn here with Article II, paragraphs (1) and (3), which only provides when a contracting party's court *must* recognize an agreement to arbitrate (paragraph (1)) and refer the parties to arbitration (paragraph (3)). Although if the conditions laid down in those provisions are not satisfied a court may not recognize the agreement or refer to arbitration, this is not *by* the Convention. This is not elliptical drafting; it is only evidence of the drafters intentions to leave pro-arbitration room to national courts.

In any event, the court determined the Vienna *Handelsgericht* as the competent domestic court. That court, confirmed by the *Oberlandesgericht* on appeal, held that the award was a nullity, because the arbitral tribunal had by applying the *lex mercatoria* acted as *amiable compositeur* and thus exceeded its authority.⁴⁶ The highest court quashed the judgment in a subsequent ruling, which is of no relevance to our purposes.⁴⁷ Meanwhile, Pabalk Ticaret sought enforcement of the award in France. A judgment of the *Tribunal de Grande Instance* of Paris granting *exequatur*⁴⁸ was reversed on appeal, the appellate court merely recording the fact that annulment of the award had meanwhile taken place in Austria.⁴⁹ The appellate judgment was quashed by the *Cour de cassation*, which cited Article VII of the New York Convention:⁵⁰

[L]e juge ne peut refuser l'exequatur lorsque son droit national l'autorise et ..., en vertu du second, il doit donc, même d'office, se livrer à cette recherche.

⁴² OGH, (1982) 7 YCA 312.

⁴³ *ibid* 313, sub [2].

⁴⁴ *ibid* sub [4].

⁴⁵ See New York Convention, Article I. Though Article V(1)(e) makes plain that annulment is internationally opposable in terms of international jurisdiction, it is equally plain that a domestic law provision is required if a domestic court is to assume annulment jurisdiction. The contrary, erroneous interpretation was followed by the House of Lords in *Hiscox v Outhwaite (No 1)*, [1992] 1 AC 562, 595-6. See also OGH, 65 SZ 484 (Article V(1)(e) contains a duty for the contracting states to provide for recourse against awards made in their territory); *International Standard Electric Corporation v Bridas Sociedad Anonima Petrolera*, 745 FSupp 172, 175 (SDNY 1990); *M & C Corporation v Erwin Behr GmbH & Co, KG*, 87 F3d, 844, 848 (6th Cir 1996). Cf Versailles, 23 January 1991, [1991] Rev Arb 291; *affirmed on other grounds*, Cass Civ 1re, 9 November 1993, [1994] Rev Arb 108. But see correctly Paris, 21 February 1980, (1980) 107 JDI 660; Cass Civ 1re, 25 May 1983, [1985] Rev Arb 415; Cass Civ 1re, 5 May 1987, (1987) 114 JDI 964; *SPP (Middle East Limited) v The Arab Republic of Egypt* (1985) 10 YCA 504 (CA); *Bombay Gas Company Ltd v Mark Victor Mascarenhas* [1998] Int ALR 178 (High Court, Mumbai) (a decision on the Indian Arbitration and Conciliation Act, 1996).

⁴⁶ HG and OLG Vienna, [1983] Rev Arb 513 and 516 respectively.

⁴⁷ OGH, (1983) 29 RIW 868. For a general commentary on the Austrian litigation see Bajons in *FS Kralik* (1986) 3.

⁴⁸ TGI Paris, 4 March 1981, [1983] Rev Arb 466.

⁴⁹ Paris, 19 November 1982, [1983] Rev Arb 466, 472.

⁵⁰ Cass Civ 1re, 9 October 1984, (1985) 112 JDI (emphasis added). See also Robert, [1985] D Chr 83; Goldman, [1983] Rev Arb 379.

The key words ‘*d’office*’ are the court’s contribution to the Convention. One may assume that the court was motivated by what United States lawyers might call a ‘pro-enforcement bias’⁵¹—and surely some of that bias is inbuilt in the Convention in that it significantly eases enforcement in comparison to the previous Geneva Convention régime.⁵² Nonetheless, the express terms of the New York Convention would, if anything, support a contrary reading that would make the application of Article VII dependent on a specific plea by the party seeking enforcement. This is the reading, incidentally, that prevails in other domestic courts which have had the opportunity to apply that provision.⁵³ And it is systemically and textually preferable. First, the terms ‘any *interested party* ... of any right he *may* have to *avail himself*’ (in French: ‘*aucune partie intéressée du droit qu’elle pourrait avoir de se prévaloir*’) suggest a dispositive right rather than a mandatory provision. Secondly, the dispositive reading tallies better with the preferred reading of V(1)(e), according to which the enforcement forum has discretion in refusing or granting enforcement. The force of this argument is not diminished by the fact that French jurisprudence relies exclusively, as will be seen presently, on Article VII and not Article V(1)(e) in granting *exequatur* to annulled awards. If there is any tacit internal cross-reference from ‘may’ in Article V(1)(e) to Article VII, as there must be, then one can hardly see how the French reading of Article VII can jibe with Article V(1)(e). Thirdly, if a plea based on Article V(1)(e) by the party resisting enforcement may fail on grounds of estoppel,⁵⁴ it would only be fair and symmetrical to make Article VII invocation-dependent. Finally, the reading proposed here would be supported by the maxim *exceptiones sunt strictissimæ interpretationis*.

The importance of the above point cannot be over-emphasized. It is often overlooked that without the *Norsolor* reading French courts would not be able entirely to discard Article V(1)(e) and use Article VII as the sole vehicle through which an annulled award may still be valid in France. Even if Article V(1)(e) obliged the French judge to refuse enforcement (the *Clair v Berardi* reading), this would be immaterial, for he is now obliged always to apply the more favourable Article 1502 NCPC whenever the New York Convention is applicable.

Norsolor marked the beginning of a series of judgements which elaborated its principle and made a conceptual whole out of it. In *Polish Ocean Line* the *Cour de cassation* dismissed, citing Article VII of the Convention, an application to vacate the *exequatur* granted to an award whose enforcement was stayed in its country of origin pending setting aside proceedings there.⁵⁵ The court ruled that an enforcement order must be given if an award fulfils the conditions set forth in Article 1502 NCPC, ‘*bien qu[e le contraire] soit prévu*’ in Article V(1)(e). The interest of that decision is more theoretical, as on its facts the case seems like one that would have more properly been decided on the basis of Article VI rather than Article VII. If the argument was that the award was not binding in the sense of Article V(1)(e), the off-the-shelf New York Convention solution would be to say that an award’s binding character is not jeopardized by a pending challenge.⁵⁶ Of

⁵¹ See *Parsons & Whittemore Overseas Co, Inc v Société Générale de l’Industrie du Papier*, 508 F2d 969, 973 (2d Cir 1974); cf *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626-7 (1985).

⁵² See above, note 16.

⁵³ See TF, 110 Ib ATF 191; President, *Rechtbank Amsterdam*, (1992) 17 YCA 572; BGH, [1991] WM 576.

⁵⁴ See below, text to note 114.

⁵⁵ Cass Civ Ire, 10 March 1993, (1993) 120 JDI 360.

⁵⁶ See, eg, *Soleh Boneh International Ltd v Uganda* [1993] 2 Lloyd’s Rep 208, 212-3 (CA). See also Supreme Court, Sweden, 13 August 1979, (1981) 21 Va JIL 211, 244; *Fertilizer Corp of India v IDI Management, Inc*, 517 FSupp 948, 957-8 (SD Ohio 1981); *Ukrvneshprom State Foreign Economic Enterprise v Tradeway, Inc*, 1996 WL 107285, at 3 (SDNY 1996). See also President, *Rechtbank Amsterdam*, [1988] NJ 67.

note is, however, that in *Polish Ocean Line* the court, using the interplay of Articles VII of the New York Convention and 1502 NCPC, entirely by-passed the Convention requirement that the enforcement forum examine the possibility of adjourning enforcement under Article VI. Disturbing as this may be, it is only consistent with the French position: if annulment is irrelevant, a pending challenge is *a fortiori* irrelevant.⁵⁷

In *Unichips v Gesnouin*⁵⁸ the respondent submitted that the court should not *de novo* scrutinize an award which has withstood the scrutiny of the courts of the place of rendition (which in that case were also the courts of the procedural law expressly chosen by the parties), for that primary, as it were, control and licence rendered the award '*internationalement régulière*'. The respondent in effect asked the court to ascribe to the Swiss judgment finding the award valid⁵⁹ what in Anglo-American law would be termed 'issue preclusion', 'collateral estoppel', or 'issue estoppel'.⁶⁰ That is, a bar to the re-examination of an issue litigated in and resolved by a competent court, when the same issue and facts are at bar in the forum.⁶¹ The Paris Court of Appeal dismissed the argument utilizing the flip-side of the rationale of *Polish Ocean Line*. The requirements of Article 1502 NCPC (applicable by virtue of Article VII of the Convention) are sufficient but at the same time always necessary. Again, such a conclusion goes against the grain of any notion of international co-ordination of judgments, but is incontrovertibly consistent with the complete inapplicability of Article V(1)(e) in the French legal order.⁶² Moreover, French courts are technically right in denying collateral effect to decisions of the forum of origin declaring an award valid by their domestic law standards. Article V(1)(e) authorizes the enforcement forum to give collateral effect to a judgment declaring void or annulling an award, but only to such judgments.⁶³ Thus, Gesnouin's plea was New York Convention-inspired, but not one within the four corners of the Convention.

The infamous *Hilmarton* series of judgments is a further manifestation of the tensions between the rendition and enforcement fora. The details are too well-known to be repeated here.⁶⁴ In an ICC arbitration an award was issued in Switzerland by a sole arbitrator between a United Kingdom broker, Hilmarton Ltd, and a French contractor, Omnium de Traitement et de Valorisation (hereinafter 'OTV'). The arbitrator dismissed Hilmarton's claim for unpaid fees for legal and fiscal advice, on the grounds that the underlying purpose of the contract, 'traffic in influence', violated Algerian mandatory law provisions, and, in the circumstances of the case, this had to be taken into account by Swiss law which was the proper law of the contract.⁶⁵ That award was subsequently set aside by the *Cour de Justice* for Geneva on the ground of '*arbitraire*' of the Swiss

⁵⁷ But cf, erroneously, Gharavi, (1996) 6 JTLP 93, 106-7.

⁵⁸ Paris, 12 February 1993, [1993] Rev Arb 255.

⁵⁹ See TF, 117 II ATF 346.

⁶⁰ Though the exact provision of French law on which the respondent was relying does not appear on the decision as reported, it may be presumed that the basis was a general rule on '*préclusion*' or good faith.

⁶¹ See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SALR 511 (SC, D&C); and for the notions *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and thirteen other ships, The Sennar* [1985] 1 WLR 490 (HL); *Alfadda v Fenn*, 966 FSupp 1317, 1325-32 (SDNY 1997).

⁶² Leurent has argued, implausibly, that Article VII should function in such cases as a mechanism to ensure that the *situs* law prevails: if an award has been validated or not annulled by the courts there, Article VII(1) should make *situs* law apply and render control by Article V(1) inapplicable; see Leurent, (1996) 12 Arb Int 269, 283.

⁶³ In any event, an order of enforcement, as distinct from a confirming declaration, at the state of origin would not under normal principles qualify as 'judgment' for purposes of recognition; see Hascher, (1996) 12 Arb Int 233, 237-41. See for an exception the Gernamy-Norway Recognition Treaty, Article 1(3).

⁶⁴ See, eg, Fouchard, [1997] Rev Arb at 338-40; Gaillard, (1998) 125 JDI 645, 651-3.

⁶⁵ See ICC 5622/1988, [1993] Rev Arb 327.

Concordat on Arbitration,⁶⁶ and that decision was confirmed by the *Tribunal Fédéral*.⁶⁷ Meanwhile, OTV sought and obtained in France *exequatur* of the award in 1990. On appeal, the Paris Court of Appeal confirmed the order, citing Article VII of the New York Convention *juncto* 1502 NCPC.⁶⁸ The court apparently found no contradiction between that conclusion and its finding that the parties had expressly submitted their arbitration to Swiss law.⁶⁹ Hilmarton made a *pourvoi en cassation*, which failed.⁷⁰ The highest court affirmed the lower court's reasoning, but added:

[L]a sentence rendue en Suisse était une sentence internationale qui n'était pas intégrée dans l'ordre juridique de cet État, de sorte que son existence demeurait établie malgré son annulation

For a while it was unclear whether the phrase '*une sentence internationale qui n'était pas intégrée dans l'ordre juridique de cet État*',⁷¹ was a veritable ratio of the decision, and if that was the case, whether it applied to all awards made in matters of international arbitration in the sense of Article 1492 NCPC—or, on the contrary, it was case-specific.⁷² The uncertainty was resolved by the later *Chromalloy* decision of the Paris Court of Appeal, where the crucial words '*par définition*' were added to the formula, thereby making it a true rule of French law.⁷³ French law thus has a wider and judge-made rule to the effect that no award rendered in matters of international arbitration is definitively integrated in any legal order, thus permitting the French judge to examine afresh the regularity of the award, without being bound by any previous decision of the forum of origin. Moreover, that rule is inflexible, in that it will apply regardless of (and thus upsetting) an agreement of the parties expressly submitting their arbitration to a law which provides for higher standards of review.⁷⁴

Hilmarton is equally important for the practical results that ensued from subsequent litigation. While litigation was proceeding in France, Hilmarton initiated fresh arbitral proceedings, which resulted in an award of 10 April 1992 that did award it the indemnity claimed.⁷⁵ Hilmarton then sought enforcement in France, seat of OTV. An order of enforcement was granted in 1993⁷⁶ and subsequently confirmed by the Court of Appeal for Versailles.⁷⁷ That court decided that the *exequatur* afforded to the first award did not prevent recognition of the second award. This was because the recognition of the first award could not 'freeze' ('figer') the dispute in the French legal order and because the purpose of enforcement was certainly not to maintain in France decisions that had been annulled abroad. Though granting *res judicata* to contrary decisions is tantamount

⁶⁶ See Concordat, Article 36(f).

⁶⁷ See Cour de Justice, Geneva, 17 November 1989 (unreported); TF, [1993] Rev Arb 315.

⁶⁸ Paris, 19 December 1991, [1993] Rev Arb 300.

⁶⁹ *ibid* 301. For the arbitration clause see [1993] Rev Arb 317.

⁷⁰ Cass Civ 1re, 23 March 1994, (1994) 121 JDI 701. Leave to enforce was subsequently granted by the English courts, where the annulment point did not arise; see *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222. The parties reached settlement after that judgment.

⁷¹ The formulation is borrowed from Professor Goldman, [1983] Rev Arb at 389.

⁷² See, eg, Oppetit, (1995) 84 RCDIP at 360-1.

⁷³ See Paris, 14 January 1997, (1998) 125 JDI 750.

⁷⁴ See above, Chapter 2, text to notes 258-267.

⁷⁵ ICC 5622/1992, (1997) 8:1 ICC Bull 52.

⁷⁶ See TGI Nanterre, 22 September 1993, (1995) 20 YCA 194.

⁷⁷ See Versailles, 29 June 1995, (1996) 123 JDI 120. The court made two decisions, concerning the recognition of the second award and the Swiss Federal Court annulling decision respectively (the latter as a first step to the former).

to reducing the notion to an absurdity, Versailles was probably taking the logical consequences of the French jurisprudence in defending the position that if an award is not anchored in a legal system anymore it loses some of the attributes of a quasi-judicial decision as well—and so do the judicial decisions of the forum that accompany it in that forum.

The *Cour de cassation*, on appeal from Versailles, was in an impossible position. There existed on the one hand a fresh award ostensibly valid at the state of rendition and on the other an award with no legal force where made but integrated in the French legal order by means of an enforcement order. The choices open to it were limited. Applying a strict doctrine of *res judicata* as a matter of French law would mean sticking to the annulled award in the face of a fresh and ostensibly valid one. On the other hand, receiving the new award in the French legal order would imply an abandonment of the notion of *res judicata*. The court, predictably, went for the former option, thereby restoring some order between French courts.⁷⁸

The problem with the *Hilmarton* jurisprudence and the upshot of the litigation is that one loses any sense of right or wrong in the procedural technicalities. Tempting as it may be to dismiss the case as a classic example of a tough case making bad law, the law did not need to be that bad. The court seems to be upholding a double standard: an international award cannot be conclusively integrated in the legal order of the rendition forum but can be so in the enforcement forum. Put crudely, the French position would be that an international relative currency of awards is acceptable so long as it is kept out of its backyard.

The position in French law therefore raises a twofold issue, namely whether the results to which it leads are, first, permissible and, second, appropriate. The first issue is directly resolved by Articles V(1)(e) and VII, in the affirmative. The second, as any issue of legal policy, is more complex. Lord Justice Bingham's words, uttered in another context, may usefully serve as a premise: 'The policy of the law must ... be to favour the litigation of issues only once, in the most appropriate forum.'⁷⁹ These words, and especially the part referring to 'the most appropriate forum', may need some modification in the context of international arbitration, but their wisdom is indubitable. Private international law has developed a number of mechanisms to eliminate, or at least mitigate undesirable results of, parallel litigation, including those of *forum non conveniens* and *lis pendens (in limine litis)*, *renvoi* (during the proceedings),⁸⁰ and the selective use of *res judicata* and other collateral effects (at the post-judgment stage). Can it be seriously suggested that the New York Convention did not aim to co-ordinate to some extent the interplay of jurisdictions around the world in matters of validity of arbitral awards? The Convention has, it is submitted, a double goal. As was said by the United States Supreme Court:⁸¹

The goal of the Convention ... was to encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which ... arbitral awards are enforced in the signatory countries. Such unification of standards necessarily implies some co-ordination of judicial decisions.

Article V(1)(e) makes plain that, desirable or not, an annulling decision of the courts of the place of rendition ordinarily obtains internationally. On the other hand, the New York Convention

⁷⁸ See Cass Civ 1re, 10 June 1997, (1997) 124 JDI 1034.

⁷⁹ See *Du Pont v Agnew* [1987] Lloyd's Rep 585, 589, per Bingham LJ (CA).

⁸⁰ See for that aspect of *renvoi* Briggs, (1998) 47 ICLQ 877.

⁸¹ *Scherk v Alberto-Culver Co*, 417 US 506, 520 (1974).

is neither a double Convention (like, say, the Brussels/Lugano Convention),⁸² nor does it set out standards for the assumption of original jurisdiction (like the 1971 Hague Convention on Recognition and Enforcement),⁸³ save for the requirement in Article V(1)(e) that the annulment court be that of the state of rendition or whose law governs the arbitration. More importantly, the Convention does not align the grounds the rendition forum may use with the grounds the Convention itself contains.⁸⁴ In that framework, there must be some room for flexibility on the part of the enforcement forum. That room should, however, be tightly circumscribed.

B. A Discretionary Standard: The United States *Chromalloy* case

The *Chromalloy* case in the District Court for the District of Columbia is so far the only United States judicial instance where the enforcement of an annulled award has been in issue.⁸⁵ The case concerned an award rendered pursuant to the UNCITRAL Arbitration Rules in Cairo in a dispute between a United States entity, Chromalloy, and the Egyptian state.⁸⁶ The arbitration clause provided for the application of ‘Egypt Laws [sic]’ and Cairo as the seat of arbitration.⁸⁷ Chromalloy directly sought enforcement of the award, ordering Egypt to pay Chromalloy a substantial amount, in the United States without requesting confirmation of the award in the Egyptian courts. Shortly after that, Egypt had the award annulled by the Cairo Court of Appeal.⁸⁸ In the United States proceedings Egypt argued that Chromalloy’s petition to enforce should be dismissed because of the annulment by the Egyptian Court. The District Court held, as a matter ‘of first impression’, that is, with no direct authority binding it, that Article V(1)(e) and 9 USC § 201 provide a ‘discretionary standard’, whilst under Article VII the award could still be enforced in the United States in accordance with the Federal Arbitration Act (9 USC §§ 1-14).⁸⁹ The court found that enforcement of the award was not prevented by the five grounds listed in 9 USC § 10(a) or the judge-made ground of ‘manifest disregard of the law’,⁹⁰ and was thus proper as a matter of United States law.

If this were a French court, that would be the end of the judicial consideration. But the District Court went further to determine whether its holding that the award was enforceable was precluded by any *res judicata* effect which might attach to the Egyptian nullification decision—which was

⁸² See Brussels Convention, above, note 13; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September 1988), [1988] OJ L319/9-48.

⁸³ See Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (The Hague, 1 February 1971), (1979) 1144 UNTS 249 (hereafter the ‘Hague Convention’), Articles 4, 10-12.

⁸⁴ Contrast the European Arbitration Convention, Article IX(1). See on that provision, OGH, 66 SZ 277; OGH, [1999] Rev Arb 385.

⁸⁵ See *Chromalloy Aeroservices v The Arab Republic of Egypt*, 939 FSupp 907 (DDC 1996).

⁸⁶ See (1996) 11:8 Mealey’s Int Arb Rep C-1, [1997] Rev Arb 439.

⁸⁷ See *Chromalloy*, 939 FSupp at 912.

⁸⁸ See CA Cairo, 5 December 1995, [1998] Rev Arb 723. The court nullified the award on the ground that the tribunal had failed to apply Egyptian administrative law (rather than civil law), based on Article 53(1)(d) of Act 27/1994 (Egypt), permitting annulment if ‘*la sentence a ecarté l’application au fond du litige de la loi convenue par les parties*’.

⁸⁹ It has been argued that this is untenable as a matter of US law, because, unlike in France for instance, the New York Convention (9 USC §§ 201-208) is the common law for the enforcement and recognition of foreign or international awards. See Gharavi, (1997) 12:5 Mealey’s Int Arb Rep 21; Schwartz, (1997) 14:2 J Int Arb 125, 132; Hulbert, (1998) 13 ICSID Rev-FILJ 124, 135-40. This, however, is a point which hinges on the interpretation of US law (in particular 9 USC §§ 9, 10, and 208) and thus need not concern this analysis.

⁹⁰ See for that ground *First Options of Chicago v Kaplan*, 514 US 938 (1995); and for previous authorities see 9 USCA, Chapter 1, paras 11-16.

superfluous, as has been suggested above.⁹¹ It answered that question in the negative, giving two reasons which on analysis seem specious. First, the court said, by agreeing on a ‘final and binding’ arbitration which would not be subject to ‘any appeal or other recourse’, the parties had excluded any means of recourse.⁹² However, such waiver is available only under certain domestic laws and subject to strict conditions.⁹³ All domestic laws provide for certain grounds of appeal, some of which are subject to waiver (appeal on the merits for instance) and some not (grave procedural mishaps for instance), and the premise behind such regulation is sound. If a court of law is fallible so may be an arbitral tribunal, and therefore parties to arbitrations should have at least a minimum of protection in the form of non-excludable procedural grounds of recourse against arbitral awards⁹⁴—hence the strict conditions imposed by the various laws. This is not the case under Egyptian law.⁹⁵ To avoid the effect of Egyptian law the District Court needed to have found, arguably, that the parties had not subjected the proceedings to Egyptian law or that for some other reason that law did not apply, both very unlikely alternatives in the circumstances of the case.⁹⁶

Second, the court continued, it was precluded from giving effect to the Egyptian decision, because it violated the forum’s public policy, that is, to give effect to arbitration agreements and awards.⁹⁷ Put at its narrowest, the holding is vacuous as it gives no proper guidance as to when that rule should apply. At its widest, however, it is an overstatement which may mean that no annulment decision can ever be given effect to by United States courts.⁹⁸ Perhaps, the appropriate reading of the relevant passage would be to confine it to a ‘violation’ of a waiver of recourse agreement.⁹⁹ Even in that hypothesis, the problem is, again, that such agreement would not be allowed by the governing law. In other words, the violation of public policy reasoning cannot be sustained unless it be conceded that sanctity of contract is of part of public policy in an unadulterated form and independently of the law of the agreement—which cannot be the case.

Chromalloy is, however, of note because it touches upon, albeit in a manner which leaves much to be desired, the issue of inter-relationship between Articles VII and V(1) of the New York Convention, a point which French jurisprudence persistently circumvents and which will be presently discussed.

III. THE PROPER LIMITS FOR DISCOUNTING ANNULMENT

The New York Convention is an open-ended text, but there are two propositions directly based on its text. First, that Article V(1) provides for discretion without further guidance as to when such discretion should be exercised. And second, that Article VII makes domestic law prevail over the

⁹¹ Above, text to note 37.

⁹² See *Chromalloy*, 939 FSupp at 912.

⁹³ See above, Chapter 2.II.C.

⁹⁴ See, eg, Kerr, (1985) 34 ICLQ 1, at 2, 15-6.

⁹⁵ See above, note 88, Article 54(1).

⁹⁶ Gary Sampliner, counsel for *Chromalloy*, concedes that ‘Egypt was not selected as the seat of arbitration for fortuitous reasons. It clearly was the country with the strongest nexus to the contract at issue...’; see Sampliner, (1996) 11:9 Mealey’s Int Arb Rep 22, 26.

⁹⁷ See *Chromalloy*, 939 FSupp at 914. The court assumed, however, that the Egyptian decision was ‘proper under applicable domestic law’: *ibid*.

⁹⁸ cf Ostrowski & Shany, (1998) 73 NYUL Rev 1650, 1671.

⁹⁹ This is the ground on which a later judgment distinguishes *Chromalloy: Spier v Calzaturificio Tecnica SpA*, 71 FSupp 2d 279, 285-9 (SDNY 1999); *reargument denied*, FSupp 2d 405 (SDNY 1999); criticized by Freyer, (2000) 17:2 J Int Arb 1, 6-7.

Convention if that law contains a more favourable régime for enforcement. It is proposed first to determine the respective scope of Articles V(1) and VII and then to turn to the particular grounds for allowing enforcement of an annulled award.

A. Correlating Articles V and VII

As a working hypothesis, there are two routes open to an award creditor seeking to have an annulled award enforced elsewhere. He must convince the enforcement forum either to discount the particular annulling decision or to discard annulment altogether without going to its merits. It has thus been hitherto assumed that the former case falls under ‘may’ in Article V(1), whereas the latter under the more-favourable-right provision of Article VII. In other words, that Articles V(1) and VII provide two alternative and independent legal bases for the enforcement of annulled awards.¹⁰⁰ This, however, cannot be right.

Take the most straightforward and uncontroversial application of Article VII, that is, where the domestic law provisions do not make annulment a ground for refusal of enforcement. In that case such annulment ceases to be relevant in that forum. To that extent, that forum will grant enforcement, thereby automatically exercising its discretion under ‘may’ of Article V(1). That forum may have no discretion under its domestic law on whether to grant or refuse enforcement, as is the case in French law, but it is certainly exercising its discretion under the New York Convention. Although the ground of V(1)(e) ceases to be considered,¹⁰¹ from a technical point of view the provision has still applied, because itself allows for its not being considered. Thus, Article V(1) has to apply in all cases where enforcement is granted, because it is a permissive but also a referring rule. So what remains to be seen is whether Article VII furnishes all the grounds on which an annulled award can be enforced—in other words, whether V(1) would only refer to VII so that their respective material scopes of application would be exactly corresponding.

Article VII is so widely drafted that it would seemingly cover both scenarios outlined above for the enforcement of an annulled award. In either case the award creditor would be exercising a right conferred by the domestic law of the enforcement forum (that is, the right to have the annulling decision discounted or the award’s validity examined despite and independently of that decision). Moreover, where the award creditor seeks to have the annulling decision not recognized¹⁰² the proceedings concern the enforcement of the underlying award and not a declaration of non-existence of the annulling decision. In our context therefore Article VII and Article V(1) are co-extensive.

B. Grounds for Exercising Discretion

It would be useful to discuss here some cases that are likely to occur in arbitration practice. The discussion is neither meant to be exhaustive nor to focus on any particular legal system.

It is beyond doubt that when the annulling judgment would not be capable of obtaining any effect in the enforcement forum, then the obstacle of annulment ceases to exist.¹⁰³ Though the ar-

¹⁰⁰ See, eg, Nariman, [1998] Int ALR 163, 165.

¹⁰¹ So the District Court erred in saying that ‘Article VII does not eliminate all consideration of Article V;’ see *Chromalloy*, 939 FSupp at 914.

¹⁰² It would be more accurate from a technical point of view to speak in terms of ‘denial of *res judicata*’, but under most national laws the conditions for granting recognition and *res judicata* substantially overlap, at least in so far as money judgments are concerned.

¹⁰³ Accord: Matscher in *Improving the Efficacy* (1999) 452, 458.

gument will no doubt be made that this would introduce through the back door requirements subverting the hard and fast rule of Article V(1)(e), in the silence of the text there is no reason to assume that the Convention intended to take away from the enforcement forum the domestic law reasons for non-recognition of judgments. That will be the case for instance¹⁰⁴ when the annulment court has not been independent or impartial,¹⁰⁵ or when judgment has been obtained by fraud, or when there has been a serious procedural irregularity (eg the defendant has not been duly summoned or was otherwise not given an adequate opportunity to present his case), or when there exists a prior and contrary judgment of the forum which is *res judicata* there.¹⁰⁶ However, and in accordance with general principles, no review on the merits of the foreign judgment should be allowed,¹⁰⁷ subject to a violation of the mandatory rules of the enforcement forum or even foreign mandatory rules.¹⁰⁸ In symmetry with what is accepted for foreign arbitral awards, the rule of no review on the merits should include the case of '*dénaturation*', or manifestly erroneous application, of the relevant provisions, even when those provisions belong to the domestic law of the enforcement forum.

Lack of jurisdiction of the annulling forum has been suggested as a candidate for inclusion in the list above,¹⁰⁹ but this is a debatable case. Patent lack of connecting factors between the forum and the case is indeed under certain systems a ground for refusal of recognition,¹¹⁰ but it has to be borne in mind that for recognition purposes the New York Convention directly attributes international regularity to an annulling decision of the courts of the state of origin or whose law governs the arbitration. Assuming that such a decision exists, the ground may only exceptionally apply. Recourse to it may be had for example when, in order to establish their jurisdiction, the courts have used tenuous legal fictions to find that an award has been 'made' in their territory,¹¹¹ or when there are conflicting decisions of both of the two fora above,¹¹² whereas the parties had expressly stipulated that the law of one of those fora would apply to the arbitration. In other words, the forum whose law has been expressly stipulated by the parties to govern the proceedings has the better claim to be internationally recognised. This proposition would follow from Article V(1)(e), which assumes that the rendition forum is the country 'in which' the award was made but

¹⁰⁴ For a comparative overview of grounds for refusal of recognition see Permanent Bureau of the Hague Conference, Enforcement of Judgments: Prel Doc No 4 (1996) 8-17.

¹⁰⁵ cf Park, *International Forum Selection* (1995) 134 (discussing the possibility of biased or corrupt judiciaries); *id*, (1989) 5 Arb Int 230, 262 (referring to 'dishonestly annulled' awards).

¹⁰⁶ cf the Brussels Convention, Article 27(3); Hague Convention, Article 5(3)(b). That case is sometimes considered to fall under the general ground of contrariety to public policy; see, eg, Germany-Greece Recognition Convention, Article 3(1)(a).

¹⁰⁷ For the principle see above, note 104, 10.

¹⁰⁸ For concrete examples of pre-labelled mandatory rules see Brussels Convention, Article 27(4) and Hague Convention, Article 7(2).

¹⁰⁹ See Sampliner, (1997) 14:3 J Int Arb 141, 161.

¹¹⁰ See Brussels Convention, Article 28. And, eg, in France Cass Civ 1re, 6 February 1985, (1985) 112 JDI 460.

¹¹¹ See above, Chapter 1, text to notes 71-75.

¹¹² Van den Berg, above, note 16, 351 has suggested that the problem is resolved by application of Article III of the New York Convention and ordinary domestic law procedural rules; cf on conflicting decisions the Hague Convention, Article 5(3)(c). This is an unlikely scenario, but cf *Waterside Navigation Co v International Navigation Ltd*, 737 F2d 150, 153 (2d Cir 1984), where the court noted that confirmation had been requested in three countries.

makes exception for the case where that forum would not coincide with the country 'under the law of which' the award was made.¹¹³

In the same vein, a good case may be made for the examination of the internal or domestic competence of the annulling authority. The argument would be based on the language of Article V(1)(e), which refers to 'a competent authority'. However, the New York Convention ascribes international regularity to the annulling decision and therefore a presumption of domestic competence should be admitted too. Subject to that rebuttable presumption, lack of competence as a matter of domestic law should be relevant, it is suggested, only if proved *in limine litis* by the award creditor.

It has been suggested in the same context that a defendant in enforcement proceedings should be estopped (or, which is the same, precluded by the principle of good faith) from raising annulment as defence if the ground for such annulment has been one that the defendant had had an adequate opportunity to raise in the arbitration proceedings.¹¹⁴ The policy foundation is to emphasize the closed and final character of arbitral proceedings by giving the arbitral tribunal the opportunity to put right any defects; as such it is sound.¹¹⁵ Moreover, there is virtually everywhere support for the proposition that an application to set aside should be inadmissible inasmuch as the claimant has had the opportunity to raise the objection in the arbitral proceedings.¹¹⁶ However, the suggestion seems to assume that the litigant's failure to raise the matter in the arbitral proceedings is due either to bad faith calculations (that he may be given a second chance in annulment litigation) or mere negligence, the failure in either case being punishable by estoppel. That is the gist of a line of decisions which admit estoppel or equivalent preclusive effect for Article V(1)(a)-(d) defences raised for the first time in enforcement proceedings, and where annulment proceedings had been initiated and failed.¹¹⁷ This author doubts the wisdom of sewing a seamless preclusive effect from the arbitration to the enforcement proceedings. It would be more acceptable, it is submitted, to admit that objections which could have been raised during the arbitral proceedings cannot for the first time be raised in enforcement proceedings if the time-limit for setting aside has passed. The general estoppel argument may also tentatively be accepted on the whole, considering that the enforcement judge will have discretion in the matter ('may') and in view of the second-line *ex officio* defences provided by Article V(2).

The conclusion here is that a threshold requirement for Article V(1)(e) is that an award must have been 'set aside by decision of a competent forum which decision can produce *res judicata* effect under the law of the state where recognition and enforcement is sought'.

¹¹³ Accord: Rubino-Sammartano, *International Arbitration Law* (1990) 500; Cf Paris, 23 October 1997, [1998] Rev Arb 143, 146; CA Brussels, 24 January 1997, [1998] Rev Arb 181, 185-7. An *a fortiori* case can be made for that proposition if the enforcement forum is that of the law chosen; cf Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (La Paz, 24 May 1984), OASTS No 64, Article 4.

¹¹⁴ See Sampliner, (1997) 14:3 J Int Arb at 162-3. Support may be derived from TF, (1980) 102 SJ 65, 75.

¹¹⁵ cf the purpose of the requirement of exhaustion of local remedies applicable in diplomatic protection proceedings; see the *Ambatielos* arbitration 23 ILR 306 (1956). See also, eg, Art 35(1) of the ECHR.

¹¹⁶ See above, Chapters 3.III.B and 4.III and the discussion there.

¹¹⁷ The most important decision is *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 (admitting a 'flexible' estoppel doctrine); discussed by Kaplan, (2000) 66 JCI Arb 25. See also above, note 26; and add *AAOT Foreign Economic Association (VO) Technostroyexport v International Development and Trade Services, Inc*, 139 F3d 980 (2d Cir 1998) (on corrupt tribunals). *Irvani v Irvani* The Times, 10 February 2000 (CA), at paras 169-172 of the transcript, goes against the proposition, but on technical grounds irrelevant here.

The second matter is a determination of the conditions of application of Article VII so far as is relevant here. It is clear that, first, there must exist domestic law provisions applicable to foreign awards as defined in Article I of the New York Convention. Second, these provisions must be more favourable, which raises the issue of determining that more favourable character of the domestic rules. The gist of the French *Hilmarton/Chromalloy* jurisprudence is that Article VII requires a formal analysis, whereby the French judge does not take account of an annulling decision of the rendition forum because in domestic law annulment is not a ground to refuse enforcement. In the recent *Bec Frères* case,¹¹⁸ the Paris Court of Appeal dealt with two awards made on an arbitration clause which was subsequently held to be null and void by the courts of Algeria, where the awards were made, on the basis of objective inarbitrability. The court did not take account of the Algerian judgments, citing Article VII, and entering judgment on the basis of Article 1502 NCPC held that the clause was valid. In a more recent decision, however, the *Cour de cassation* hinted that the proper level of analysis may require comparing the precise import of the relevant provisions of French law with those of the New York Convention,¹¹⁹ thereby interpreting Article VII as allowing 'cherry-picking'. Professor van den Berg has argued against such selective use of domestic law provisions; domestic law should either apply *en bloc* or not at all.¹²⁰ His position is, however, too dogmatic to be accepted. One cannot see how it would serve the purpose of the Convention to make an award creditor benefit from a more favourable provision of domestic law but still be caught by a less favourable one, even if a specific plea is required for the application of domestic law, which implies the exercise of a faculty. Furthermore, van den Berg's reading would go against the text and nature of an international treaty which purports to step aside, as it were, in favour of domestic law only where and *to the extent that* the latter contains more favourable provisions.¹²¹

A further issue is to determine the circumstances under which the enforcement forum may under Article VII of the Convention grant enforcement despite annulment at the country of origin, when such annulment would otherwise produce *res judicata* effect in the enforcement forum. The straightforward case where that forum does not consider annulment in itself as a reason preventing enforcement has been discussed above. Can, however, the enforcement forum grant enforcement because its domestic law does not provide the *ground* of annulment on which the foreign court based its decision? This is in effect what happened in the US *Chromalloy* case. The court, it will be recalled, considered that the award was impugned on a ground which did not exist in United States law, namely error of law. It concluded that the award would be allowed to stand under United States law and granted enforcement under Article VII. However, Article VII contemplates (more favourable) domestic law provisions relating to enforcement, not to annulment. It is irrelevant for Article VII whether the enforcement forum's law would or would not allow annulment; what matters is whether that forum discounts annulment at the state of origin, on whatever ground that annulment may be, for enforcement purposes. This follows not only from the clear wording of Article VII, but also from the mere existence of Article V(1)(e). Moreover, the enforcement forum would not normally provide in its domestic law for annulment of New York

¹¹⁸ Paris, 24 February 1994, [1995] Rev Arb 275.

¹¹⁹ See Cass Civ I re, 24 March 1998, (1999) 126 JDI 155 (the case concerned the *exception d'ordre public* of Articles 1502(5) NCPC and V(2)(b) of the New York Convention). Cf also Paris, 2 April 1998, [1999] Rev Arb 821 (cumulatively applying French law and the New York Convention).

¹²⁰ Above, note 16, 85-6, with further references.

¹²¹ cf TF, 110 Ib ATF at 193-4.

Convention (that is, foreign) awards but only for domestic awards.¹²² A decision of the Second Circuit made in circumstances similar to *Chromalloy* but refusing to follow it should be seen as made on that narrow ground; for the rest it merely distinguishes *Chromalloy* and is thus subject to the criticism made above.¹²³

The reasoning of the District Court for the District of Columbia was therefore erroneous. The court seemed to be hinting, however, that the real ground for its decision was that the annulling decision could not produce *res judicata* effect because its legal foundation was otiose in the forum.¹²⁴ Even that hypothesis, however, would go against the principle of prohibition of review on the merits. Contrariety to public policy would be justified only if *recognition and enforcement* of the *dispositive part* of the judgment would be against the fundamental policies of the forum, not where the reasoning would be contrary to those policies.¹²⁵ The court did not, and could not, demonstrate such contrariety.¹²⁶ Moreover, no violation of an applicable mandatory rule of law of the United States could be demonstrated. It is submitted that the only proper ground for the decision would be an application of the estoppel doctrine: although Egypt could have raised the matter of the law applicable at the proceedings, it did not do so.¹²⁷

It is noted in conclusion that there are indeed exceptional cases where the residual discretion of the enforcement court will permit enforcement of an award annulled at the state of origin. Those cases, unlike the cases of residual discretion exercised in matters falling under Article V(1) paragraphs (a)-(d) of the Convention, are in reality cases where the enforcement court does not have a large margin of discretion and can thus be foreseen in advance with some accuracy. For either that court will be applying trite rules or principles of its domestic law and/or the circumstances founding an estoppel plea will be well-known to both parties.

IV. THE CASE FOR RESTRAINT

Having considered the more technical aspects of Articles V(1)(e) and VII, it is now proposed to turn to arguments of legal policy. It will be discussed whether the technically impeccable construction analysed above is deleterious to the purposes of the Convention and should thus be restrained or abandoned altogether.

It is thought that the case for not taking account of an annulling decision of the rendition forum when that decision cannot be vested the authority of *res judicata* in the enforcement forum is compelling not only on technical grounds but also from the perspective of sound legal policy. Moreover, the reported cases on the New York Convention are evidence that the case will play in practice very rarely if at all. In fact, there is only one case where an enforcement court disregarded an annulling decision squarely on that ground, and it was a case decided on Belgian law.¹²⁸ The

¹²² On non-domestic awards in the US see below, Chapter 7.II.C.2.

¹²³ See *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*, 191 F3d 194 (2d Cir 1999).

¹²⁴ See above, text to notes 97-98.

¹²⁵ See, eg, Μαριδάκη, *H Εκτέλεσις* (3rd edn, 1971) 65; and in the context of the Brussels Convention see Gothot & Holleaux, *La Convention de Bruxelles* (1985) sub 256. Cf TF, (1998) 16 Bull ASA 634, 643; BGH, [1969] CMLR 123, 134.

¹²⁶ Accord: Rogers in *Improving the Efficacy* (1999) 548.

¹²⁷ See Sampliner, (1997) 14:3 J Int Arb at 163-5.

¹²⁸ See TPI Brussels, 6 December 1988, (1990) 35 AFDL 267; *affirmed*, CA Brussels, 9 January 1990 [1990] JT 386.

court there found that it was not bound by an Algerian decision *inter alia* because that decision was not *res judicata* in Algeria.¹²⁹

The position in French law is more problematic, for conceptual reasons and for the practical results it leads to. It has to be borne in mind that the central obligation of a contracting party to the New York Convention is, in matters of recognition and enforcement, to give to foreign arbitral awards effect equivalent to that of domestic awards without imposing more onerous conditions,¹³⁰ although it may rely on the grounds of Article V(1)-(2) not to give such effect. Article V is thus an exception, and not the rule, and this is why Article VII allows for the enforcement of awards under more relaxed domestic law rules. Paulsson is thus surely right in saying that a state cannot violate its conventional obligations by granting enforcement:¹³¹ the fanciful hypothesis of a state granting enforcement to all New York Convention awards which do not violate its public policy is a very legitimate one under the Convention. On that premise, survival of an annulled award in one domestic legal system cannot be such a bad thing. Moreover, what is permitted by French law in its current state is an isolation of the annulling judgment. The French judge scrutinizes a New York Convention award under the heads provided for in 1502 NCPC, which are substantially the same as those provided for in Article V(1)(a)-(d) and (2) of the Convention. This is not by any stretch of imagination tantamount to a licence to enforce any and all awards in France, for the grounds for refusal to enforce are sufficient (as is proved by a comparison between Articles 34 and 36 of the Model Law). Briefly, France cannot be said to violate her obligations under the Convention.

A critique which has been made against the French conception is that it subverts international uniformity.¹³² Seen in the abstract, the French position is that an award may be invalid in the rendition forum (and everywhere else for that matter) but valid in France. This relativity, however, may cut both ways; the French legal order would not consider it an offence to its sovereignty for an enforcement forum to disregard an annulling French decision.¹³³

The more trenchant aspect of that argument is that such relativity subverts any notion of international judicial co-operation, economy, and comity. This criticism is premised on either or both of two assumptions, namely that the courts of the state of origin always have a legitimate claim to hold annulment proceedings and that in that state the same grounds for annulment of awards as under the New York Convention, Article V(1)(a)-(d) and (2), apply. The latter assumption¹³⁴ is plainly erroneous. An empirical survey is outside the ambit of this section, but exorbitant grounds for annulment of awards are still current,¹³⁵ though the propagation of the Model Law and the modernization of arbitration laws around the world will, it is hoped, gradually bring about a greater degree of uniformity. Furthermore, if the grounds for annulment at the state of origin tally with the grounds for refusal of enforcement, the same result would be achieved by both fora.

¹²⁹ See *ibid* sub [15], [19].

¹³⁰ See New York Convention, Article III.

¹³¹ See Paulsson, (1998) 9:1 ICC Bull 14, 17; Carbonneau, (1998) 6 Tul J Int & Comp L 277, 281.

¹³² See, eg, Leurent & Meyer-Fabre, (1995) 13 Bull ASA 118; Gharavi, (1997) 12:1 Mealey's Int Arb Rep 21. And see Poudret, [1998] Rev Arb 8, 15-21 (suggesting that the Brussels/Lugano Conventions mechanism be extended to judicial decisions on arbitral awards).

¹³³ This is sometimes overlooked, hence the criticism for legal imperialism and the like; see, eg, Besson & Pittet, (1998) 16 Bull ASA 498, 510.

¹³⁴ See Reisman, above, note 38, 114.

¹³⁵ See above, Chapter 2, text to notes 146-154.

The former assumption holds good as a rebuttable presumption, as has been suggested above. It is believed to reflect principles of international jurisdiction and human rights requirements that each state must provide for annulment jurisdiction for arbitrations whose seat is in the territory.¹³⁶ A possible rider to that principle, for cases where the parties have expressly submitted the case to another law and the courts of that state will assume jurisdiction was found in a previous chapter to be too cumbersome to be effective.¹³⁷ This is the crux of the problem with French law.

It was believed that the relativity accepted in France would lead to a ‘multilocalization’, as opposed to a complete detachment from national laws, or ‘delocalization’, of international arbitral awards.¹³⁸ It seems, however, that the French have lost sight of that postulate and have turned the case on its head. Professor Gaillard is the leading proponent of the view that the (any) enforcement forum has a better claim to determine the validity of an international award than the rendition forum.¹³⁹ His proposition is correct as a corrective measure, that is, as an exception to the rule. The place of the arbitral proceedings, which will normally be where the award will be rendered and controlled by the courts, was chosen by the parties, it was in other words part of their commercial agreement and is reflected in the considerations exchanged. It is not suggested that the parties always consciously make a choice of arbitration law when they choose a locale for their proceedings; it is merely contended that sophisticated parties do, or should be imputed to, know that they will have to live with the choice of that locale and the legal consequences of their choice.¹⁴⁰ By contrast, the enforcement forum has no connection with the agreement of the parties or the proceedings; the connecting factors are either the presence of assets or an interest to have the award recognized for *res judicata* purposes, which are perfectly valid and sufficient connections, but only as regards *enforcement* proceedings.¹⁴¹ It is thought that that forum should to a certain extent be independent, but one can hardly see why that forum should be afforded any prevalence over the rendition forum as a matter of principle. The enforcement forum is by definition a haphazard one and, moreover, enforcement proceedings may take place in multiple fora, whereas the annulment forum will in the vast majority of cases be unique. The enforcement forum can therefore hardly make any claim to extraterritorial effects. Finally, the logical conclusion of the acceptance of pre-eminence of the enforcement forum would be that there cannot sensibly exist any controlling jurisdiction.¹⁴² Annulment would be reduced to an *action en inopposabilité* good for local purposes, without any claim to universal recognition. Thus, any international award would be vested with an inchoate or *prima facie* regularity at the moment of its issuance. This cannot be right.

The French position is entirely defensible if the following principles are adhered to. First, that French law, applicable *in lieu* of the Convention provisions, provide grounds for non-recognition which would safeguard at the enforcement stage the minimum requirements provided for in Article V(1)(a)-(d) of the Convention—which is the case now. If the conditions of enforcement were significantly more lax in France, disappointed award creditors would systematically try to have a

¹³⁶ See Chapter 3.V above.

¹³⁷ See above, Chapter 2, text to note 107.

¹³⁸ See Mayer in *Droit et Pratique* (1984) 81, 82-4; *id* in *The Internationalisation of International Arbitration* (1995) 37, 46 (criticizing resulting disharmony).

¹³⁹ See, eg, Gaillard, (1998) 125 JDI at 672-4; *id*, NYLJ, 2 October 1997.

¹⁴⁰ Professor Park bases his whole argument on this point: Park, (1999) 93 AJIL 805.

¹⁴¹ Switzerland, however, applies a strict requirement of connection when execution is sought against a state; see TF, 106 Ia ATF 142, and the references there.

¹⁴² Thus: Goldman, [1980] Rev Arb 323, 359-60; Fouchard in *Improving the Efficacy* (1999) 601.

second bite at the cherry in the courts of that country, thereby burdening the courts and public finances with a backlog of cases with no substantial connection with France. The argument of 'moral hazard' that economists often invoke would be pertinent as well: it is hardly conducive to rational decision-making to allow commercial parties to pass the cost of bad decisions (that is, to arbitrate in a 'hostile' legal environment) to their opponents in litigation and the state of enforcement. Another way to see this point is thus: if the 'seat' is a juridical concept depending on the choice of place of arbitration by the parties, as has been suggested in Chapter 2 and admitted by the French courts, that would contradict the total lack of integration of the award in the law of that seat.¹⁴³

Secondly, the French doctrine should function as a corrective measure and not as a universal doctrine. Thus, when the agreement of the parties expressly provides for a certain law to govern the proceedings, a valid judgment of the courts of that state, or of the courts of the state of origin but according to that law, should be given effect to.¹⁴⁴ That can be achieved by construing the Convention and French law requirements as *de minimis*, rather than always essential as is the case now. On that reading, the annulment of the first *Hilmarton* award should have been binding in France.

Thirdly, French courts should modify their *res judicata* doctrine to deal with cases such as *Hilmarton*. The *Cour de cassation* was internally inconsistent in holding that an award may have multiple, or at least more than one, legal systems as validity reference points, but once the award was integrated in the French legal order by the limited means of an enforcement order the matter ended there: if a dispute cannot be localized elsewhere, why should it be localized in France?¹⁴⁵ It is often overlooked that fresh arbitration proceedings can be initiated after annulment, but a judicial decision vested with *res judicata* normally ends litigation conclusively. The point is that if there exists a fresh award that an enforcement forum fails to recognize because of its having granted recognition to a previous award, that forum subverts the principle of finality of arbitral awards, one of the principles of the Convention.¹⁴⁶ Further, when the parties initiate proceedings anew after annulment (as was the case in *Hilmarton*) they indicate their belief that annulment was proper. Refusal to enforce the product of the new proceedings on the part of a court would subvert their commercial understanding. So in symmetry with the '*multijuridicité*' of arbitral awards the French legal system must admit a degree of flexibility for its judicial decisions. This could perhaps be achieved either by precluding by estoppel an application for enforcement of the annulled award (if fresh arbitral proceedings are already on foot) or through a mechanism of *reformatio propter nova* (if enforcement was granted before the initiation of the new arbitral proceedings).¹⁴⁷

Perhaps more importantly, French law must find a way to compensate a party who has been subjected to enforcement, and perhaps the only way to do that would be through an action for unjust enrichment (*condictio indebiti*). That party will not be able to succeed in a tort action in the annulment state, for there is no illegality on the part of the party seeking enforcement elsewhere.

¹⁴³ Leurent, [1998] Rev Arb at 406-7.

¹⁴⁴ cf Goldman, [1983] Rev Arb at 390.

¹⁴⁵ Van den Berg, above, note 6, 181 suggests that the 'unilateralist' French school of private international law might have exercised a strong influence in the shaping of such conceptions. However, rules of recognition and enforcement are by definition unilateral.

¹⁴⁶ cf Newman & Burrows, NYLJ, 18 November 1997.

¹⁴⁷ Under German law, § 1061(3) (formerly § 1044(4)) ZPO, a 'declaration of enforceability' may be set aside if the award has been set aside abroad after enforcement was granted in Germany. See, eg, OLG Frankfurt am Main, (1994) 40 RIW 686.

And it is safe to assume that the annulment forum will not be able to enjoin the award creditor from seeking such enforcement. The enforcement forum is sovereign in the determination of the conditions for granting enforcement,¹⁴⁸ and a restraining order would be an offence to its sovereign judgment.

The suggestions made here purport to improve on a sensible rule. French law prevails because the New York Convention so allows, not because of any French idiosyncratic belief that their law should prevail. Therefore, the application of French law should be in line with the spirit of the Convention.

There is a last argument to be addressed. It has been asserted by eminent authors that, even if Articles VII and V(1) would seem to allow the contrary, an annulling judgment should always be given effect to, on the premise that the adjudication of the matter of (in)validity should be final.¹⁴⁹ This is a forceful thesis, supported by the fact that annulment at the state of origin has been retained in more recent international treaties,¹⁵⁰ national laws,¹⁵¹ and the Model Law.¹⁵² If the grounds contained in Article V(1)(a)-(d) are indispensable, as a perusal of all modern national laws will prove, then a plausible interpretation of the fact that the ground of sub-paragraph (e) was included in the first place would be that the drafters wished to promote the goal of finality in adjudication.

The first objection is that if the Conventions drafters were absolutely serious about such finality, the enforcement forum would not be able to review an award confirmed at the state of rendition if and to the extent that the confirming court had scrutinized the award under grounds identical to the ones contained in Article V(1)(a)-(d) of the Convention. Secondly, the reason for the inclusion of sub-paragraph (e) was, it is submitted, that the Convention is built around the notion of valid arbitral awards.¹⁵³ But there is no evidence in the Convention that the jurisdiction and holdings of the courts of the state of rendition were meant to be sacrosanct, and the suggestions made in this section emphasize this fact. As the enforcement forum's law may yield to the Convention's provisions, which would allow for instance the enforcement of an award that would not be considered as such under applicable domestic law,¹⁵⁴ so may yield the annulling forum's law to provisions of the enforcement forum's law, applicable in virtue of the Convention.

In sum, the finality thesis is really an argument based on the postulate of international harmony of judgments—which is undeniably appealing, but eventually not convincing. In the context of an exceptional and tightly circumscribed faculty not to take account of an annulling judgment, as has been proposed above, the thesis loses much of its force. In view of that fact, the argument would be reduced to the maxim *de minimis non curat praetor*: why bother with exceptional cases and

¹⁴⁸ See, eg, *Arab Business Consortium v Banque Franco-Tunisienne* [1996] Lloyd's Rep 485, 492 (CA).

¹⁴⁹ In addition to the authorities cited above, note 132, see van den Berg, (1998) 9:2 ICC Bull 1, 5-6; and above, note 16, 351.

¹⁵⁰ See above, note 1.

¹⁵¹ See above, note 2. Indeed, some laws unequivocally provide that enforcement must be refused if annulment has taken place at the state of rendition; see CCP (Netherlands), Article 1076(1)(A); CCP (Italy), Article 840(5); Arbitration Act 1999 (Sweden), § 54(5).

¹⁵² See Article 36(2)(a)(v). The proposal was made during the drafting of the Model Law to abandon the New York Convention model for that of Article IX(1) of the European Arbitration Convention. It was dismissed as 'too ambitious and difficult to apply'; see the comments and preparatory materials in Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law* (1989) 1061, 1079-80.

¹⁵³ See van den Berg, above, note 149, 6.

¹⁵⁴ Such would be the situation in English law before the admission of '*amiable composition*' awards; see Private International Law Committee, Fifth Report, Cmd 1515 (1959) para 16.

sacrifice absolute legal certainty? However, it must be conceded that certainty should not prevail over fairness, which is what the suggestions made above try to achieve. Admittedly, the French example is morally neutral. It is neither fair nor unfair, merely pro-enforcement. But it has been argued above that within certain limits French law should not subvert certainty, and in any event sophisticated commercial parties have the certainty that enforcement in France is a possibility regardless of annulment elsewhere.¹⁵⁵

Finally a word on a recent suggestion which would provide a hard and fast rule for distinguishing between annulling judgments. Paulsson¹⁵⁶ makes a distinction between 'Local Annulment Standards (LSAs)' and 'International Annulment Standards (IAS)'. The latter would comprise the four grounds contained in Article V(1)(a)-(d) of the New York Convention, which grounds tend to be the exclusive grounds for annulment in modern domestic laws as well as the Model Law, Article 36(2)(a).¹⁵⁷ Annuling decisions based on such grounds would be accorded deference by the enforcement forum. Any other ground falls within the local variety, and annulment based on such ground is denied extraterritorial effect. The construction achieves symmetry between the grounds for annulment and those for refusal of enforcement, which is doubtless laudable,¹⁵⁸ but it is entirely without the language and the spirit of the New York Convention. In fact, it proposes to re-write the Convention along the lines of the 1961 European Arbitration Convention, Article IX(1) or, which is the same, make all contracting parties to the New York Convention parties to that Convention too.¹⁵⁹ Thus one can hardly see through what legal construct Paulsson's theory will operate, and until such time it must remain at the level of legislative proposal.¹⁶⁰

The proper position is that there must be a single court exercising the so-called primary function of control after the making of an award. More precisely, if such control is to be available at all, it must be one-stop litigation. The subsequent enforcement fora must normally pay deference to the that court's finding, whether it be annulling or upholding the award.¹⁶¹ Discretion to enforce or refuse enforcement is exceptionally afforded by the Convention and should be very sparingly exercised.

V. CONCLUSION

The analysis here focused on the provisions of the New York Convention and examined the matter mainly from the perspective of the enforcement forum. It has been argued that annulment at the state of issuance or whose law governs the proceedings is, and should continue to be, normally

¹⁵⁵ In fact, this was an anticipated effect of the 1981 reform of French law; see Fouchard, (1982) 109 JDI 374, 419. That level of certainty should be acceptable for planning business decisions. See further Hayek, *The Road to Serfdom* (1944) ch VI; Raz, (1977) 93 LQR 195, at 198, 204, 210.

¹⁵⁶ See Paulsson, (1998) 9:1 ICC Bull 14. That paper elaborates on a theme discussed in two previous ones: (1996) 7 Am Rev Int Arb 99; (1997) 12:4 Mealey's Int Arb Rep 20. Accord: Nariman, [1998] Int ALR 163, 165.

¹⁵⁷ In other words, municipal law is admitted to the extent provided for in those sub-paragraphs; whether that leaves the back door open for abuse (as contended by Chan, (1999) 17 Boston U ILJ 141, 199-200) is debatable.

¹⁵⁸ The Model Law seeks to achieve such result in Articles 34 and 36, provided however that the originating and the enforcement fora are both Model Law states; see Possible Features of a Model Law, UN Doc A/CN.9/207 (1981) para 110; Analytical Commentary, UN Doc A/CN.9/264, (1985) 16 UNCITRAL YB 104, paras 6-9 ad Article 34.

¹⁵⁹ cf European Arbitration Convention, Article IX(2).

¹⁶⁰ Thus explicitly Girsberger in *Völkerrecht und Internationales Privatrecht* (2000) 231, 245-251.

¹⁶¹ See above, Chapter 2, text to note 193.

dispositive of the fate of the award. This principle, however, is subject to two exceptions, namely where the annulling decision would not pass the test for *res judicata* in and under the law of the enforcement forum and where the enforcement forum's law applicable to foreign awards falling within the scope of application of the Convention does not consider annulment as a circumstance precluding enforcement. Both possibilities, it was suggested, always fall within the combined effect of Articles V(1) and VII of the Convention. The technical and policy aspects of the matter were then discussed, and the conditions under which recourse may be had to the relevant provisions of the Convention clarified.

The premise for the suggestions has been that the New York Convention did not purport to make awards annulled at their state of origin prevail in another forum. At the same time, it did not exclude that possibility. The *travaux préparatoires* show that the issue was not expressly contemplated by the drafters, but that does not mean that it is an issue altogether outside the contemplation of the law. The best position would be that the Convention left the question open to be decided by the courts,¹⁶² which must deal with it by regarding the Convention as made of a single texture and 'not alter the material of which it is woven, but ... iron out the creases'.¹⁶³ Whilst the New York Convention abolished any requirement that an arbitral award be confirmed at the place of its rendition, which was the prevailing reading of the Geneva Convention,¹⁶⁴ the Convention is built around the notion and presumption of a valid award. The abolition of confirmation at the state of origin was conceived more as an improvement on the speediness of recognition rather than an outright dismissal of the relevance of annulment proceedings in the state of origin. Article VI makes that clear.

If the fate of an award in an international arbitration is conclusively and exclusively determined by the courts of the state where it was deemed to have been rendered, it becomes little more than a judgment of the courts of that state, the jurisdiction of which the parties had sought to exclude in the first place by agreeing to arbitrate. In fact, it may become something less than that, if the local judiciary is not well predisposed towards awards involving the interests of local entities, or the local sovereign, and foreign entities. The other extreme, where an award annulled at that state travels around the world like an itinerant friar begging for enforcement is equally unattractive. The suggestions made here attempt to remedy the pitfalls of those extreme theses within the framework of the New York Convention.

¹⁶² cf Posner, (1988) 86 Michigan Law Review 827, 881.

¹⁶³ *Seaford Court Estates v Asher* [1949] 2 KB 481, 499, *per* Denning LJ (CA).

¹⁶⁴ But see *Union Nationale des Coopératives Agricoles de Céréales v Robert Catterall & Co Ltd* [1959] 2 QB 44, 53-4 (CA).

Chapter 7

The Requisite Degree of Connection between the Award and Municipal Law

I. SOME CLARIFICATIONS

It is still a matter of some controversy more than forty years after the conclusion of the New York Convention whether there is a requirement for a legal nexus between the award and municipal law for an arbitral award to enter the Convention's material scope of application. Opinions often revolve around the concept of 'nationality' of arbitral awards, but this only obfuscates the issue further, and unnecessarily veers it towards more general questions of legal theory. At all events, nationality was always meant as an all-encompassing exegetical concept that would describe to which arbitrations the law of a given state applies and, consequently, the awards that are treated as domestic in that state for the purposes of remedies against, and enforcement of, awards. In other words, nationality is a shorthand for various rules of international jurisdiction and their legislative premise. Now it is clear that such municipal law constructs may not be apposite to an international instrument such as the Convention. For it purports to unify only the enforcement aspects, that is, only the final stage in the life of an award, and the underlying philosophy is directly to set out some validity standards for such purposes.¹

That issue here would also arise in the context of bilateral conventions cross-referring to the New York Convention, and domestic legislation incorporating the Convention. But it would not arise where the international instrument would be a double convention, prescribing the law applicable to procedural matters (or the validity of arbitration generally) at the stage of the proceedings. The paradigm example of such convention is the European Arbitration Convention, whose Article IX(1) largely neutralizes or pre-empts the question. By prescribing autonomous standards according to which setting aside in the state of the proceedings is internationally current, that convention leaves no backdoor for the intervention of domestic law, as a threshold requirement of nationality or otherwise.²

This may or may not be the case for the Inter-American Convention on International Commercial Arbitration, which refers to the Inter-American Commercial Arbitration Commission ('IACAC') Rules as the fall-back applicable law in Article 3, but also to the 'applicable law or proce-

¹ cf TF, (1997) 22 YCA 800, sub [13].

² See European Arbitration Convention, Articles IX(1)(d), IV(1)(a), IV(1)(b)(iii), IV(4)(d); Kopelmanas, [1961] AFDI 331, at 341, 345-6; Pointet in *World Handbook III* (1965) 263, at 271, 273, and 289.

dural rules' in Article 4, first sentence.³ The wording is equipose, but it can be safely assumed that the purpose was to eliminate the need to resort to a municipal law, even as a supplementary source of procedural law.⁴ (This was necessitated by the antiquated arbitration laws in Latin America.) On the other hand, no support may be drawn in the preparatory materials for the proposition that the legislative intent was to make the IACAC Rules superior to municipal law.⁵ Further, if that were the case, Article 5(1)(e) on annulment would be modified to take account of the supremacy of the rules.⁶ In any event, the IACAC Rules (and the 1982 IACAC Rules before them) are modelled on the UNCITRAL Rules, whose Article 1(2) reserves the application of the mandatory rules of the law applicable.⁷

On the other hand, the 1972 Moscow Convention provides for arbitration under the auspices of national chambers of commerce and seems to presuppose that the procedural law of the state concerned will have applied.⁸ As a result, the enforcement provisions of that convention are of exceptional strength, providing for semi-automatic enforcement.⁹

In any event, the New York Convention is the most oft-used vehicle for the recognition and enforcement of arbitral awards, and the issues to be discussed here have practically arisen only in connection with that convention. The Convention refers to the law of a specific state only in connection with some aspects of the award. The relevant provisions, in Article V, read as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (d) The parties to the agreement [to arbitrate] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, *failing any indication thereon*, under the law of the country where the award was made; or
 - (e) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
 - (f) ...
 - (g) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, *failing such agreement*, was not in accordance with the law of the country where the arbitration took place; or
 - (h) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(emphasis added)

³ See Inter-American Convention, Articles 3, 4. Article 5 of that Convention, however, follows *verbatim* Article V of the New York Convention, and thus some of the observations in this chapter may be applicable *mutatis mutandis* to that convention too.

⁴ See Caminos, (1988) 3 ICSID Rev-FILJ 107, 113-4; Norberg in *Handbook* (1998) at 5. See also Jackson, (1991) 8:3 J Int Arb 91.

⁵ See OAS Doc OEA/Ser.K/XXI/1, CIDIP/57 (1975) in *Actas y Documentos de la Conferencia Especializada Interamericana sobre Derecho Internacional Privado I* (1975) 293, 298.

⁶ van den Berg, (1989) 5 Arb Int 214, 225-6 concurs on wider grounds that this author cannot share.

⁷ See IACAC Rules, Article 1(2); IACAC Rules (1982), Article 1(2).

⁸ See Moscow Convention, Articles I(1), IV(1)-(2). On the practice of East-European tribunals see above, Chapter 4.I.A.1.

⁹ See Strohbach in *Liber Amicorum Sanders* (1982) 305, 309-10; *id.*, (1976) 1 YCA 4; Capatina, (1975) 102 JDI 503.

From that perspective, the issue becomes one of determining whether the degree of connection required by the Convention between an arbitral award and municipal law is such as to create the functional equivalent of 'nationality'. At the same time, it is evident that analysis under the Convention should be unconstrained by the concept of nationality as such.

It is proposed separately to discuss the three categories of arbitral awards whose inclusion in the material field of the Convention has proved in practice to be debatable; though a single theoretical model will be proposed for all of them, they pose different problems. Firstly, awards made by standing or *ad hoc* international tribunals established by treaty between sovereign nations; the Iran – United States Claims Tribunal is the paradigm case-study for such awards (below, section III). Secondly, awards that have been refused the character of 'domestic' awards at the state where they have been made, together with awards that have purportedly been made outside the normative framework of any domestic procedural law (below, section IV).

A textual and contextual analysis of Article I of the Convention is the logically prior matter. It provides in material part that:

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition of enforcement of such awards are sought, and arising out of differences between persons whether physical or legal. It shall *also* apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.
(emphasis added)

II. FOREIGN AND NON-DOMESTIC AWARDS

A. Legislative History

1. *The Origins*

As a matter of drafting, determining the proper test of 'internationality' for the purposes of the *ratione materiae* field of application of an international convention is always a delicate exercise; for whatever falls within the scope of the unifying international instrument is inevitably removed from the ambit of municipal law.¹⁰ There are therefore two crucial parameters, namely the subject-matter whose unification would be useful on the one hand, and the limits of the politically accepted limitations of state sovereignty on the other. The matter becomes more sensitive, of course, when the proposed instrument purports to set forth substantive rules (rather than conflicts rules), as is in part the case with the New York Convention. As will presently be seen, an additional difficulty with that convention was that not all parties involved in the drafting shared the same conceptual fundamentals—an essential ingredient of a fragmentary or partial regulation that must be based on some shared presuppositions.

The project of a new convention was initiated by the International Chamber of Commerce (hereafter the 'ICC'), with the aim of replacing the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards by an international instrument that would give recognition and effect to a *tertium genus* of arbitral awards: an 'international award, that is, an award completely independ-

¹⁰ cf TS, 8 October 1981, (1984) 1 RCEA 158.

ent of national laws', whose foundation would be (apart from an *exequatur*) the sole will of the parties.¹¹ Analytically of course the foundation would be international law, which would delegate the normative role to party autonomy. The main obstacle the Geneva Convention was perceived to pose against that concept was that it provided only for the 'enforcement of ... those awards that are strictly in accordance with the rules of procedure laid down in the law of the country where the arbitration took place—consequently, national awards only ...'.¹²

The thrust of the proposed changes, however, did not require a novel provision on the scope of application. The Preliminary Draft Convention prepared by the ICC adopted the 1923 Geneva Protocol wording¹³ paired with an objective internationality criterion. Article I of that draft convention read:¹⁴

The present Convention shall apply to the enforcement of arbitral awards arising out of commercial disputes between persons subject to the jurisdiction of different States [the Geneva Protocol definition] or involving legal relationships arising on the territories of different States.

The central idea was directly to set out the conditions of enforcement (more accurately the conditions precluding enforcement) without reference to the municipal law of the state of the arbitral proceedings.¹⁵ And this required the abrogation of the requirement that the arbitral procedure be in accordance with the 'will of the parties and ... the law of country in whose territory the arbitration takes place', which was imposed by Article 2(1) of the Geneva Protocol and made a precondition for enforcement by Article 1(c) of the Geneva Convention. It is observed here by way of note of caution that, although the prevailing interpretation of Article 2(1) certainly was that conformity with national procedural law was a prerequisite at the enforcement stage,¹⁶ Swiss courts in particular were consistently interpreting it as providing for disjunctive (rather than conjunctive) conditions: an award should be in accordance with either the will of the parties or the law of the place of arbitration, the latter being a fall-back suppletive option.¹⁷

At all events, a draft Article III(b), whose text with minor changes eventually became Article V(1)(d) of the New York Convention, was meant to give preponderance to the agreement of the

¹¹ ICC, *Enforcement of International Arbitral Awards* (Publication No 174, 1953) 7, 8. For the historical evolution of the position of the ICC see also Marx, 'Exécution des Sentences Arbitrales Étrangères' (ICC Doc 5710/1935) at 3-4; *Les Arbitrages de la CCI et la Loi Nationale* (1949); *Arbitrage Commercial International et Liberté Contractuelle* (1951). For appraisals of this aspect of the proposal see Eisemann, (1956) 2 RIW 3, 5 (supporting it); Habscheid, (1957) 20 ZZP 25, at 30-35 and 35-43 (arguing on the strength of the principle that the freedom of parties must be limited to the choice of a national procedural law that would give an award its nationality); Bülow, (1956) 2 RIW 37, 38 (same).

¹² See ICC, *Enforcement of International Arbitral Awards* (1953) 7.

¹³ See Geneva Protocol, Article 1, first paragraph. The Geneva Convention's field of application is determined by a cross-reference to awards 'made in pursuance of an agreement ... covered by the Protocol on Arbitration Clauses ...': Geneva Convention, Article 1.

¹⁴ Preliminary Draft Convention, above, note 12, 12.

¹⁵ So 'international award' had a narrow meaning: see ICC Doc 420/71, quoted in Bruns & Motulsky, (1957) 9 RIDC 717, 724.

¹⁶ See, eg, Cass (It), 27 March 1954, (1954) 4 Giust Civ 789; and further Mezger, (1959) 24 RabelsZ 222, 239-47.

¹⁷ See in particular TC Vaud, (1949) 46 SJZ 205, 207; CA Berne, [1955] Rev Arb 27; TPI Geneva, [1959] Rev Arb 90 (with contradictions). Cf TF, 78 I ATF 352, 359-61; Cass (It), 2 May 1960, (1960) 43 Rivista DI 686, 693. See also Renggli, *Die Grenzen* (1955) 38-40; Walker, *Die freie Gestaltung des Verfahrens* (1968); the case-law from other states cited by Mezger, (1959) 24 RabelsZ 222, 240-1, note 37; and *Alsing Trading Company v Greece*, 23 ILR 633 (ad hoc, 1954).

parties, thereby making the application of any procedural law, as a standard of validity for the award, and in particular that of the state of the arbitral proceedings suppletive.¹⁸ This in turn was meant as a clear negation of any requirement of nationality—on the assumption that if an award had to be within the confines of a certain procedural law it acquired the ‘nationality’ of that law. But that was the outer limit of dissociation between the law, and by extension the law of the *situs*, and the validity of the arbitration: a draft Article IV(e) provided that annulment in the state where the award was made would preclude enforcement, and that such circumstance would be taken into account by the enforcement court *proprio motu*.¹⁹

In short, the philosophical underpinnings of the proposed draft convention were only modestly reflected in its concrete provisions. Or, less charitably, what the draft convention gave with one hand it took back with the other. For, if now the non-application of any domestic procedural law was no excuse to deny enforcement, it would still be open to a state to assume original (annulment) jurisdiction over an award in accordance with its domestic jurisdictional rules and invalidate it on grounds of its domestic law (that the draft convention purported to expurgate), thus precluding enforcement on grounds of annulment. Clearly, the jurisdiction of the state of the proceedings could go unchecked, and pre-empt the procedural autonomy of the parties as defined in the draft convention.²⁰

This half-way house arrangement is reflected in a paradox: even if, as is often said, the New York Convention’s drafters endorsed neither the philosophical premises nor the goals of the ICC, central provisions of the Convention are substantially the same as in the ICC draft. The question is therefore whether the provisions of the Convention may or may not be made to bear the concept of an ‘international’ arbitration as conceived by the ICC.

2. The Subsequent Drafting Process

When the project was taken up by the United Nations the appellation of the project was changed to a convention on ‘foreign’ rather than ‘international’ awards, the latter title being suggestive of inter-state public international law awards.²¹ The criterion of internationality (or rather the foreign element) to be retained as a condition for an award to enter the scope of the convention was now purely territorial, that is, essentially the one adopted in the final text of Article I(1), first sentence of the Convention. But it is nowhere stated or implied that that change was necessitated by the rejection of the whole notion of international awards.²² It is only the abandonment of the objective criterion contained in the ICC draft that could perhaps be explained by the change in outlook, if such it was, of the Convention at that stage.²³ In any event, the territorial criterion taken in itself

¹⁸ See Preliminary Draft Convention, above, note 12, 13.

¹⁹ *ibid*; and see now New York Convention, Article V(1)(e).

²⁰ But see, erroneously, Motulsky, *Écrits* II (1974) 381, 391, arguing that the Convention itself precludes courts of contracting states from annulling an award on the basis of any domestic law provisions, because the Convention implies acceptance of the principle of procedural autonomy of the parties. This may be *lege ferenda* correct, but the Convention does not regulate the exercise of original jurisdiction; see Article I(1), first sentence. See also below, note 37; and above, Chapter 6, text to note 45, where the relevant case-law is cited.

²¹ See Report by the ECOSOC, UN Doc E/2704 and Corr 1 (1955) para 17.

²² See *ibid* para 23, where it is stated that the Geneva Protocol’s subjective criterion (parties subject to the jurisdiction of different Contracting States) was abandoned because it was prone to lead to non-uniform interpretation. For the text of draft Article I(1) see the Annex to the Report, *ibid* 7.

²³ For reactions against the abandonment of that alternative criterion see, eg, UN Doc E/CONF.26/2 (1958) 3-5, 10-12.

(as indeed any of the criteria discussed above) is totally neutral, in that it does not indicate any qualitative requirements for an award to enter the scope of the Convention.

However, a lively debate ensued between certain delegations on whether any award made abroad was really foreign. Again, the debate was to a great extent theological and not necessarily reflected in the draft provisions debated. It was assumed, that is, that if foreign is an award made in the territory of a state other than the enforcement state, the law of the former state would have governed the procedural validity of the award (which it would not necessarily, at least from the enforcement forum's perspective;²⁴ see Article V(1)(d)), and annulment in that state would have automatically precluded enforcement (which it would in principle; see Article V(1)(e)).

This was clearly a debate on the concept and elements of nationality of awards. The Federal Republic of Germany (as it then was) took the view that 'the seat of the tribunal may—but is not inevitably bound to—influence the nature of the award',²⁵ and thus 'the place where the award was made should not be considered as a determining factor'.²⁶ France concurred in the result, on the grounds that the *locus* of the proceedings was accidental and as such could make no claim to regulate them²⁷—that is, on the premise that the procedural régime and validity of the arbitration proceedings was a matter for the sovereign determination of the parties. Haight, the ICC delegate, put that view forward powerfully:²⁸

It [is] difficult to see why the procedural requirements of the country where the arbitration took place should have any relevance. That country was not asked to make any State facility available to the parties. All that happened was that the parties visited one or more experts, who, after hearing the various facts of the case and the arguments of the parties, decided in favour of one of them.

Germany on the other hand proceeded on the basis that the determination of the 'foreign' character was exclusively a matter for the forum, which would practically allow her to retain the criterion prevailing by then in German law, which qualified as domestic awards made in accordance with German procedural law.²⁹ Germany's main concern was thus not to extend the convention's coverage to awards made abroad under its own procedural law, whereas France and the ICC argued more on and for the sake of the principle that the geographical seat is accidental.

A so-called 'eight-power amendment' reflected the German position by introducing variable geometry in the Convention's scope, now encompassing all awards not considered domestic in the country where they would be relied upon.³⁰ The present formulation of Article I(1), which retains both criteria, originates in the report of a working party at the New York conference, which was proposed as a compromise solution.³¹ Clearly, however, the second criterion was subordinate to the first, territorial, criterion, so that Germany would have to apply the Convention to awards

²⁴ The key words here are 'at least from the enforcement forum's perspective': a draft provision that directly provided for the arbitral procedure to be regulated by the agreement of the parties and only failing that by the law of the *situs* (ie what Article V(1)(d) allows for enforcement purposes) failed to muster the necessary support; see UN Doc E/CONF.26/L.52 (1958) 2.

²⁵ See UN Doc E/2822 (1956) 8.

²⁶ See UN Doc E/CONF.26/SR.4 (1958) 4.

²⁷ See UN Doc E/CONF.26/SR.3 (1958) 2.

²⁸ UN Doc E/CONF.26/SR.3 (1958) 4.

²⁹ Details above, Chapter 2.I.B.

³⁰ See UN Doc E/CONF.26/L.6 (1958). See similarly a draft convention proposed by Mezger in Eisemann *et al*, *Internationale Schiedsgerichtsbarkeit* (1958) 64, Article I(1).

³¹ See Report of Working Party No 1, UN Doc E/CONF.26/L.42 (1958) 2, para 5.

hitherto considered domestic.³² In other words, the second criterion being supplemental and auxiliary to the first ('It shall *also* apply'), all awards made outside the territory³³ fall under the Convention.³⁴

And finally the compromise over the scope of the Convention was paralleled by the text of Article V(1)(e), which gives international efficacy to annulment not only by the courts of the state where the award was made but also of the state 'under the law of which [the] award was made'.³⁵ Articles I(1) and V(1)(e) read together reflect the conception that the legal foundation of an award could be drawn either from the law of the state of the proceedings³⁶ or of the law (of a state) chosen by the parties. If either of those states is not the requested state the Convention applies; and for the purposes of the Convention either of those states may consider that the award belongs to its domestic legal order and exercise annulment jurisdiction over it.³⁷

That system, whereby the *situs* state is the default legal system of reference (*point d'ancrage*) unless the parties exercise a choice of law in favour of some other *domestic* law, is complemented by the provision of Article V(1)(a), which establishes a similar presumption for the law applicable to the agreement to arbitrate.³⁸

The legislative history would suggest then that (i) though none of the candidate criteria, and certainly not the ones actually adopted, for the scope of application of the Convention would, in view of other provisions, *in limine* exclude awards purportedly based only on the will of the parties or international law, (ii) the subsequent discussions at the New York conference were made on the basis that the choice of the parties could only extend to a domestic legal system, and that legal system would determine the validity of an award as a whole. In other words, the territorial and 'non-domestic' criteria in Article I(1) were meant to accommodate two specific concepts of nationality of awards.³⁹

³² See the statements of the German delegate (Bülow), UN Doc E/CONF.26/SR.23 (1958) 9-10. Germany had proposed the inclusion of a reservation, which was defeated, that would have allowed it to exclude from the convention German law awards; see UN Doc E/CONF.26/L.41 (1958) para 3(b). For a similar Belgian proposal see van den Berg, below, note 65, 24.

³³ To the extent that a reciprocity reservation under Article I(3) would not apply.

³⁴ There is, however, an isolated contrary interpretation according to which an award purported to be made under the procedural law of the enforcement state is not a Convention award; see Klein, (1961) 57 SJZ 229 and 247, at 233. Pryles, (1993) 9 Arb Int 259, 260; and Deshpande, (1992) 9:4 J Int Arb 51 contemplate similar solutions. See also the unreported judgment of the Commercial Court, Ankara of 1 March 1995, summarized in the report of the judgment of the Court of Appeals in the same case: CA Ankara, 1 February 1996, (1997) 22 YCA 907. That interpretation is plainly contrary to the express and clear provision, and seeks to re-introduce through gloss an amendment that, as has been seen above, failed.

³⁵ That provision is elliptically drafted but the text is clear enough; for a better formulation see Bülow in *Essais Minoli* (1974) 81, 82, note 3.

³⁶ Note that the Convention contemplates the straightforward case where the award was made in the state in whose territory the arbitral proceedings took place. Article V(1)(d) and (e), where the Convention refers to the 'country where the arbitration took place' and the 'country in which [the] award was made' respectively, mean the same country seen at successive stages of the proceedings. See van den Berg, *The New York Arbitration Convention* (1981)323; and cf Model Law, Article 31(3). *Contra*, eg, *Hiscox v Outhwaite (No 1)* [1992] 1 AC 562, 577-8, per McCowan LJ (CA) (*obiter*).

³⁷ It is therefore legitimate to use Article V(1)(e) as an interpretative guide to the exercise of annulment jurisdiction provided for by domestic law; cf OGH, (1997) 22 YCA 619, sub [6].

³⁸ The final formulation of Article V(1)(a) was agreed on at the last stages of the New York conference; see, eg, van den Berg, (1985) 6 Pace LR 25, 39-40.

³⁹ Thus, eg, Private International Law Committee, Fifth Report, Cmd 1515 (1959) 23.

B. Analysis: Article I(1) as a Single-Purpose Vehicle

Received authority would, as has been seen, qualify the entirely neutral geographical criterion in accordance with the historical pedigree of the second criterion: if non-domestic awards are awards made within the territory but under the (procedural) law of another state, a requisite for all Convention awards (made within or outside the territory) is that they have been made under some law.⁴⁰

Attractive as it would seem, it is suggested with respect that the construction must fail. There are two clear limits to an historical purposive interpretation: first, an exhaustion of the limits of the text within the document read as a whole (systemic interpretation) and, second, the requirements imposed by modern conditions.⁴¹

Moreover, the context of the treaty, as elucidated by the *travaux préparatoires* above, ranks at equal level with 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.⁴² Admittedly, the decentralized practice of the courts of the contracting states to the Convention does not come within the strict terms of that provision, and cannot automatically make a claim to be decisive for the interpretation of the Convention. Nonetheless, concurring and convincing interpretations of the text by the authorities of different contracting states (and perhaps arbitral tribunals) must be considered an indispensable element of interpretation, and to this practice one will turn forthwith.

1. Determining a 'Foreign Award' is by no means tantamount to determining its Nationality

It must be made clear that the preparatory materials do not unequivocally support the proposition that the Convention did, or even purported to, definitely settle the matter of its material scope of application. The debates outlined above took place between a small number of experts, but that was a very small group in the New York conference. The overwhelming majority of the delegates were career diplomats accredited to the United Nations, and thus not acquainted with the issues.⁴³ Perhaps as a result of that, not all delegations understood the provisions of the draft convention in the same way, and this is perhaps especially the case for Article I.⁴⁴

In some debates Article I was made to bear two different roles, though only the first of them was crucial to the provision. The first role is a reflection of the delimitation of the competence *to enforce* as a matter of international jurisdiction: which awards are to be considered foreign and thus normally (but not necessarily) escape the challenge jurisdiction of a state?⁴⁵ This is a definition by negation. The second role is auxiliary: the provision may, but does not have to, contain the criteria for nationality of awards. This, in contrast, is a definition by affirmation, on the elements of which the delegates could not agree. This is clear from the discrepancy between Article I(1)

⁴⁰ Thus van den Berg, (1985) 6 Pace LR at 39-44, 62-4; Klein, (1958) 37 RCDIP 255 and 479, at 488-90.

⁴¹ For such a requirement see *Loizidou v Turkey (Preliminary Objections)*, A 310, 20 EHRR 99, para 70, citing *Tyrrer*, A 26, 2 EHRR 1, para 31. The general rule of interpretation is codified in the Convention on the Law of Treaties (Vienna, 22 May 1969), (1980) 1155 UNTS 331 (hereafter the 'Vienna Convention'), Article 31(1).

⁴² See Vienna Convention, Article 31(3)(b).

⁴³ See Glossner in *Enforcing Arbitral Awards* (1999) 5, 6.

⁴⁴ Note, however, that Article I was adopted as a whole by 28 votes in favour, 1 against, and 1 abstention; see UN Doc E/CONF.26/SR.23 (1958) 9.

⁴⁵ It should not be thought that either territoriality or procedural law are sacrosanct in practice. For instance, the FCN Treaty (US-Germany, 1954) applies (i) to awards made as between citizens of the contracting parties, (ii) even if the award has been made outside the territory of those states; see Article VI(2).

and V(1)(e): the first contains an aggregation hierarchically arranged ('It shall also apply'), whereas the second a disjunction of equal terms ('or under the law of which').

What is more, in Article I(1) the delegates were not interested in reaching agreement on 'nationality' but merely on what qualified as non-national. For instance, the Italian delegate was concerned with a change that the Convention would make to Italian law by allowing Italian citizens to arbitrate abroad, thereby reducing the Italian courts to enforcement courts only.⁴⁶ Other delegations understood Article I(1) as not obliging them to recognize the validity of awards made in their territory under a foreign procedural law.⁴⁷

The German delegate treated nationality and non-nationality as one, for he made the statement at the close of the proceedings that the Federal Republic would treat all awards made abroad as foreign for recognition purposes, but if they were made under German procedural law they would at the same time be treated as domestic for annulment jurisdiction purposes.⁴⁸ France, on the other hand, endorsed the present formulation of Article I(1) as 'less categorical and more realistic, without in any way anticipating other relevant questions',⁴⁹ clearly implying that the precise scope of the Convention was not definitely settled by the wording of the Convention.

Thus, and though in a perfect legal world the two notions would be coterminous, they clearly are not so in the system of the Convention. The foreign element defines the enforcement jurisdiction regulated exclusively by Article I, whereas annulment jurisdiction as defined in Article V(1)(e) circumscribes the outer limits of nationality. A contracting state has ostensible authority to annul any award made on its territory (Article V(1)(e)), and because that judgment is entitled to recognition abroad, for all practical purposes the nationality of the award will have been established by the act of asserting jurisdiction over that award. As a practical matter, then, nationality depends on municipal jurisdiction rules and not any abstract characterizations glossed over Article I(1). Article I(1) therefore determines only whether an award is foreign or not.

2. The True Purpose of Article V(1)(d)

The purpose of subparagraph (d) was to make the will of the parties hierarchically superior to the law of the state of the proceedings. The purpose of the ICC was to render private will the sole determinant, and this is one purpose, but the provision does more than that. Suppose that an arbitral tribunal, disregarding a clear instruction of the parties, follows a procedure peculiar to the trade sector concerned or provisions of the local law (mandatory or not) or, simply, its own fiat. Unless they constitute a breach of procedural public policy, such deviations would under common law pass muster in both the controlling and the enforcement forum⁵⁰—whereas party will is in the Convention hierarchically superior.⁵¹ That of course applies not only to contractually made-up

⁴⁶ cf UN Doc E/CONF.26/L.49 (1958). See also ICC Doc 420/INT.23 (1955).

⁴⁷ See UN Doc E/CONF.26/SR.6 (1958) at 7 (Turkey) and 8 (Colombia).

⁴⁸ UN Doc E/CONF.26/SR.23 (1958) 9. See above, Chapter 2.I.B.

⁴⁹ See UN Doc E/CONF.26/SR.5 (1958) 6.

⁵⁰ See, eg, Cass Civ 1re, (1968) 95 JDI 719 (tribunal applied the procedural law of the *situs*, though it was promulgated after the arbitration agreement; enforcement cannot be refused at common law); TF, 117 II ATF 346 (derogation from a clear instruction that parties always have the opportunity to make oral hearings does not amount to a breach of Article 182(3) LDIP).

⁵¹ See Paris, [1996] Rev Arb 100, 102 (time-limits set by parties to be respected on pain of non-enforcement even if governing law would allow derogation from parties' instructions); CA Baselstadt, (1968) 64 SJZ 378 (two-stage procedure, contrary to arbitration agreement, caught by V(1)(d)).

rules but also to rules applying in virtue of the parties having submitted to, or incorporated, a municipal law.⁵²

The other effect of the provision is to make the law of the *situs* suppletive, allowing for its application to fill gaps or to make the agreement of the parties operative when, for objective or subjective reasons, it breaks down. In fact, a substantial portion of the reported cases which state that the law of the *situs* applies despite contrary (provisions in the) agreement of the parties had to face exactly this type of situation.⁵³

In the submission of this author, the proper position is as follows. It is axiomatic for the arbitrator that the agreement of the parties must always be implemented.⁵⁴ If there is an agreement of the parties on a point, the options are two. If the agreement violates the law of the controlling forum and the award is annulled, enforcement will in principle be impossible. If it does not, then the award will be enforceable and the agreement will be given effect to under Article V(1)(d). If no agreement exists on a particular point, the arbitrator may apply the mandatory or other rule of the law of the seat. The same should apply when the agreement is incapable of being performed in the circumstances. Professor van den Berg argues for the application of the law of the seat, always, precisely to cover such cases—eg, when the agreement provides for an umpire procedure but one party refuses to appoint its arbitrator.⁵⁵ However, it is more in line with the text to expand ‘failing such agreement’ to cover cases where the agreement is factually inoperative and the parties may naturally be presumed to have wished for arbitration to take place than not to take place at all. In the example above, the party who resorted to the law (and courts) of the seat would not be punished by Article V(1)(d). In other words, rather than eliminating the principle, it is better to expand the exception, in a wholly natural way.

3. Reconciling the Provisions

Further, the argument that there is an irresistible inference from the second criterion that the award was made in accordance with the local—and in any event some—law crucially overlooks the text. Article V(1)(e) says that the parties are free sovereignly to regulate the procedure (Article V(1)(d)) only to the extent that the controlling forum so permits. On the other hand, that cross-reference is valid only to the extent that that legal system has in fact intervened and annulled the award: Article V(1)(e). So Article V(1)(e) cannot be expanded in the abstract to deactivate, as it were, Article V(1)(d) on prudential grounds.⁵⁶ In other words, it does not follow from the fact that some court may assume annulment jurisdiction over an award that the award must be governed by some law, for jurisdiction rules are unilateral. Even when they depend on a choice of procedural law, nothing excludes the creation of a *for de nécessité*, and at all events this is an issue for the municipal legislator, not for private parties, to resolve.⁵⁷ In the light of these considerations, the

⁵² The contrary proposition finds no foundation in either law or principle; thus however Mayer in *Planning Efficient Arbitration Proceedings* (1996) 25, 37.

⁵³ See *Associated Bulk Carriers v Mineral Import Export* (1984) 9 YCA 462 (SDNY 1980); Cass (It), 28 January 1982, (1984) 9 YCA 423.

⁵⁴ *Contra*, Paris, 24 February 1994, (1997) 22 YCA 682, sub [15]-[16].

⁵⁵ See van den Berg, (1987) 2 ICSID Rev-FILJ 439, 436-7.

⁵⁶ cf AAA, (1984) 39 Arb J 58, 60. *Contra*, Cmd 1515, above, note 39, 8; ILA, British Branch, Report: Delocalised Arbitrations (1982) paras 2.1-2.11.

⁵⁷ On the impact of party autonomy on annulment jurisdiction see Chapter 1.IV.B.

best interpretation would surely be the one actually allowing for the operation of both provisions: *ut res magis valeat quam pereat*.

This line of reasoning would defeat an argument made, in slightly different ways, by a number of respected authorities, namely that the references to a municipal law in Article V(1) must be read over Article V(1)(d) too.⁵⁸ One way to put this is that arbitration is a continuum based on a private pact, with the result that only the proper law of that pact would determine the various aspects of validity of an award; consequently the procedural validity is determined by the law chosen by the parties and suppletively by the law of the *situs*.⁵⁹ Another way is to interpret Article V(1)(d) from V(1)(e): if the Convention provides for some annulment authority, that authority must determine the validity according to some law—its *lex fori*.⁶⁰

It is submitted with respect that such arguments are ill-founded. They disregard a clear provision, which has been exhaustively debated and survived. The ECOSOC draft suggested that the arbitral procedure should be⁶¹

in accordance with the agreement of the parties to the extent that such agreement was lawful in the country where the arbitration took place, or, failing such agreement [with the law of that state].

That amendment was defeated, then re-introduced, then defeated again.⁶² The records of the conference contain a statement of the Italian delegate that there was an understanding in the relevant working party that subparagraph V(1)(d) intended to provide for autonomy only in respect of a given law, not as a *carte blanche* to regulate the proceedings.⁶³ But it is nowhere explained why such understanding, if indeed there was one, was not incorporated in the final text. Professor Sanders, one of the expert delegates, confirms that Article V(1)(d) simply makes party autonomy the sole determinant in matters procedural, the only limit to that such autonomy at the enforcement stage being sub-paragraph (b) of the same paragraph, which reflects the principles of natural justice.⁶⁴ This interpretation is naturally borne out by the terms of the provision and is supported by eminent authority.⁶⁵

The same interpretation was accepted as part of the relevant provisions of the UNCITRAL Model Law.⁶⁶ It will be recalled that Article 35 applies to the recognition and enforcement of ‘an arbitral award, irrespective of the country where it was made’, and that Article 36(1)(a)(iv) reproduces *verbatim* Article V(1)(d) of the New York Convention. The net result is that the Model Law

⁵⁸ See, eg, Bülow, above, note 35. To the same result but without explanation South African Law Commission, Report (Project 94, 1998) paras 3.11, 3.38-39.

⁵⁹ See Klein, above, note , 248-9; *id* in *Festgabe zum Schweizerischen Juristentag 1963* (1963) 145, 154-6; Bülow, (1959) 20 KTS 1, 11 (implicitly).

⁶⁰ See van den Berg, above, note 38, at 52-4, 62-4.

⁶¹ See Draft Convention (Annex to UN Doc E/2704 and Corr 1 (1955)), Article IV(g); and *ibid* para 43.

⁶² See the reactions of various states and the ICC in Comments on Draft Convention, UN Doc E/2822, at 7-8, 15-6, 18; and the Note by the Secretariat, UN Doc E/CONF.26/2 (1958) para 14.

⁶³ See UN Doc E/CONF.26/SR.17 (1958) 9-10; on which see Bülow, above, note 35, 89-90.

⁶⁴ See Sanders, (1959) 6 Neth ILR 43, 54. His views remain the same in later writings; see *id* in *World Handbook II* (1960) 293, 317; (1975-II) 145 RdC 205, 284.

⁶⁵ See, eg, van den Berg, above, note 36, 326-7; Fouchard, *L'Arbitrage Commercial International* (1965) 331-2; Schlosser, *Das Recht des Internationalen Schiedsgerichtsbarkeit* (2nd edn, 1989) 347; Luzzato, (1977-II) 157 RdC 9, ch II; Remiro-Brotóns, (1984-I) 184 RdC 169, 229; Ferrante in *Liber Amicorum Sanders* (1982) 129, 132-5; Motulsky, [1959] Rev Arb 2, 11; Bredin, (1960) 87 JD1 1002, 1023; Robert, [1958] D Chroniques 223, 226 (implicitly). Contini, (1959) 8 AJCL 283, 301-3 expresses hesitations.

⁶⁶ See UN Docs A/CN.9/168 (1978) and A/CN.9/WG.II/WP (1983) 4.

applies *eo ipso* to all international commercial arbitrations taking place within the territory of enacting states, in accordance with Article 1 of the Law, and contrariety to the mandatory procedural rules of the Law carries with it the possibility of annulment in accordance with Article 34(2)(a)(iv): but an enacting state does not require that an award made abroad should come within the confines of any law at all for enforcement purposes.⁶⁷

Judicial practice would confirm the reading. The provision does not give rise to litigation, so it has to be conceded that most of the reported cases deal with the matter *obiter*.⁶⁸ But the cases alleged to support a contrary reading dealt either with cases when the agreement was inoperative in the circumstances,⁶⁹ or where the parties were held to have in fact agreed on a certain municipal law,⁷⁰ or, finally, were simply *obiter*.⁷¹ The more troubling *Fratelli Damiano* judgment of the Italian *Corte di cassazione* does say that the Convention requires a '*vinculum juris* as a presupposition to recognition', but the judgment is on the whole defective.⁷² The question was whether a tribunal sitting in London was obliged to give reasons when the parties had so agreed but the local law, ie the Arbitration Act 1950, allowed it not to. The answer was clearly that it was. To reach that result the court engaged in a convoluted discussion of awards whose foundation is a *lex mercatoria* but which do not enter, the court said, the Convention's scope. To give preponderance to the agreement of the parties, and effect to the literal meaning of V(1)(d), the court argued that the parties' agreement (tacitly) 'incorporated' the European Arbitration Convention, not adequately justifying the validity of such incorporation as a true choice of law.

In a famous arbitral award made by Professor Lalive as sole arbitrator, it was said, in response to an objection to his jurisdiction based on Indian law:⁷³

According to this [international] custom international commercial arbitration may be entirely 'detached' or separated from the 'national' laws of the parties: it shall only be governed by the rules of arbitration chosen by the parties or referred to by the parties in their agreement (such as the ICC Rules in the present case). ... This was well expressed in the New York Convention ... under Article V(1)(d)

It was clear that the arbitrator considered Article V(1)(d) as evidence of a rule of general international law according to which the validity of an arbitration *as a whole* did not need to depend on a municipal law. Crucially, this finding was of no detrimental effect to subsequent enforcement proceedings in the English courts. It was disputed there whether this was a Convention award within the meaning of the Arbitration Act 1975 (it was not) and whether this was an enforceable

⁶⁷ See Analytical Commentary, UN Doc A/CN.9/264, (1985) 16 UNCITRAL YB 104, 138, para 11.

⁶⁸ See the very powerful statements by the TF, 108 ATF Ib 85, 89-90; and Rouen, 13 November 1984, [1985] Rev Arb at 126-7; *Hainan Machinery v Donald & McArthy Pte Ltd* [1996] 1 SLR 34, 41; CA Florence, 13 April 1978, (1979) 4 YCA 294.

⁶⁹ Above, note 53.

⁷⁰ Reims, 23 July 1981, [1982] Rev Arb 303. TS, 14 January 1983, (1984) 1 RCEA 182 is more ambiguous, since the court seemed to assume that the parties had chosen English law (which permitted the absence of reasons in the award) by choosing to arbitrate in England.

⁷¹ TS, 11 February 1981, (1984) 1 RCEA 149.

⁷² See Cass (It), 8 February 1982, (1982) 105 For It I 2285.

⁷³ See ICC 1512/1970 (2nd preliminary award), (1980) 5 YCA 174, sub [4]. The case is not cited here with entire approval, for it was stipulated that 'all questions arising from or pertaining to' the arbitration would be subject to Indian law and jurisdiction. See also the awards in *SA Mines, Minerais et Métaux v Mechema Ltd* [1980] Rev Arb 560, 562 (ad hoc, 1977) (less clearly); ICC award of 5 April 1984, [1986] Rev Arb 469, 472-3.

award at all, but never on the grounds that the procedural régime was not one supplied by a national law.⁷⁴

Finally, not a single policy argument has been advanced for the proposition resisted here. If the safeguards of Article V are both sufficient to stop improper awards and exhaustive, and a perusal of national laws and international documents confirms that they are, then a further requirement of a *lex arbitri* is clearly unnecessary. This remark has to be coupled with the facts that annulment jurisdiction remains, in the system of the Convention, in the domain of individual states, and that procedural irregularities of all sorts are a matter for the litigant resisting enforcement to raise. Thus, if a competent court has in principle been available to the interested party, which did not however raise an objection, what legitimate interest one seeks to protect by refusing the aegis of the Convention to awards made out of the bounds (in a procedural and general sense) of national law?⁷⁵

The conclusion is this. Arguing that the Convention requires some sort of prerequisite nexus is a gloss unsupported by its text and purpose. Experience says that if any nexus were required that would surely be reflected in the provisions on the validity of the procedure, which it is not. It is therefore circular to read a threshold requirement in a provision that does not have to provide for any such requirement in the first place, at the same time disregarding an express provision which says, in effect, that there can be no such threshold requirement. Furthermore, the argument that the Convention could not have intended to elevate private parties to lawmakers by a stroke of the pen⁷⁶ is not tenable either; if any instrument can effect such a legislative proxy, that is an international convention. Thus for instance the UNCITRAL Model Law eliminates traditional choice of law, by providing in Article 28(1) that: 'The arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable ...'.⁷⁷

The only way to reconcile the fundamental antinomy of the text, Article V(1)(d) and (e), is to accept that the Convention addresses the issue of 'nationality' as a purely jurisdictional, rather than substantive, matter, in subparagraph (e). This does not mean that if, and only if, an award is subject to appeal it may enter the Convention's scope.⁷⁸ What it means is that the courts and law of that state function as Convention organs, for the furtherance of its goals. Their jurisdiction, to the extent that it exists under their *lex fori*, is acknowledged; the Convention assumes that they

⁷⁴ See *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9; *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (QB and CA). The court interpreted the arbitral clause as subject to the laws of India but held that the procedural law was the ICC Rules supplemented by the CCP of Geneva. The interesting point is that neither court considered the possibility that the award might somehow be 'spoiled' by the finding of the arbitrator quoted above.

⁷⁵ See below, note 89.

⁷⁶ Thus Bülow, above, note 35. Similarly Wetz Müller, *Der 'Internationale' Schiedspruch* (1966) 36-49, argues that the concept of an international award was too 'revolutionary' to have been contemplated.

⁷⁷ See Model Law, Article 28(1) (emphasis added). The approach is now adopted by a number of domestic laws; see, eg, NCPC, Article 1496; CPC (Netherlands), Article 1504(2).

⁷⁸ Elements of that argument in the Remarks of Mezger and Broches, (1982) 60 ILA Rep at 282-3 and 290 respectively.

will exercise it if the law has any interest in applying⁷⁹—if it does in effect or not is a subordinate matter, irrelevant to the application *per se* of the Convention.⁸⁰

C. Non-Domestic Awards

1. The Theoretical Considerations

Article I(1), second sentence has been used against the literal reading here advanced, on the grounds that the phrase ‘not considered as domestic’ exclusively means ‘awards made under the procedural law of another state’, so that a similar requirement should be read into the first sentence of the same paragraph.⁸¹ However, Article I has a logic of its own, and gives a supplemental effect to the procedural law of a given state (whereas this role may be exclusive under Article V). So the first point is that if Articles V(1)(e) and I(1) do not run parallel in effects, they do not need to run parallel in substance either.

As has been seen above, the aggregation of the two criteria in Article I is the result of a compromise, and of the rejection of a criterion that would leave it to each state to determine which awards are foreign (ie, Convention awards) and which domestic. Germany at that time did adhere to a procedural characterization of nationality, but other states that shared similar concerns did not.⁸² These considerations would suggest that the concept of non-domestic awards is defined by blanket reference to the law of the forum.⁸³

Further, the debates before and at the conference show that the delegates were concerned to restrict the operation of the Convention, so that no arguments from those debates can be used against a state that wishes to *expand* its coverage. In the same vein, the compromise solution adopted in Article I(1) evidently changed not only the effectiveness of the original proposal, but also its texture. The addition of ‘also’ is crucial, for it demolishes any policy or dogmatic barrier to an expansion of the coverage of the Convention to awards not made in the territory. First, the Convention does allow a more favourable treatment of arbitral awards (see Article VII(1)). And if Article VII(1) cannot be applied by direct analogy in support of the reading advanced here (for it would presuppose an award falling within the scope of the Convention, which would take us back to the original question), an interpretative analogy may be drawn. Secondly, the safeguards in enforcement are designed to be adequate, and may satisfactorily replace any domestic law, except when they yield to an even more favourable provision.

If that is correct, then any criterion may be used to expand the coverage of the Convention. For instance, nationality of the parties, an impermissible consideration of non-foreign character under the Convention,⁸⁴ is harmless if used to enlarge its coverage. Other considerations that could be adduced are the nationality of the arbitrators *vis-à-vis* that of the parties, the law governing the arbitration agreement, or an objective criterion related to the international character of the under-

⁷⁹ cf Samuel, *Jurisdictional Problems* (1989) 295; Fouchard *et al*, *Traité* (1996) 655-6; Lando, (1985) 34 ICLQ 746, 763, note 65; Rivkin, (1993) 9 Arb Int 67, 81.

⁸⁰ For the proposition that exclusion *in limine* of the jurisdiction of the courts to entertain an annulment action does not preclude enforcement see TF, 101 Ia ATF 154, 156-8; *Gerechtshof, The Hague*, 28 April 1998, (1998) 23 YCA 731, 734.

⁸¹ See van den Berg, above, note 40.

⁸² See above, notes 30-32.

⁸³ Accord: Rensmann, (1998) 15:2 J Int Arb 37, 55.

⁸⁴ See New York Convention, Articles I(1), II(1), III; and note 22 above.

lying transaction. Such factors have been found relevant, as will be seen in the outline of practice below.

2. The Relevant Practice

There is some legislative practice in the form of enactments to give effect to the Convention which would confirm that 'non-domestic' is a characterization entirely for the enforcement forum. The South African Act contains an unclear, but seemingly catch-all, clause, which renders the Convention applicable to awards 'the enforcement of which is not permissible in terms of the Arbitration Act, 1965 ... but which [are] not in conflict with the provisions of this Act'.⁸⁵ A less well-known example is provided by the Ghanaian Act, which defines non-domestic awards by reference to the law applicable to the agreement to arbitrate.⁸⁶ Indian law contains an obscurely worded but open-ended provision which seems to allow for enforcement under the Convention of, amongst others, awards made pursuant to foreign arbitration law on Indian territory.⁸⁷ (In fact, the provision is so widely drafted that it would cover any award resulting from an agreement in writing, for the Convention applies to any agreement in writing, irrespective of any element of internationality.⁸⁸) And finally, Swiss and Swedish laws render the Convention applicable to awards made in the territory but in respect of which the parties have excluded any means of recourse.⁸⁹

The available jurisprudence would further corroborate the point. Thus, German courts have applied the procedural law criterion, even though in all available cases this was an *ad abundantiam* consideration, for the awards concerned were made abroad.⁹⁰ Similar decisions had been made by French courts under the régime predating the amendment of the NCPC in May 1981.⁹¹

The case-law from the United States is richer, and elucidates some of the issues raised by the German and French decisions. Chapter 2 of the Federal Arbitration Act, implementing the New York Convention, contains a provision reading in relevant part as follows:⁹²

An agreement or award arising out of [a commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

Historically, the provision attempts to clarify that the Convention does not apply to interstate commerce, to which Chapter 1 of the Federal Act applies.⁹³

⁸⁵ See Recognition and Enforcement Act (South Africa), Definition of 'foreign arbitral award' under (b); on which see Jacobs, *The Law of Arbitration in South Africa* (1977) 164. The Act is to be repealed by a new act, and that definition will disappear; see the Report cited above, note 58, at paras 3.35-3.44.

⁸⁶ See Arbitration Act (Ghana), s 36(1).

⁸⁷ See Arbitration and Conciliation Act, 1996 (India), s 44(a): awards made 'in pursuance of an agreement ... to which the [Convention] applies'. (The provision descends from the Foreign Awards (Recognition and Enforcement) Act, 1961, s 2(a).

⁸⁸ See New York Convention, Article II.

⁸⁹ See above, Chapter 2.II.C. Lalive *et al*, *Le Droit de l'Arbitrage* (1989) 450-51, argue that this is not a mere extension by means of domestic law, but an extension under the non-domestic clause.

⁹⁰ cf BGH, 104 BGHZ 178 (award made in Belgium); BGH, (1976) 22 RIW 449 (award made in Romania); LG Munich, (1980) 5 YCA 260. In all these cases the reference is to ZPO § 1044(2)(1) (old).

⁹¹ Paris, 19 November 1982, [1983] Rev Arb 466; Cass Civ 1re, 9 October 1984, [1985] D 101. The award was made in Austria.

⁹² 9 USC § 202.

The first case where the issue was crucial to the determination of the dispute concerned an award rendered by an tribunal in New York between a Swiss and a Norwegian party and under a clause providing expressly that the arbitration would be governed by the law of that state. The court was asked to apply § 201 and enforce the award under the Convention's provisions. After a narrative of the preparatory materials, where it noted the procedural-territorial distinction, the court went on to hold that⁹⁴

awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legislative framework of another country, e.g., pronounced in accordance with foreign law *or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.*

Conscious of the fact that the procedural law criterion to which it clearly alluded by the words 'made within the legislative framework' is not a consideration of the same nature as the domiciles of the parties being outside the jurisdiction, the court hastened to add:⁹⁵

We prefer this broader construction because it is more in line with the intended purpose of the treaty, ... namely to encourage the recognition and enforcement of international arbitration awards.

If the arguments adduced above, in section II.C.1, are correct, the court would not need to weave the factual and legal criteria together. But the court accepted that § 202 had an expansive (side-) effect and therefore Chapters 1 and 2 of the Federal Act had overlapping coverage.⁹⁶

The subsequent case-law from all circuits has simply taken *Bergesen* as a given,⁹⁷ and applied the Convention even in situations where both parties were domiciled in the United States but the dispute related to international trade.⁹⁸ It is of some importance to note here that the executive and legislative branches seem to have assented to such expansion of the coverage of the Convention. The legislation implementing the Inter-American Convention, Chapter 3 of the Act, contains no reservation that would preclude the *Bergesen* interpretation.⁹⁹

Note here that a matter of some disagreement was whether the reciprocity reservation made by the United States on accession, that it would apply the Convention 'only [to] those awards made

⁹³ See van den Berg, above, note 38, 49; and 9 USC § 1.

⁹⁴ *Bergesen v Joseph Muller Corp*, 710 F2d 928, 932 (2d Cir 1983) (emphasis added, citation omitted). For a detailed (and critical) comment and further references see van den Berg, above, note 38.

⁹⁵ *ibid* (citation omitted).

⁹⁶ *ibid* 933-4.

⁹⁷ See, eg, *McDermott International, Inc v Lloyds Underwriters of London*, 120 F3d 583 (5th Cir 1997); *Skandia America Reinsurance Corp v Seguros La Republica*, 1996 WL 622559 (SDNY 1996); *Allen Group, Inc v Allen Deutschland GmbH*, 877 FSupp 395 (W Mich 1994); *SAE Sadelmi SpA v Papua New Guinea Electr. Comm'n*, 1994 WL 669543 (SDNY, 1994); *Dworkin-Cosell Interair Courier Services, Inc v Avraham*, 728 FSupp 156 (SDNY 1989). For a good judicial discussion of the arguments, and references to academic papers see *Trans Chemical Ltd v China National Machinery Import and Export Corp*, 978 FSupp 266 (SD Texas 1997); *affirmed*, 161 F3d 314 (5th Cir 1998).

⁹⁸ See *Lander Co, Inc v MMP Investments, Inc*, 107 F3d 476; *cert denied*, 118 SCt 55 (1997).

⁹⁹ See 9 USC §§ 301-307. If anything, § 307 would say the contrary; it provides that:

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

For an application of the Inter-American Convention to awards made in the US, and a discussion of the matter see *Productos Mercantiles e Industriales, SA v Faberge USA, Inc*, 23 F3d 41, 44-5 (2d Cir 1994).

in the territory of another Contracting State',¹⁰⁰ precluded the play of the non-domestic clause. The Court of Appeals for the Seventh Circuit, *per* Posner CJ, thought that it did not, and other courts followed suit.¹⁰¹ The judgment is not entirely clear, but it would seem that the learned judge was saying that if the intention was to make an exclusion, § 202 would not have been included in the first place. This is to a great extent question-begging, for the object of the inquiry is still the true effect of § 202. But it transpires from the practice of other states, who fought for the inclusion of non-domestic awards at the conference but made the reciprocity reservation nonetheless, that the reservation applies only in regard to the territorial criterion.¹⁰² For the extension of the Convention to awards made in its territory is, as it were, courtesy of that state (because no state needs to extend the Convention to non-domestic awards at all and relatively few have done so), so that no reservation would be necessary for such cases.¹⁰³

The second matter that arises out of the non-domestic classes of awards is the determination of the annulment forum. As a direct result of the overlapping coverage of Chapter 1 of the Federal Act on the one hand and 2 and 3 on the other, United States courts now wear two hats in respect of non-domestic awards: they may enforce them under Chapters 2 and 3 but at the same time also control them under Chapter 1.¹⁰⁴

This is not as paradoxical as it would appear at first sight, and certainly not in violation of the treaty obligations of the United States. What happens now is that United States courts continue to perform a role given to them in Chapter 1,¹⁰⁵ whereas they *additionally* function as enforcement courts for the same awards. So that if there is a motion to confirm and a cross-motion to vacate and the court finds for the party resisting enforcement, it will apply Article V(1)(e), first case, and dismiss the motion to enforce. This is surely more in line with the spirit of the Convention, especially if account is taken of the inverse situation prevailing in Germany under the 1961 implementing act, which affords German courts jurisdiction to annul awards made abroad (that is, awards within the primary scope of application of the Convention) but under German law, apparently without protest from other contracting states.¹⁰⁶

The authorities are unanimous that although enforcement of non-domestic awards made in the territory may proceed under the Convention, under no circumstances can an award made under

¹⁰⁰ See 21 UST at 2566.

¹⁰¹ See *Lander*, above, note 98, 481-2.

¹⁰² Germany and France both made Article I(3) reservations (339 UNTS 286 and 336 UNTS 426 respectively), which are now withdrawn; see *Multilateral Treaties Deposited with the Secretary-General*, status as at 30 December 1999, <<http://www.untreaty.un.org>>. See the judgments cited above, notes 90-91.

There is an isolated opinion of the Court of Appeal for Paris urging the contrary interpretation (see Paris, 21 February 1980, (1980) 107 JDI 660), but this was clearly an *obiter*, and thus not crucial, for the court had accepted that the Convention did not apply to a *recours en nullité*, which was the object of the judgment. See however for an approval of that part of the judgment, de Boissésou, *Le Droit Français de l'Arbitrage* (1990) 435, 437-8.

¹⁰³ See the closely argued and elegant paper by Rau, (1996) 7 Am Rev Int Arb 213, 225-8. And see further Domke, (1971) 19 AJCL 575, 576-7; Bredin, (1960) 87 JDI 1002, 1012; Bülow, (1961) 83 JBI 305, 308-9; Sedalek, (1962) 4 ZfRV 23, 25. *Contra*, Gaja in *Essais Minoli* (1974) 191, 208; Marmo, (1959) 42 Rivista DI 31, 34-5.

¹⁰⁴ See, eg, *Yusuf Ahmed Alghanim & Sons, WLL v Toys "R" Us, Inc*, 126 F3d 15 (2d Cir 1997) (on which see Carbonneau, (1998) 6 Tul J Int & Comp L 277); *Spector v Torenberg*, 852 FSupp 201 (SDNY 1994); *Celulosa del Pacifico SA v A Ahlstrom Corporation*, 1996 WL 103826 (SDNY 1996). The 'two hats' approach was also adopted by the House of Lords at one time; see above Chapter 2.I.D.

¹⁰⁵ See 9 USC §§ 9-16.

¹⁰⁶ See above, Chapter 2.I.B.

federal procedural law but in a foreign state be annulled in the federal courts.¹⁰⁷ In other words, the concept of non-domestic awards may enlarge only enforcement, not annulment competence.¹⁰⁸ Interestingly, the courts have not cited the traditionally territorial foundation of their annulment jurisdiction in support of that proposition;¹⁰⁹ they have resorted to Article V(1)(e) to show that this would be contrary to the Convention. They thus perceive their aggregate jurisdiction as a true *dedoublement fonctionnel*.¹¹⁰

The practical differences at the level of substantive grounds for *vacatur*, if any, not being critical,¹¹¹ it may of course be queried whether there is any useful purpose in the creation of non-domestic awards. But this is outside the ambit of this thesis. There are two important lessons from the brief discussion on non-domestic awards. First, it is confirmed that the non-domestic characterization is a matter exclusively for the forum concerned and not necessarily related to the procedural law of the arbitration. Secondly, there is a bifurcation between annulment jurisdiction, that alone having any consequences resembling to 'nationality', and enforcement jurisdiction, that being exclusively an Article I(1) issue.

D. Conclusions

It is unfortunate that such an important instrument as the Convention still poses fundamental problems of interpretation like the ones discussed in this section. Admittedly, such problems can in the overall scheme of things be relegated to the periphery of real life. But they do arise in a few hard cases which are sufficiently important to ask for a reconsideration of the basic questions (such cases are discussed in the following sections).

It is interesting, and of some general validity, to note the amount of skilled labour and controversy surrounding a text that on its face is straightforward. But there is in truth no such thing as plain meaning, and our fond presuppositions (this author not excepted) often creep in the analysis. The other factor is of course that even legislative texts suffer from lack of clarity and technical infelicities. Though it is true that 'those who have not participated in the give-and-take of the diplomatic process become the heroes of retrospective analysis',¹¹² the need for a compromise at the expense of clarity is sometimes an important consideration in legal analysis. In conclusion, the Convention's requirement of scope are determined (i) by a simple geographic criterion into which nothing further needs to or should be read, and additionally (ii) by some other factor which is in the discretion of the enforcement forum as to the content and as to whether it will be included at all. The requirements for enforcement are then exclusively and exhaustively set out in Article V, which acknowledges a split proper law for arbitration and as far as procedural law is concerned makes the will of the parties the primary law of the arbitral proceedings.

¹⁰⁷ See the authorities above, note 104.

¹⁰⁸ A pre-New York Convention case suggests the contrary, but only tentatively, and it remains isolated: *Amtorg Trading Corp v Camden Fibre, Mills*, 304 NY 519 (CA New York 1952).

¹⁰⁹ See above, Chapter 2, text to notes 120-125.

¹¹⁰ See *Toys "R" Us*, 126 F3d at 19-23.

¹¹¹ They concern (a) the additional judge-made ground of 'manifest disregard of the law' read into Chapter 1; (b) possibly, a different standard of violation of public policy; (c) different procedural deadlines. See further Rau, above, note 103, 234-41. However, a permeation of federal law by more flexible standards prevailing under the New York Convention is a likely development in the future.

¹¹² Kissinger, *Years of Renewal* (1999) 178.

III. AWARDS OF THE IRAN – UNITED STATES CLAIMS TRIBUNAL

A. The Issues

A central and distinctive element of the Iran – US Claims Tribunal (hereafter the ‘Tribunal’) is that its monetary awards against Iran and in favour of US subjects, but only such awards, are to be satisfied from an escrow account in which were placed Iranian assets that had been frozen by the United States immediately after the revolution.¹¹³ Iran is under an obligation to replenish the account so that the balance will be at all times US\$ 1 billion.¹¹⁴ Because of that extremely powerful extra-judicial enforcement mechanism, ordinary court procedures become of marginal practical importance in the overall caseload of the Tribunal, for the few monetary awards made by the Tribunal in favour of Iranian nationals and in the context of proceedings in other fora where an award of the Tribunal is pleaded with preclusive effect.

The relevant provision, Article IV(3) of the Claims Settlement Declaration, is framed in wide terms:

Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

The provision has a threefold purpose: it confirms that the Tribunal’s awards must be accorded the same validity as judicial decisions of a competent forum; creates an obligation on the two contracting states to provide in their internal legal order a mechanism through which they will be enforced as such; and perhaps operates as constructive waiver of immunity from enforcement.¹¹⁵ It is of course to be observed that the reference to ‘enforceable awards ... in the courts of *any* nation’, insofar as it may be construed as an onerous obligation on third parties, cannot be binding on any other state which has not expressly assumed the obligation to treat the awards as valid.¹¹⁶ The only ‘objective’ effect that Article IV(3) may have *vis-à-vis* third states’ fora is reduced to a solemn, if indirect, declaration of the fact that the awards emanate from a competent international tribunal duly constituted by an international agreement of the states concerned—a fact to which the third state concerned will attribute the juridical value appropriate under its laws. But the matter has never directly arisen in the context of enforcement proceedings.¹¹⁷

The above quoted provision does not, however, spell out the exact mechanism through which awards are to be ‘enforceable’, perhaps because of the very particular circumstances under which the wording was negotiated and drafted. Nonetheless, over and beyond the declarative value of the provision, it is plain that, in accordance with ordinary treaty principles, it does create a positive obligation, leaving the modalities of its implementation to the two states concerned (*obligation de résultat*). The first leg of this obligation was aptly described by the Tribunal in the following terms:¹¹⁸

¹¹³ See GD, para 7. And *Sperry Corp v United States*, 853 F2d 904 (Fed 1988); *reversed*, 493 US 52 (1989).

¹¹⁴ *ibid.*

¹¹⁵ On the last point: Mohebi, *The International Law Character* (1999) 273-4.

¹¹⁶ See Vienna Convention, Article 35 (*stipulation à la charge d’autrui*).

¹¹⁷ The issue has arisen in the context of proceedings on the same dispute in a different forum, as part of an estoppel *per rem judicatam* defence; see *Dallal v Bank Mellat* [1986] QB 441, 458-63.

¹¹⁸ *Iran v US* (62-A21-FT) 14 Iran-US CTR 324, 330, para 14 (1987).

The Parties to the Algiers Declarations are obligated to implement them in such a way that the awards of the Tribunal will be treated as valid and enforceable in their national jurisdictions.

The second leg of the obligation was described thus:¹¹⁹

It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto. If procedures did not already exist as part of the State's legal system they would have to be established, by means of legislation or other appropriate measures. Such procedures must be available on a basis at least as favorable as that allowed to parties who seek recognition or enforcement of foreign arbitral awards.

The reasoning of the Tribunal in respect of its last conclusion is not free from ambiguity, and this because of the inherent constraints imposed on an international tribunal sitting in judgment of international responsibility of states. As is the case with all international courts and tribunals, it is not within the jurisdiction of the Tribunal to prescribe the proper course of action when the obligation in question does not contain or entail precise action; they must confine themselves to a review and appreciation of the outer limits of the discretion exercised by states in their domestic sphere.¹²⁰

The Tribunal's *ratio* would seem to be that the closest equivalent in domestic law, foreign arbitral awards, should be made to accommodate the Tribunal's awards; it is *not* said that the arrangements, within each state, for the enforcement of foreign arbitral awards do or should apply *ipso facto* to the awards of the Tribunal. For, additionally, that would entail a sovereign interpretation of treaties in force for the states concerned—treaties, in other words, outside the Tribunal's jurisdiction. The ruling of the tribunal would thus be satisfied with a domestic law edict that would render applicable, in the territories of the two states, the New York Convention (in the context which is of interest here), with modifications to take account of the special nature of the awards of the Tribunal. Even in the absence of such legislation, however, United States courts have interpreted the Convention to be applicable, under its own terms and the implementing US legislation, to Tribunal awards.

So the issues may be conveniently grouped as follows. If the Tribunal's awards were Dutch, then the Convention would be directly applicable. If, however, they are not, as was argued above,¹²¹ then the mechanism of applying the Convention, if any, must be discussed. That discussion is of general relevance to the enforcement of awards made by tribunals established under international law.

B. The Approach of the Courts

It must at the outset be made clear that the intervention of national authorities for enforcement of awards based on international treaties is still necessary. Though the international instrument will invariably speak of final and binding awards this means no more than awards subject to no appeal on the merits. If other, 'extraordinary', remedies are excluded too, such as remedies for lack of

¹¹⁹ *ibid* para 15.

¹²⁰ See, eg, *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*, ICJ Reports 1950, 395.

¹²¹ See above, Chapter 5.II.

jurisdiction or gross procedural violation, then that will be spelt out.¹²² More importantly, international law does not imply a term in an arbitration agreement that would make an award self-executing.¹²³ So the awards of the Tribunal must still go through the national courts.

The opportunity to test these propositions arose from two awards of the Tribunal awarding large sums to the Iranian respondents by way of counterclaim.¹²⁴ Iran brought an interpretative dispute before the Tribunal, arguing that the United States had an international law obligation to satisfy those awards, independently from any steps that the Iranian parties might take in the courts. The Tribunal found no term, express or implied, in the Declarations supporting that construct, but simply held that the United States had an obligation to provide an appropriate mechanism in *foro domestico*.¹²⁵

A first point, which is not made explicit in the case-law is that the New York Convention's wide terms, 'awards arising out of differences between persons, whether physical or legal' do cover awards concerning states.¹²⁶ The European Arbitration Convention makes that clearer by expressly providing that 'legal persons of public law' have the right to conclude valid arbitration agreements.¹²⁷

The Court of Appeals for the ninth circuit enforced the first of those awards under the New York Convention.¹²⁸ The court relied on the plain language of § 202 of the Federal Act and found that nothing precluded the award being a Convention award. In particular, it dismissed an argument that Convention awards must, as a prerequisite, be made under a national law. The crux of the court's reasoning is that the Convention contains specific grounds for refusal of enforcement and there is thus no need to read into the opening provision any further requirements than those contained in the text (and § 202).¹²⁹

The second case posed more complex problems. The circumstances were similar, and the court had the advantage of the *Gould* precedent and the Tribunal's award on the obligation to provide for enforcement. In the instant case, however, the party resisting enforcement argued that the award was tainted with the irregularity of Article V(1)(b), lack of due process in the specific form of inability to present one's case. This was due to the extremely unusual circumstances of the case.¹³⁰ In short, the case of the respondent (claimant in the Tribunal case) was that it was directed by the president of one of the chambers of the Tribunal at a pre-hearing conference to submit an

¹²² See, eg, ICSID Convention, Article 53(1): 'shall not be subject to appeal or any other remedy except those provided for in this Convention.'

¹²³ See TC Brussels, 30 April 1951, (1952) 41 RCDIP 111 (enforcement not possible without *exequatur*).

¹²⁴ *Gould Marketing, Inc v Ministry of National Defence of Iran*, 3 Iran-US CTR 147 (Interlocutory Award, 1983) (permitting counter-claims as stand-alone, rather than set-off, claims); *Gould Marketing, Inc v Ministry of National Defence of Iran*, 6 Iran-US CTR 272 (1985) (awarding damages for breach of contract and ordering specific performance); *Avco Corporation v Iran Aircraft Industries et al*, 19 Iran-US CTR 200 (1988) (same).

¹²⁵ See above, text to notes 118-119.

¹²⁶ See van den Berg in *Acts of State* (1997) 41, 42-4; Delaume, (1997) 91 AJIL 476, 477, with further references.

¹²⁷ See European Arbitration Convention, Article II(1).

¹²⁸ See *Ministry of Defense of Islamic Republic of Iran v Gould, Inc*, 887 F2d 1357 (9th Cir 1989); *cert denied*, 494 US 1016 (1990); *distinguished by Reynolds v International Amateur Athletic Federation*, (1996) 21 YCA 715 (SD Ohio 1993). See also *Ministry of Defense of Islamic Republic of Iran v Gould, Inc*, 969 F2d 764 (9th Cir 1992).

¹²⁹ See *Gould*, 887 F2d at 1364-5.

¹³⁰ For a detailed account see *Iran Aircraft Industries et al v Avco Corporation*, 980 F2d 141, 143-4, (2d Cir 1992); and Judge Brower's Concurring and Dissenting opinion in the original award: 19 Iran-US CTR at 238.

audited version of the accounts receivables ledgers rather than the invoices in its possession individually, whereas the Tribunal later dismissed the claim on the grounds that the necessary invoices had not been submitted.¹³¹ The court found that this constituted a V(1)(b) defence.

The case turned on whether the particular nature of the Tribunal's awards precluded the court from refusing enforcement, on any ground. It was held that the obligation to treat the Tribunal's awards 'at least' *pari passu* with foreign arbitral awards really meant 'exactly as' such awards, and that 'final and binding' did not imply automatic enforcement.¹³²

The resulting interstate dispute ended up before the Tribunal, Iran alleging a violation of treaty obligations. Here as well, the disagreement was on the meaning of 'final and binding' as a rule delimiting the respective jurisdiction of the Tribunal and national authorities. Iran argued that the New York Convention was not an appropriate vehicle at all, as it was made for foreign rather than international awards.¹³³ The Tribunal reasoned thus:¹³⁴

The Tribunal agrees that those provisions are problematic in the context of Tribunal awards, particularly when viewed in the light of the States Parties' obligations under the Algiers Declarations relating to the enforcement of those awards. Indeed, Article IV, paragraph 1, of the Claims Settlement Declaration, which provides that '[a]ll decisions and awards of the Tribunal shall be final and binding', rules out the possibility of re-judication of the merits of Tribunal awards by a municipal court, either under the guise of Article V of the New York Convention or by any other means.

Despite the reference to 'problematic' provisions, nowhere does the Tribunal subscribe to the argument that the United States must provide another vehicle for the enforcement of its awards. All the Tribunal requires is that the enforcement forum confine itself to a confirmation of the authenticity of the award.¹³⁵ This fact, coupled with a silent dismissal of the Iranian argument on the inappropriateness of the Convention and the confirmation of the international nature of the Tribunal's awards, is strong evidence for the interpretation advanced here. Lest it be accepted that the Tribunal contemplated the Convention as a one-off vehicle or in terms that change the nature of the instrument altogether—which does not seem cogent and is not what the Tribunal said—the *Iran v US (A27)* case is a refutation of any additional material requirement for the scope of the Convention.

There is no evidence to suggest a contrary interpretation. The only contrary ruling has been that of sole arbitrator Lagergren in *BP v Libya*, refusing the possibility that the procedural law could be international law, *inter alia* on the ground that:¹³⁶

[T]he parties ... must be presumed to have intended to create an effective remedy. The effectiveness of an arbitral award that lacks nationality—which it may if the law of the arbitration is international law—generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality. [T]he attachment to a developed legal system is both convenient and constructive.

¹³¹ See 19 Iran-US CTR at 211. However, the Tribunal rejected the claim on the grounds of lack of evidence that the invoices were payable: *ibid*.

¹³² See *Avco*, 980 F2d at 145 (Cardamone J dissenting on the grounds that V(1)(b) requires a very strong injustice).

¹³³ See *Iran v US (586-A27-FT)* (1998) 13 Mealey's Int Arb Rep G-1, para 33 (1998).

¹³⁴ *ibid* para 63; see also para 69.

¹³⁵ See New York Convention, Article IV(1)(a).

¹³⁶ *BP Exploration Company (Libya) v Libya (Merits)*, 53 ILR 297, 309 (ad hoc, 1973).

Note that Lagergren did not pronounce himself in categorical terms, and his reasoning is one of prudence. To the extent that his opinion would apply to the New York Convention too, it is suggested that there is no ground, and none is adduced in the award, to believe that such opinion is correct in strict law.

C. Some Distinctions and a Postscript on Nomenclature

This section has examined a representative and contemporary example of a standing international tribunal and its practice as a confirmation of the proposition that all awards made outside the territory are capable of enforcement under the Convention. The same considerations would apply to the exceptional case, examined in Chapter 5 above, of awards made by tribunals established between a private party and a state or analogous entity and functioning under international law.

It is often suggested that international awards should fall under the Convention because they are anational or stateless (which are the object of the next section). Unless the argument is made simply *a fortiori*, it should be clear that an award made by a tribunal established and proceeding under international law is anything but stateless; it is an award of another nature. It is only the basic rationale that is the same: no inherent quality is required by the Convention. But the specific applications differ sharply.

In the case of international awards (i) the proper law of the arbitration agreement will be international law and never the law of the state of the proceedings, unless the constitutive instruments provide for its application; (ii) the law governing the proceedings in Article V(1)(d) will be exclusively the agreement of the parties, having force of law by virtue of its being an international law instrument; (iii) annulment or suspension, if at all available, can only be effected by the organ to which that function is entrusted by the relevant instrument and never by the courts of the law of the state of the proceedings. Additionally, the other defences, including public policy and arbitrability may fall away too, but only in respect of a New York Convention state which is also party to the agreement establishing the tribunal concerned, and if that agreement expressly or by necessary implication so requires.

By contrast, the only deviations for stateless awards is that municipal law as a fall-back option in Article V(1)(d) ceases to apply and that they may be afforded immunity from annulment in the courts, but that as a matter of domestic law and not by operation of international law. So though the treatment of those two types of awards under the domestic law clauses of the Convention may be similar, it is by no means identical, and the 9th Circuit in *Gould* was wrong to hold the contrary.¹³⁷ But there is nothing in the grain of either the Convention or such awards to keep them out of its scope: with necessary adaptations, Article V can still adequately deal with such awards.

IV. ANATIONAL AND STATELESS AWARDS

In this short section the conclusions of the preceding sections will be tested against the backdrop of the few relevant reported cases. The paucity of the evidence is in itself no cause for concern, with the proviso however that the case-law as a whole cannot be considered as representative or conclusive, for the simple reason that both anationality and statelessness are, at a minimum, marginal phenomena.

¹³⁷ In *Gould*, 887 F2d at 1365. Moreover, and contrary to the court's holding, municipal law under Article V(1)(a) cannot fall away, because this would imply a *contrat sans loi*.

In what follows anationality is taken to be a quality of the award resulting from a decision of the parties or the arbitrator to exclude the proceedings, and in particular the procedural law governing them, from any municipal legal order. Thus anationality is a deliberate choice sanctioned by a given legal order which refuses to exercise annulment jurisdiction recognizing that the award is outside its law. Awards purportedly made under no law at all but not brought to the scrutiny of the courts may also be called anational; in that case the so-called 'negative choice' is in effect a glorified exclusion agreement.¹³⁸ By contrast, a stateless award is one not accepted by any legal order as domestic, although the record (clause, terms of reference, award) would show no such intention. Statelessness would in other words denote the 'homeless' status of an award putatively or possibly made within the bounds of some system of law.

Such adjectives must of course be accepted for pedagogical purposes and only with a pinch of salt. First, the net result is the same in both cases, and this is the important thing for our purposes here. Secondly, the purity of the distinction is blurred in practice.¹³⁹ Thirdly, the terms here employed seek to portray as absolute what is in fact rather relative: we cannot be sure whether an award is nowhere accepted as domestic before all connected legal systems have been tried. So the terms refer in the main to the law of the place where the award has been made, on the assumption that this system could make a strong claim to regulate the award (for stateless awards) or is the one whose effects one seeks to avoid (for anational awards).

A. Anational and Homeless Awards

The starting point must be the case, in fact the judicial marathon, of *Société Européenne d'Etudes et Entreprises v Yugoslavia*. The facts are well told elsewhere,¹⁴⁰ but the essential elements are as follows. In 1932, a French company, Société Européenne d'Etudes et Entreprises (hereafter 'SEEE') entered a contract with the Yugoslav state (as it then was) for the construction of a railroad. SEEE's remuneration would be by way of bonds spread over a number of years. Payments were suspended during the second world war and never resumed. In 1950, the French government, exercising diplomatic protection, agreed a lump-sum settlement with the Yugoslav government. SEEE took the view that the settlement did not extinguish all contractual obligations of Yugoslavia, and thus the payment was not in full satisfaction. It initiated arbitration under a clause contained in the contract, where Yugoslavia refused to appoint its arbitrator. An arbitrator was appointed by the judicial authorities of the Canton of Vaud, and the arbitration proceeded with two arbitrators.¹⁴¹ In 1956, they found for SEEE on the merits, and awarded it approximately 6 billion French francs with interest.¹⁴²

A long string of enforcement litigation ensued in France, where the crucial questions were whether the intergovernmental settlement had extinguished SEEE's claims and whether Yugosla-

¹³⁸ Indeed, the unavailability of recourse is a fundamental objection to anational awards: van Hecke in *Essays Wengler II* (1973) 357, 361-2.

¹³⁹ The British ILA Branch for instance did not distinguish: see above, note 56, paras 1.7 and 2.4.

¹⁴⁰ See Delaume, (1987) 4:3 J Int Arb 25; Paulsson in *Contemporary Problems* (1987) 141, 142-3.

¹⁴¹ The clause, quoted in full in (1958) 37 RCDIP 359, provided for an umpire procedure. For a similar clause in a contract with Yugoslavia see the *Losinger & Co* case, PCIJ, Series C, No 78, 44 at 52-3 (Article XVI).

¹⁴² See *SEEE v RFP Yougoslavie* (1959) 86 JDI 1074 (ad hoc, 1956).

via was protected by sovereign immunity.¹⁴³ The litigation relevant here took place in Switzerland and the Netherlands.

Yugoslavia brought a *recours en annulation* before the *Tribunal cantonal* for Vaud, on the ground that the two-arbitrator procedure was invalid by the law of that Canton.¹⁴⁴ The court conceded the argument, but reached a different conclusion. It reasoned that the judicial intervention provided for in the clause was no conclusive evidence of an intention to subject the arbitration to the 'judicial authority' of the Canton, and no such intention was pleaded in the court; that the law of the Canton allowed an '*arbitrage conventionnel*', that is, an arbitration outside the bounds of that (procedural) law; and that, in consequence, it could not accept the award *qua* award 'within the meaning of Article 516 of the Code of Civil Procedure of Vaud', but without prejudicing the possible validity of the award under another municipal law.

The judgment is no doubt peculiar and confused. It must be seen against the background of an antiquated procedural law, on the one hand, and an arbitration clause concluded between experienced parties negotiating at arm's length on the other. The court was at crossroads reconciling those two factors. The backbone of the court's reasoning was that the arbitral *lex fori* is a matter for the parties to choose (citing Klein), and that consequently the law of the seat could not, without more, apply. This is an admirable but potentially threatening premise. Assuming that by its own law an application to set aside could not be excluded by the parties, and therefore that law either applied or did not apply at all, the court failed to see that there must be a fall-back legal order (something akin to a *for de nécessité*). Its reasoning that the parties had shown no intention to have a Vaudois award was flawed, in that they had shown nothing contrary to that either, and this is what matters. And nowhere does the court say that it would be prepared to apply another law to determine the validity of the award, had it found that that law was chosen by the parties. Consequently, the only honest alternatives would be either to accept the award's registration as a mere material act or to go on and annul it. As the *dispositif* stands, 'nothing is said here of the validity of the award by its proper law, which law we cannot determine save that it is not our law', it is a landmark of judicial indeterminacy and good intentions unfulfilled. Or, the objective inability of the judge to mitigate the undesirable effects of his own law.

The important point here, however, is that the court did not annul the award. The judgment purported to achieve a quasi-equitable solution, and in no way to prejudice the fate of the award. This was confirmed in the subsequent judgment of the *Tribunal fédéral*, which rejected an appeal by SEEE on the grounds that no annulment, not even partial, had been effected by the court below, and thus SEEE lacked standing to sue ('*intérêt légitime à agir*').¹⁴⁵

It is parenthetically noted that there exist two similar decisions of Swiss courts. The first follows suit after SEEE and reiterates the same reasoning and conclusions albeit in different circumstances.¹⁴⁶ The second is a judgment of the *Tribunal fédéral* which expressly approves the approach of the trial courts. In circumstances very similar to the SEEE case, the court affirmed that

¹⁴³ A chronologically arranged narrative: TGI Paris, 8 July 1970, (1971) 98 JDI 131. The *exequatur* granted was retracted, and that judgment was confirmed by Paris, 29 January 1975, (1976) 103 JDI 136; *reversed*, Cass Civ 1re, 14 June 1977, (1977) 104 JDI 864. Meanwhile, the 1970 (reversed) judgment was affirmed on the ground that the award suffered from a 'manifest error affecting its very foundation': Orléans, 13 December 1979 (unreported); *reversed*, Cass Civ 1re, 13 October 1981, (1982) 109 JDI 931. Subsequently, enforcement was permitted again: Rouen, 13 November 1984, (1985) 112 JDI 473. That judgment was finally reversed on grounds of immunity: Cass Civ 1re, 18 November 1986, (1987) 114 JDI 120.

¹⁴⁴ See TC Vaud, (1958) 106 JdT III 107.

¹⁴⁵ See TF, 106 JdT III 116.

¹⁴⁶ See TC Vaud, (1961) 109 JdT III 98 (*expertise arbitrale* between Greek, Spanish, and Israeli citizens).

there must be some legal order making an award an 'award', but discerned no indication of such subjection to the law of Geneva.¹⁴⁷

The important part of the *SEE* enforcement litigation took place in the Netherlands. The courts there had to fathom the effect of the Swiss judgments and whether the award came within the New York Convention. The crucial thing was that the Dutch courts assumed that since Swiss courts had declined to assign Swiss nationality to the award, the award was governed by no law at all. The Hague appellate court ruled that if this was not a Swiss award it was not an award at all for the purposes of the New York Convention.¹⁴⁸ On the premise here resisted, namely that the Convention implies that some law will have governed the award, the court refused leave to enforce. The Hoge Raad reversed the judgment, considering, correctly, that the Convention's requirements of attachment to a certain domestic law are exhausted in the requirements of compliance with the laws enumerated in Article V(1)(a), (d), (e).¹⁴⁹ The Court of Appeal, to which the case was remanded, again refused to allow enforcement, holding that the 1950 agreement precluded enforcement (Convention, Article V(2)).¹⁵⁰ The case went up to the Hoge Raad for a second time. That court overruled the Court of Appeal, considering that the effect of the 1950 agreement was a matter considered by the arbitrators, whose *de novo* consideration was excluded, but refused enforcement nonetheless.¹⁵¹ It equated the refusal of the Swiss courts to consider the award as belonging to the Swiss legal order to an annulment provided for in Article V(1)(e) of the Convention.

Despite the supreme jurisdiction's segregation of the two matters, the Dutch decisions are the best example of how the issues of 'nationality' and annulment jurisdiction are interrelated, conceptually and in the Convention in particular. The holding that a refusal of the legal order of the seat to accept an award as made under its own law equals annulment is analytically an admission that only those courts are competent to determine the 'nationality' of an award. This is broadly correct, for the Convention does give effect to such judgments of the courts of the place where the award was made, in the absence of judgments of the courts under whose law the arbitration was held.¹⁵² In other words, the legal validity, or even the legal existence of a document as an 'arbitral award', under the Convention is practically determined by whether there has been annulment or not. It is wrong, however, to argue from there that the Convention did not intend to introduce a novel type of award in its scope of application, namely an award subject to no legal order.¹⁵³ The Convention did not determine anything by way of legal prerequisite; it left it to the courts and law of the seat (or under the law of which the award was made) to determine the valid-

¹⁴⁷ TF, (1969) 48 RCDIP 106, 110-11; *affirming* Cour de Justice, Geneva, (1969) 91 SJ 356. In an interesting reply to the critique of the judicial minimalism made above the court said that a determination of the proper law of the arbitration was going to the merits, whereas the non-national finding precluded jurisdiction *in limine*; this of course does not solve the problem.

¹⁴⁸ See Gerechtshof, The Hague, [1972] Rev Arb 318; *reversing* President, Arrondissementsrechtbank Rotterdam, 9 November 1971, *extracted in* Stuyt, (1974) 5 NYIL 35 (the latter judgment ruled that sovereign immunity precluded enforcement).

¹⁴⁹ HR, [1974] NJ 993.

¹⁵⁰ See Gerechtshof, The Hague, [1974] Rev Arb 322.

¹⁵¹ HR, [1976] NJ 774.

¹⁵² The particular application was wrong, however, for the Tribunal fédéral expressly and authentically interpreted the Vaud judgment as not annulling the award, and a pronouncement on the effects of a judgment by the court of rendition is binding on the enforcement forum.

¹⁵³ Thus Sanders, (1980) 27 Neth ILR 393.

ity of an award—and even that not conclusively.¹⁵⁴ So that if neither of those laws will, as a jurisdictional or substantive law matter, entertain an application to annul, on any ground whatever, the award will be a candidate for enforcement under the Convention. (In fact, any award will be a candidate for enforcement under the Convention, because annulment as a ground to refuse enforcement is a subordinate matter.)

The enforcement proceedings in Sweden in the *Götaverken* case did not give rise to any such issues.¹⁵⁵ It has been speculated that the award, after the Paris court's refusal to recognize it as French, could have been enforced in France as non-domestic¹⁵⁶ (which is plausible), and in the same manner in Sweden too¹⁵⁷ (which is *prima facie* illogical and unnecessary). Similarly, when the *Liamco* award was brought for enforcement in the United States and Sweden, there was no doubt that the New York Convention applied,¹⁵⁸ despite the fact that the award was expressly said not to be subject to any municipal law.¹⁵⁹ Generally, the construction that anational and homeless awards may be enforced under the non-domestic clause in their state of rendition makes sense,¹⁶⁰ but this is not an objective matter falling to be decided under the Convention alone. The Convention merely contains an empowerment to create a legal category; its existence in the first place and its contents depend on the law of the state concerned.

A situation to be distinguished is when the enforcement forum side-steps the choice of the parties by re-qualifying the award as having been made under the procedural law of the seat and finds, implicitly, that it is regular under that law.¹⁶¹ Practical as this may be, it is not the place of the enforcement forum to make such determinations (though it may determine whether the tribunal applied the procedural law or rules chosen by the parties). The Convention acknowledges such authority only to two jurisdictions.

B. An Award by any Other Name

There is an ingenious argument made by Professor Sanders, to the effect that Article V(1)(e) implies that the legal nature of an 'award', that is, whether something is an award at all, is determined by some law, and in the first instance by the law of the seat. The Convention, in other words, presupposes that at the threshold some law must say that the document at hand is an 'award'.¹⁶² On reflection, the argument is flawed. The Convention uses the term in a rudimentary legal manner, that is, to refer to what is commonly known as 'award' and 'arbitration'. More technically, it uses autonomous terms, without reference to any law, to refer to the intrinsic characteristics of a type of proceedings. Should the Convention require any further than that rudimentary definition, it would expressly say so.

¹⁵⁴ See Chapter 6 above.

¹⁵⁵ Litigation was requested while annulment proceedings were afoot in France, and so the issue was whether the award was binding in a Convention sense; see Supreme Court, Sweden, 13 August 1979, (1981) 6 YCA 237.

¹⁵⁶ See Fouchard, (1980) 107 JDI at 673.

¹⁵⁷ See Hjerner, (1982) 60 ILA Rep at 301-2.

¹⁵⁸ See CA, Svea, 18 June 1980, 62 ILR 225; *Libyan American Oil Co v Socialist People's Arab Libyan Jamahirya*, 482 FSupp 1175 (DDC 1980), *vacated on other grounds*, 684 F2d 1032 (DC Cir 1981).

¹⁵⁹ See above, Chapter 5, text to note 295.

¹⁶⁰ See, eg, Toope, *Mixed International Arbitration* (1990) 127; Bowett, (1983-II) 180 RdC 168, 219; Bucher in *International Arbitration in the 21st Century* (1992) 29, 41-2.

¹⁶¹ See above, note 74.

¹⁶² See recently, Sanders, *Quo Vadis Arbitration?* (1999) 248.

This is confirmed by the few cases that deal with the problem whether the instrument to be enforced may be classified as an arbitral award, as distinct from other related forms of award. The cases reported on Italian law *lodi irrituali* (contract law 'informal' awards) concentrate on intrinsic characteristics rather than a conflicts analysis.¹⁶³ The better position would seem to be that whether the parties had intended a binding, and thus arbitral, award falls to be determined by the law that provides for the particular form of award concerned,¹⁶⁴ but whether the concept under that law falls within the Convention is a matter to be determined autonomously.¹⁶⁵

The Convention contemplates that the *legal validity* of a document by way of 'award' is determined by the courts (and by common, though not necessary, implication the substantive law) of a legal system that has an acknowledged interest in doing so. Such interest must be *manifested* in and by an annulling decision. Let it be assumed for example that an *ex æquo et bono* award is made in Ruritania, where such awards are not considered as awards at all. It cannot be suggested that such award is for that reason alone not a Convention award, though the matter would differ if Ruritanian courts had intervened and annulled the award.

So once the intrinsic characteristics of an instrument make it an arbitral award the question really becomes whether annulment has taken place and whether such annulment may be given effect to in the enforcement forum. Thus, in the extremely unlikely case that the courts of the seat deny the 'national' character to an award, they do not take away the foundation of the award, unless they intend to nullify the award. All they will have said is that some other law and courts may consider the award as their own. The Convention takes away the necessity for a pronouncement on nationality.¹⁶⁶ If no annulment has taken place, examination may take place under Article V(1)(a)-(d) and (2).

The construction here advanced would thus accept that the exception of an award that 'has not yet become binding on the parties' in Article V(1)(e) has nothing to do with whether an anational award has the force of an award under a given law. The wording 'not yet binding' indicates that 'binding' is autonomously defined as 'not subject to appeal on the merits'.¹⁶⁷ The Convention neither requires a confirmation order (Article IV), nor obliges the enforcement court to stay its proceeding pending the outcome of an annulment action (Article VI).¹⁶⁸ An award becomes 'binding', in other words, once made by the arbitral tribunal and unless and until a final judgment sets

¹⁶³ See BGH, (1982) 22 NJW 1124 (it is not an arbitral award); and *contra*, Cass (It), 15 December 1982, (1983) 106 For It I 2200; 6 July 1982, (1983) 106 For It I 736; 18 September 1978, (1979) 102 For It I 2422. Unclear: *Eurocar Italia, SpA v Maiellano Tours, Inc*, 156 F3d 310 (2d Cir 1998).

From the extensive literature see Patocchi & Schiavello, [1998] ADRLJ 132, 146.

¹⁶⁴ cf OLG Hamburg, (1982) 2 IPRax 146; *Spier v Calzaturificio Tecnica SpA*, 663 FSupp 871 (SDNY 1987); *Frydman et al v Cosmair et al*, 1995 WL 404841, *4-*6 (SDNY 1995).

¹⁶⁵ cf *Al Midani et al v Al Midani et al* [1999] 1 Lloyd's Rep 923 (whether a decision by the Shari'a Council is to be treated as a judgment or an award; if the process has been consented to it is an award).

¹⁶⁶ In a little-known sequel to the *Romano* case (above, note 146), Professors Maridakis and Fragistas opined favourably on enforcement under the then in force Greek CCP; see Maridakis & Fragistas, (1965) 13 NoB 1137. Though the award was conclusively determined by the authorities of Vaud to be '*inexistent en tant que jugement arbitral*', they looked for a legal foundation in general principles of law (captioned as 'natural law') and the law of the enforcement forum. This is contrary to the thesis here advanced, but the opinion was not on the Convention (but Schlosser, above, note 65, 49-50, appears to espouse a similar approach for Convention cases). No Greek judgment is reported on the case.

¹⁶⁷ Thus van den Berg, above, note 36, 333-46. On the issue as a whole see Freyer & Gharavi, (1998) 13 ICSID Rev-FILJ 101.

¹⁶⁸ Gaillard, E, JCI Droit International, Fasc 586-11 (1992) para 23; and see above, Chapter 6, text to note 56. But see TPI Geneva, (1987) 5 Bull ASA 28.

it aside.¹⁶⁹ In fact, at least two reported decisions that trap themselves into accepting a complete autonomy for the parties under Article V(1)(d) and at the same time that ‘binding’ is determined under the procedural law chosen by the parties, conclude that if the parties have excluded the application of national law, then an award is binding once made.¹⁷⁰

V. CONCLUSIONS

This chapter has attempted a fresh interpretation of the New York Convention, an interpretation believed to be in line with the intention of the drafters and practical needs of real life. It has argued that the legal force *qua* award is in the first place given by the Convention. For the rest, the Convention, Article V(1)(e), leaves the precise determination of validity to the courts and law of either of two states. If annulment has not taken place, enforcement will be granted if the award does not fall within the cases enumerated in Article V. For awards based on international law the position is slightly modified: such awards may not be annulled because the state of the proceedings will *ex hypothesi* have relinquished annulment jurisdiction.

So the Convention comes full circle by ascribing legal force (what is often referred as ‘the legal foundation’) on and by its own terms. Thus, asking for some prior requirement that the award be made under some law is tantamount to pre-requiring validity, which is logically muddled and a usurpation of the authority of those two states, who may be entirely disinterested in regulating the award.

The conclusion is that one must not lose sight of the Convention’s goal of simplicity, which was to substitute the notion of ‘nationality’ with the practical notion of factual validity. That is in contradistinction to other instruments that insist on a close and prior connection with the rendition

¹⁶⁹ OGH, (1996) 21 YCA 596, sub [49]. This is the position of English courts: *Hiscox v Outhwaite (No 1)* [1992] 1 AC 562, 573; *Rosseel NC v Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd’s Rep 625, 628; *Arab Business Consortium v Banque Franco-Tunisienne* [1996] 1 Lloyd’s Rep 485, 492 (CA).

¹⁷⁰ See *Bergesen*, above, note 68; Rouen, 13 November 1984, above, note 143.

forum law.¹⁷¹ If factual validity as required by the Convention is equated to 'nationality' as a matter of appeal only, this is of course no harm, but the heart of the matter remains the same.

¹⁷¹ cf TGI Paris, 24 October 1975, (1976) 65 RCDIP 358. The court there refused to enforce an ICC award made in the Canton of Tessin on the grounds that the 1869 Franco-Swiss treaty required something more than the award's 'purely fortuitous' place of issuance be in the other state. The court exacted a 'sufficient link with the legal order of the state of rendition' (which it found lacking), but that was a simple descriptor of the precise requirements of the treaty, namely that the award be legalized, a certificate of no extant challenge against it, etc (see Article 16(1)-(3)).

For similar provisions see Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo, 8 May 1979), (1986) 1439 UNTS 87, Article 2(a), (g) (that convention applies to awards not covered by the Panama Convention; see Article 1(2)). The 1969 Franco-Spanish convention applies to 'décisions arbitrales rendues valablement sur le territoire de l'une des Parties contractantes': Article 12.

Conclusions

Each chapter of this thesis ends with a few succinct conclusions. Rather than collating them here, it was thought more useful to state certain fundamental propositions of this thesis in the form of model provisions:

Article 1

- (1) Except as provided in Articles 2 and 3, this law shall apply if the seat of the arbitral proceedings is within the territory.
- (2) The 'seat' of the arbitral proceedings is the juridical seat of the arbitration designated:
 - (a) by the parties to the arbitration agreement, or
 - (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
 - (c) by the arbitral tribunal if so authorized by the parties,or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.¹
- (3) In particular, but without limitation to the generality of the foregoing, the seat of the arbitral proceedings shall be considered to be within the territory if the parties have agreed on the application of the arbitration or procedural law of this state without further stipulating the place of the proceedings.

Article 2

- (1) This law shall also apply in respect of the enforcement of arbitral awards made by tribunals whose seat, as defined in Article 1, was outside the territory (a 'foreign award').
- (2) An award made by a tribunal whose seat cannot be determined in accordance with Article 1, but which has been rendered outside the territory shall also be enforced under this law.
- (3) An award which was intended by the parties or stated by the tribunal to have been made under no municipal law shall also be enforced under this law, whether or not such agreement or finding was valid in accordance with the law applicable.
- (4) Enforcement shall proceed by and under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Article 3

- (1) This law shall also apply:
 - (a) to the constitution of the arbitral tribunal, if the respondent is domiciled or has his habitual residence within the jurisdiction or if the law designated as applicable to the arbitration agreement or the arbitration procedure is the law of this state;
 - (b) to provide assistance, by granting a provisional or protective measure provided by the law of this state or otherwise, when the seat is outside the territory; provided that

¹ The formulation follows s 2 of the Arbitration Act 1996.

Conclusions

- (i) the measure requested relates to a moveable or immovable situated in the territory; or
 - (ii) in any other case, the courts of this state would have ordinary general jurisdiction in the absence of the arbitration agreement or specific jurisdiction in respect of the remedy requested.
- (2) In exercise of the powers conferred to it by subparagraphs (1)(a)-(b) the court shall evaluate the appropriateness of exercising its jurisdiction taking into consideration the jurisdiction which a court of another state may have in respect of the same proceedings and remedy requested, and in particular whether that court is already seised of a request to the same or equivalent effect as the one of which the court is seised.
- (3) The court will decline to hear an action brought before it where an arbitration agreement in writing is shown to exist, unless it finds that such agreement is manifestly null and void, inoperative, or incapable of being performed.
- (4) For the purposes of the preceding paragraph:
- (a) unless the agreement has been expressly submitted to the law of this state, the court will not consider it manifestly null and void unless such finding would be based on duress, mistake, or fraud; and
 - (b) any subject-matter of which the parties had, at the time of making of the agreement, the free disposition, and which relates to a property right is arbitrable.

Article 4

A final award on the merits shall be conclusive of the dispute, provided that the parties have not invested another tribunal, body, court (of this state or other), or person with authority to review the award of the tribunal, as to the law and/or the facts.

Article 5

- (1) Subject to Article 4, an application to set aside shall be the exclusive remedy against an arbitral award.
- (2) An award shall be set aside by Court of Appeal of the district of the seat of the arbitral proceedings or in which it was made, or, when such determination cannot be made, by the Court of Appeal of [the capital], only if the applicant proves that:
- (a) one or more members of the tribunal were not independent of, and impartial to, the parties; or
 - (b) the tribunal did not treat the parties equally and fairly, except if no impact of that at all can be ascertained on the reasons or dispositive part of the award; or
 - (c) the conduct of the proceedings or the constitution of the tribunal was contrary to an agreement by the parties, except if:
 - (i) such agreement was contrary to paragraphs (a) and (b); or
 - (ii) the agreement was in the circumstances factually inoperative.
- (3) The court shall dismiss *in limine*, without a hearing on the merits, an application to set aside if the respondent proves that the applicant knew or ought to have known of the existence of any of the grounds in subparagraphs (2)(a)-(c) and did not raise that objection before the arbitral tribunal; provided that this restriction shall not apply when the arbitral tribunal was not in a position to remedy the defect.

[Here may be added provisions on lack of competence (*infra* and *ultra petita*, arbitrability, absence or invalidity of the agreement to arbitrate) and violation of substantive public policy. However:]

Procedural Detachment in International Arbitration

- (4) In no case shall the court set aside an award on procedural grounds additional to those in subparagraphs (2)(a)-(c) based on a violation of the public policy applicable in cases with an international connection (the 'international public policy').
- (5) An appeal on grounds of law may be brought against the judgment of the Court of Appeal within an exclusive period of 60 days from its [making] [notification].

Article 6

- (1) The court shall decline to exercise its jurisdiction under Article 5 if there is an agreement in writing excluding the recourse to set aside (an 'exclusion agreement').
 - (2) An agreement submitting the arbitration to the law of another state shall not have the effect of paragraph (1), even if under the law of that state an exclusion agreement would exclude the jurisdiction of the courts of that state.
- [Optional: (3) The court shall decline to exercise its jurisdiction under Article 5 if the respondent proves *in limine* that there exists a more appropriate forum and that such forum will exercise its jurisdiction. A more appropriate forum is exclusively that:
- (a) agreed upon in writing by the parties, at any point; or
 - (b) of the state to the law of which the parties have expressly submitted the arbitration as a whole and/or the arbitral procedure.]

Article 7

Further to Article 2(4), the following rules apply to the recognition and enforcement of foreign awards:

- (1) A judgment finding an award regular and made by the courts of the state of the seat of the arbitral proceedings within the meaning of Article 1(2)-(3), or the state whose law was chosen to apply to the arbitral procedure, shall be *res judicata*, provided that according it such effect would not manifestly offend against the international public policy of this state.
- (2) If the party resisting enforcement has failed to seek the setting aside of the award within the period in which an application to set aside must be brought before the courts mentioned in paragraph (1), the court may *in limine* dismiss the objections of that party; except if it would be impossible or inequitable to require from that party to have recourse to those courts.
- (3) Provided that setting aside was based in the foreign jurisdiction under provisions to the same effect as Article 5(2):
 - (a) A judgment setting aside an award and made by the courts of the state of the seat of the arbitral proceedings within the meaning of Article 1(2)-(3), or the state whose law was chosen to apply to the arbitral procedure, shall never be *res judicata* if it manifestly offends against the international public policy of this state.
 - (b) A judgment setting aside an award and made by the courts of the state in which the award was rendered may be *res judicata* if the seat of the arbitral proceedings cannot be determined in accordance with Article 1(2)-(3).
 - (c) If the courts of the state of the seat of the arbitral proceedings within the meaning of Article 1(2)-(3) and the courts of the state whose law was chosen to apply to the arbitral procedure have made irreconcilable judgments on the validity of the award, *res judicata* will be accorded to the judgment of the latter courts.
- (4) No other judgment on the validity of the award shall have any *res judicata* effect, in which case Article V(1)(e) of the New York Convention ceases to apply.

Article 8

Conclusions

- (1) Subject to the international agreements in force in this state, an arbitration involving at least one sovereign state or one private law entity which exercises functions of state sovereignty entrusted to it by the state under the laws of which it is organized (collectively a 'state') shall be subject to Articles 1-7.
- (2) Paragraph (1) shall not apply where:
 - (a) the parties have expressly submitted the arbitral procedure to international law; or
 - (b) the parties have expressly excluded recourse to municipal courts for setting aside; or
 - (c) the arbitral tribunal has found either (a) or (b).
- (3) Subject to the international agreements in force in this state, an arbitration involving at least one international organization shall not be subject to Articles 1-7.
- (4) Paragraph (3) shall not apply where:
 - (a) the parties have expressly submitted the arbitral procedure to any municipal law; or
 - (b) the parties have expressly provided for recourse to municipal courts for setting aside; or
 - (c) the arbitral tribunal has found either (a) or (b); or
 - (d) the international organization has expressly waived its immunity from suit.
- (5) Even when Articles 1-7 do not apply, under paragraphs (2) and (3) of this Article, the court may entertain an application under Article 3(1)(b) if it considers it appropriate in the circumstances to do so.

Additionally, hereunder follow model arbitration rules on the applicable procedural rules. Note that these are not totally aligned to the model law provisions above; indeed, there can be no exact alignment, because from the point of view of the arbitrator, municipal law, and considerations of efficacy more generally, are subordinate to party autonomy.

Article 1

- (1) The tribunal is bound always to give full effect to the instructions of the parties as to the rules governing the arbitral proceedings.
- (2) The tribunal shall invite the parties to a preliminary meeting, with a view to setting out in writing the rules of conduct of the arbitration.

Article 2

- (1) Subject to Article 1, the tribunal shall apply [these Rules] and, where they are silent, it shall devise a rule as much as possible consonant with the general spirit of [these Rules] and rules generally accepted by international tribunals as reflecting good practice.
- (2) In the discharge of its duty under paragraph (1), the tribunal shall always take account of the particular circumstances of the case, and shall always seek the views of the parties before making its decision.
- (3) Subject to Article 1, the tribunal shall never be obliged to draw inspiration from any municipal law.

Article 3

- (1) When the rules resulting from the application of Articles 1-3 are in conflict with a provision of law whose violation may result in the award's being set aside in a competent forum (a 'mandatory provision'), the tribunal shall attempt to reconcile the rules resulting from the application of Articles 1-3 with the mandatory provision.
- (2) If a rule resulting from the application of Article 1 cannot be reconciled with a mandatory provision, the tribunal shall apply the rule resulting from Article 1.

Procedural Detachment in International Arbitration

- (3) If a rule resulting from the application of Article 2 cannot be reconciled with a mandatory provision, the tribunal shall apply the mandatory provision.
- (4) Paragraphs (1)-(3) shall apply by analogy each time a provision of the law applicable to the arbitration as a whole or to a specific act will not give binding force to a direction given by the tribunal.
- (5) The tribunal shall always seek the views of the parties before making its decision under paragraphs (1)-(4).

Article 4

- (1) The tribunal shall have the widest discretion to discharge its duties within the limits set by Articles 1-3. In particular, it shall adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the dispute.²
- (2) It shall moreover make every reasonable effort to ensure that its award is enforceable.

Article 5

- (1) The tribunal shall always act fairly and impartially, never granting any undue advantage to one party over another.
- (2) The tribunal shall afford each party an opportunity to be heard on each issue that arises for consideration, and on each issue which may form a basis of an award by the tribunal.
- (3) The tribunal shall afford each party an opportunity adequately to address the arguments made and evidence adduced by its opponent.

Article 6

- (1) The parties shall in good faith co-operate with each other and the tribunal on any issue arising in relation to Articles 1-5.
- (2) If a party knows, or ought to have known, of the violation of a rule applicable in the arbitration proceedings and does not without delay raise an objection, that party shall be precluded from raising that objection in any subsequent proceedings.

² That sentence follows almost verbatim Article 14.1(ii) of the LCIA Rules.

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Procedural Detachment in International Arbitration

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Conclusions

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Conclusions

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