
**THE LEADING
ARBITRATORS'
GUIDE TO
INTERNATIONAL
ARBITRATION**

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Chapter 10

THE ROLE OF THE ARBITRATOR IN DETERMINING THE APPLICABLE LAW

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I. INTRODUCTION

It should hardly be necessary to preface a discussion of the applicable law in international arbitration by stressing its importance to the outcome of the dispute. Yet despite the particularly obvious relationship between the content of the law applicable to the merits and the result of an arbitration, it appears to be fashionable in certain circles to dismiss as devoid of any practical relevance the complex issues of private international law that may arise in this regard. According to these skeptics, rather than wasting their time on such purely academic questions, arbitrators should focus on adopting pragmatic solutions to determining what law to apply to a given dispute.¹

In reality, the seemingly abstract questions of comparative law and conflict of laws, or even quasi-philosophical issues such as the interrelation between private and public international law or the hierarchy of norms in international commercial matters, frequently have significant practical ramifications and far-reaching financial

¹ For a particularly subtle view of the issue, see William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953): “The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”

repercussions. For example, in the second half of the 20th century a highly academic debate was waged in legal literature over the validity of stabilization clauses in international contracts,² with numerous commentators arguing that the autonomy of the parties allows the applicable law to be frozen at any given time for the purposes of their contract, and that private parties should have the right to protect themselves from the legislative power of the State-party to the contract, where that State's law is the governing law of the contract. Other authors, noting that the stabilization of a law could result in the application of a law that no longer exists, argued that allowing parties to provide for a stabilized law to govern their contract would effectively place the parties above the law in an unacceptable manner. Such an abdication of legislative power, they contend, would be incompatible with the principles governing State sovereignty and with the need for all contracts to be rooted in a given legal order.³

This debate raised issues reaching the very core of both public and private international law. At the same time, the question of whether a given stabilization clause is valid can be of very significant practical relevance in an international arbitration. For example, in ICC Case No. 4961,⁴ a dispute arose out of a long-term contract between an Algerian State-owned entity and a U.S. company for the

² See, e.g., Prosper Weil, *Les clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique*, in MÉLANGES OFFERTS À CHARLES ROUSSEAU – LA COMMUNAUTÉ INTERNATIONALE 301 (1974); Bernard Audit, *Transnational Arbitration and State Contracts: Findings and Prospects*, in TRANSNATIONAL ARBITRATION AND STATE CONTRACTS 23, 77 (1988); Wolfgang Peter, *Stabilization Clauses in State Contracts / Les clauses de stabilisation dans les contrats d'Etat*, 1998 REV. DR. AFF. INT. / INT'L BUS. L.J. 875; WOLFGANG PETER, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS 214 (1995); Pierre Mayer, *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat*, 113 JOURNAL DU DROIT INTERNATIONAL 5 (1986).

³ For an example of an abstract debate on the matter, see the various publications discussing the theory of *Grundlegung*, also known as *ordre juridique de base*. See, e.g., Pierre Mayer, *Le Mythe de l'Ordre Juridique de Base (ou Grundlegung)*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES – ÉTUDES OFFERTES À BERTHOLD GOLDMAN 199, 209 (1982).

⁴ Unpublished.

sale of liquefied natural gas (LNG). One of the key issues of the dispute was whether the doctrine of change in circumstances (“*imprévision*”) could be invoked by the American buyer in light of the global oil crisis which, according to that party, had fundamentally impacted the economy of the contract according to which fixed quantities had to be lifted or paid for. In the legal systems that recognize it, the doctrine of *imprévision* allows the judge or arbitrator to reduce an obligation which has become excessive as a result of unforeseen and exceptional circumstances or events that fundamentally alter the equilibrium of the contract.⁵ In this case, the parties had provided for Algerian law to govern their contract. The contract further contained a stabilization clause, which froze Algerian law at the time of the conclusion of the contract. At that time, Algerian law — largely based on the French Civil Code — did not include a statutory *imprévision* clause. Although the parties were free to specifically include such a provision in their contract, in this case they had not. Shortly after the contract was signed, however, the Algerian legislature adopted a new Civil Code which, in keeping with the 1949 Egyptian Civil Code which served as a model for the civil codes of many Arab countries, specifically included *imprévision* at Article 107 paragraph 3 as a means for the judge to “reduce to reasonable limits the obligation that has become excessive.” Obviously, for arbitrators having to assess the impact, if any, of the oil crisis on the buyer’s take-or-pay obligations, the question of the validity of the stabilization clause was of paramount importance. Whereas under the frozen law chosen by the parties to govern their contract, the provisions of Article 107 paragraph 3 could not even be invoked, an argument could be made under the new Algerian Civil Code in favor of a complete restructuring of the parties’ obligations by the arbitral tribunal. In this case, an apparently esoteric private

⁵ See for example the definition at Article 6.2.2 of the UNIDROIT Principles of International Commercial Contracts. Somewhat clumsily, the UNIDROIT Principles refer to this concept as “hardship,” as this term is widely known in international trade. On the UNIDROIT Principles, see generally MICHAEL JOACHIM BONELL, *THE UNIDROIT PRINCIPLES IN PRACTICE* (2002).

international law issue, that of the validity of the stabilization clause — which was, for once, challenged by the foreign co-contractor, at the request of which such clauses are generally inserted in international agreements— became the decisive issue on which turned hundreds of millions of dollars.⁶

Another example of a debate found in most private international law treatises, which might similarly be viewed as being overly academic, concerns the effects of a choice of governing law by the parties that would lead all or part of their contract to be void. While it has been argued that such a choice cannot be valid, as the parties must be assumed to have intended that the provisions of the contract would be binding on them,⁷ some authors consider that, even in this case, the parties' choice of applicable law must be respected and the relevant clause — or even the entire contract — declared void.⁸

Once again, the practice of international arbitration demonstrates that this is far from being an issue of purely academic interest. A recent example of its practical relevance is provided by ICC Case No. 10625,⁹ where a dispute arose out of the purchase of a turbo-generator plant by a Portuguese chemicals manufacturer from a French vendor. The parties had chosen Portuguese law as the law governing the contract. Following several failures of the plant, the Portuguese purchaser brought arbitral proceedings against the vendor, claiming damages as a result of being deprived of use of the plant for nearly eight months. The respondent's defense turned on the inclusion in the purchase agreement of a limitation of liability clause, under which its sole duty was to repair any defects in the plant appearing during the warranty period. The clause excluded liability of

⁶ The case was ultimately settled in conditions which led to a large down payment by the American party and the taking of a large participation by the State-owned company in the stock of its co-contractor.

⁷ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187, comment e (1971).

⁸ For references to arbitral case law, see FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1439 (E. Gaillard and J. Savage eds., 1999).

⁹ Award of 2001, unpublished.

either party “for indirect loss or consequential damage unless caused by a deliberate act.”

Relying on a rather idiosyncratic provision of the Portuguese Civil Code prohibiting limitation of liability clauses, the arbitral tribunal found this contract clause to be null and void. The arbitrators expressly noted that this solution was in contrast to most continental European laws of the civil law type, which tend to allow the parties to a contract to freely exclude or limit liability for breach of contract, provided that the breach is not intentional or grossly negligent. However, considering itself to be bound by the choice of law made by the parties, the arbitral tribunal found that it had no choice but to apply the rules of Portuguese law, “no matter how customary or normal it [the contractually stipulated limitation of liability] may otherwise be in international business.” The answer given by the arbitral tribunal to the question of whether to uphold the choice of law made by the parties, despite the fact that the chosen law invalidated a crucial contract provision, was decisive for the outcome of the case, as the exclusion of indirect losses and consequential damages had an important impact on the amount of damages awarded.

Yet another example of the impact of the choice of applicable law concerns the measure of damages awarded under different legal systems. As any international lawyer is aware, some legal systems allow substantially higher measures of damages than others. This found a telling practical illustration in ICC Case No. 8450,¹⁰ which concerned a pre-bid agreement entered into between a U.S. corporation and a Saudi-Arabian entity. The seat of the arbitration was London. In the absence of any governing law provision in the agreement, the arbitral tribunal ruled that the governing law of the agreement was that of the State of New York. As New York law allows punitive damages, this determination of the applicable law by the arbitral tribunal opened the door to the potential liability of the respondent for punitive damages, and not merely for compensatory damages. Leaving aside the question of whether an award for

¹⁰ Unpublished.

punitive damages might be contrary to international public policy in certain legal systems¹¹ or even when confronted to a truly international notion of international public policy,¹² this case provides yet another — and rather obvious — example of the significant financial repercussions that the choice of applicable law may have.

Admittedly, in many cases, the results achieved under different potentially applicable governing laws would be identical for any given dispute. However, it is equally clear that in a meaningful number of cases, the determination of the rules of law applicable to the merits of the dispute will be of crucial importance for the dispute's outcome, making this one of the most essential steps in the arbitral process.¹³ In determining these rules, unlike local courts, arbitrators are not

¹¹ This is deemed to be the case, for example, in Japan, where a recent decision of the Supreme Court refused in part to recognize a U.S. judgment ordering a Japanese corporation *inter alia* to pay punitive damages, on the basis that this part of the foreign judgment was contrary to Japanese public policy. The Japanese Supreme Court held that the Japanese liability system “is essentially different from the punitive damages system, which has the primary purpose of punishment and general prevention. In this country, it is left to the criminal or administrative sanctions to punish the offender and to deter similar conduct in the future. Thus, it is incompatible with the fundamental principles or basic tenets of the Japanese system of damages based on torts to hold that between the parties in a tort, the victim may receive from the offender damages intended for punishment and general prevention in addition to the damages caused by the actual loss. Therefore, enforcement of the part of the Foreign Judgment ordering the appellant company punitive damages in addition to the compensatory damages and costs shall have no effect because it is contrary to the public policy of Japan.” *Northcon I, Oregon Partnership v. Mansei Kogyo Co. Ltd. et al.*, Supreme Court Judgment, July 11, 1997; 51 *Minshu* (6) 2573 [1997], reprinted in 41 *JAPANESE ANNUAL OF INTERNATIONAL LAW* 104 (1998).

¹² On this concept, see Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *ICCA CONGRESS SERIES No. 3, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 257 (P. Sanders ed., 1987); on the topic of punitive damages in international arbitration, see E. Allan Farnsworth, *Punitive Damages in Arbitration*, 7 *ARB. INT'L* 3 (1991).

¹³ For additional examples of the importance of the applicable law to the merits of the dispute, see David J. Branson and Richard E. Wallace, Jr., *Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 *VIRGINIA J. INT'L L.* 39 (1986).

bound by the choice of law rules of the seat of the arbitration (II). Rather, the determination of the applicable law by the arbitrators is guided in the first place by the duty to respect the intentions of the parties (III). In the absence of a choice of law by the parties, or instructions as to how the choice of law should be made, the arbitrators have broad discretion in selecting the applicable law, which does not entail, however, that this choice is arbitrary (IV).

II. IRRELEVANCE OF THE CHOICE OF LAW RULES OF THE SEAT OF THE ARBITRATION

Unlike local courts, and contrary to what is generally considered to be an outdated theory reducing their role to that of a quasi local court, international arbitrators are not bound by the choice of law rules of the seat of the arbitration. As a result, arbitrators are not required to apply the choice of law rules of the seat of the arbitration in order to determine the applicable law (A). Similarly, they are not bound by the limits to the validity of the law chosen by the parties that may be stipulated by the private international law rules of the seat of the arbitration (B).

A. No Requirement to Apply the Choice of Law Rules of the Seat of the Arbitration When Selecting The Applicable Law

In the absence of a choice of law by the parties to an international dispute, a local court will apply the conflict of laws rules of the forum in order to determine the law applicable to the merits of the dispute. In the past, it was widely held that arbitrators should also adopt this approach. F.A. Mann considered that unless the parties had specifically agreed on a different method of determining the applicable law, “just as the judge has to apply the international law of the forum, so the arbitrator has to apply the private international law of the arbitral tribunal’s seat, the *lex arbitri*.”¹⁴

¹⁴ F.A. Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION – LIBER AMICORUM FOR MARTIN DOMKE 167 (P. Sanders ed., 1967); *reprinted in* 2 ARB.

Some still consider that the choice of the seat of the arbitration leads in practice to at least a strong inference that the parties also implicitly meant to choose the choice of law rules of that jurisdiction for the determination of the governing law.¹⁵ However, this approach is not followed by most modern arbitration statutes and institutional arbitration rules. Falling in line with the broader trend in international arbitration to limit the role of the seat — the seat being frequently chosen for practical reasons such as geographical convenience or legal neutrality, without any real link with the dispute — the more modern approach considers artificial an interpretation of the choice of seat as an indication of the applicable law or the applicable choice of law rules by the parties.¹⁶ This is all the more so where the seat of the arbitration was not chosen by the parties, but by the arbitral institution administering the arbitration.¹⁷

INT'L 241 (1986); *see also* DAVID ST. JOHN SUTTON, JOHN KENDALL, JUDITH GILL, RUSSELL ON ARBITRATION 68 (1997). The Resolution of the Institute of International Law of September 26, 1957 on Arbitration in Private International Law followed this approach, providing in its Article 11 that “[t]he rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference.” Resolution adopted during the Amsterdam session held on September 18-27, 1957, INSTITUT DE DROIT INTERNATIONAL, TABLEAU DES RÉOLUTIONS ADOPTÉES (1957-1991), at 236, 243 (1992). *See also*, more recently, Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT'L 19, 32 (2001).

¹⁵ Howard M. Holtzmann, Donald F. Donovan, *United States*, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 44 (J. Paulsson ed., 2001); D. Rhidian Thomas, *Commercial Arbitration – Arbitration Agreements as a Signpost of the Proper Law*, in LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY, ANNUAL INDEX 141 (1984). For an arbitral award adopting this approach, *see* ICC Case No. 5551 (1988), ICC BULLETIN, Vol. 7, No. 1, at 82 (1996), in which the arbitral tribunal held that “[i]n cases where parties choose a third State as the seat of their arbitration, it is reasonable to assume, in the absence of a choice of law, that they envisaged or even intended, but in any event have not excluded, that the applicable law to the merits be determined by reference to the choice of law rules of the seat.” (our translation)

¹⁶ *See* ICC Case No. 8385 (1995), 124 JOURNAL DU DROIT INTERNATIONAL 1061 (1997), and observations by Y. Derains.

¹⁷ *See* W. LAURENCE CRAIG, WILLIAM W. PARK, JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 321 (3d ed. 2000).

Accordingly, most modern arbitration statutes have eliminated any reference to the choice of law rules of the seat of the arbitration in the context of the determination of the law applicable to the merits of the dispute.¹⁸ The same is true of the 1997 AAA International Arbitration Rules (Article 28 (1)), the 1998 LCIA Rules (Article 22.3), the 1998 ICC Rules (Article 17 (1)) and the 1999 Rules of the Stockholm Chamber of Commerce (Sec. 24 (1)).¹⁹ This contemporary approach is also clearly reflected in arbitral case law, as well as finding wide support in legal commentary.²⁰ For example, in ICC Case No. 6294, the arbitral tribunal stated in the clearest possible terms that it is “an uncontested principle of the prevailing opinion in legal writing that, contrary to state courts, an international arbitrator is not bound to respect the choice of law rules of the seat of the arbitration.”²¹ Similarly, the arbitral tribunal in ICC Case No. 8113

¹⁸ See, e.g., Article 1496 (1) of the French New Code of Civil Procedure; Article 1054 (2) of the Netherlands Code of Civil Procedure; Article 187 (1) of the Swiss Private International Law Statute; Article 834 of the Italian Code of Civil Procedure (Law of January 5, 1994); Article 28 (2) of the UNCITRAL Model Law, which follows the UNCITRAL Arbitration Rules; on the evolution of arbitration statutes, institutional rules and international conventions, see Marc Blessing, *Regulations in Arbitration Rules on Choice of Law*, in ICCA CONGRESS SERIES NO. 7, PLANNING EFFICIENT ARBITRATION PROCEEDINGS / THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 391 (A.J. van den Berg ed., 1996).

¹⁹ But see Article 4 of the 1989 International Arbitration Rules of the Zurich Chamber of Commerce and Article 13 (2) of the 1993 Rules of Procedure of the Court of Arbitration of the Hungarian Chamber of Commerce, *infra* at Section III.

²⁰ See, e.g., Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A US Perspective*, 15 J. INT'L ARB. 7 (1998); Ole Lando, *The Law Applicable to the Merits of the Dispute*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 129, 137 *et seq.* (P. Sarcevic ed., 1989); W. MICHAEL REISMAN, W. LAURENCE CRAIG, WILLIAM PARK, JAN PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION – CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 707–08 (1997); FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 8, ¶ 1538; on the development of U.S. law, see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES – COMMENTARY & MATERIALS 103–06 (2000).

²¹ ICC Case No. 6294 (1991), 118 JOURNAL DU DROIT INTERNATIONAL 1050 (1991), and observations by J.J. Arnaldez (our translation). See also ICC Case

concerning a dispute between a Syrian agent and a German trading company over their agreement to open a plant in Syria, held that:

“The Swiss rules of conflict of laws would not be the appropriate rules of conflict for this dispute. Not only is the Tribunal, sitting in Zurich, not bound to apply the Swiss rules of conflict of laws, but the application of such rules to the dispute would not be appropriate or justifiable since the contractual relationship between the parties has no connection whatsoever with Switzerland.”²²

A similar decision was reached by the arbitrators in the more recent ICC Case No. 11264.²³ Their award is particularly telling given the common law background of the three arbitrators and the seat of the arbitration in Singapore, elements that in the past would have favored the application of the choice of laws rules of the seat of the arbitration. The dispute in this arbitration concerned a turnkey contract for a hydroelectric power station entered into by two Philippine corporations. While it was common ground between the parties that the law of the Philippines applied to all claims in the arbitration founded in contract, a dispute arose over whether Australian law should apply to a claim brought for “misleading and deceptive conduct.” The arbitral tribunal examined in great detail the relevance of the seat of the arbitration for the purposes of determining the applicable law in the arbitration, noting that:

No. 1512 (1971), II Y.B. COM. ARB. 128 (1976); ICC Case No. 2730 (1982), 111 JOURNAL DU DROIT INTERNATIONAL 914 (1984), and observations by Y. Derains; ICC Case No. 6527 (1991), XVIII Y.B. COM. ARB. 44, 45 *et seq.* (1993); ICC BULLETIN, Vol. 7, No. 1, at 88 (1996), in which the arbitral tribunal noted that “[i]n accordance with the classical doctrine on conflicts of law, this rule [i.e. the appropriate rule on choice of law] should be determined by the law in force at the place of arbitration (*lex fori*). However, this doctrine has been widely criticized, mainly in consideration of the fact that the arbitrator, differently from the national judge, has no *lex fori*. Therefore, the arbitral tribunal considers it more appropriate to apply the general principles of international private law as stated in international conventions, particularly those in the field of the sale of movable goods.”

²² ICC Case No. 8113 (1995), XXV Y.B. COM. ARB. 324 (2000).

²³ Award of 2002, unpublished.

“Before determining the seat of the arbitration it is helpful to consider the significance of the seat for the purposes of determining the applicable law in the arbitration. Various views have been expressed in text-books dealing with international arbitration and conflict of laws.”

The arbitral tribunal then discussed the views expressed by the authors of several treatises on international arbitration regarding the role of the seat in the determination of the applicable law, as well as recalling the position traditionally held in common law legal systems:

“In common law countries, until the introduction of modern legislation dealing with international arbitration such as the UNCITRAL Model Law (‘Model Law’), it was probably the case that an arbitrator was obliged, in general, to apply the choice of law rules of the seat of the arbitration. This followed from the conflictual rule that the arbitral procedure was governed by the law of the seat (unless the parties had selected a different law) and from the view that the procedural law determined which choice of law rules were applied by the arbitrator. Absent the choice of a different procedural law by the parties, the applicability of the law of the seat to govern procedural matters is established by English cases such as *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583. Likewise in *Bank Mellat v. Helliniki Techniki SA* [1983] 3 ALL ER 428 (CA) Kerr L.J. remarked at P431:

“The fundamental principle in this connection is that under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland or some foreign country, since this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connections: see *James Miller Partners Ltd v. Whitworth Street Estates (Manchester) Ltd*. Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures

floating in the transnational firmament, unconnected with any municipal system of law.²³

The applicability of the law of the seat to procedural matters is established in Australia in *American Diagnostica v. Gradipore Ltd* (1998) 44 NSWLR 312 at 340-1. As to Singapore see *Coop International Pte Ltd v. Ebel SA* [1998] 3 SLR 670 at 703.”

The arbitral tribunal nonetheless concluded that it was not bound to apply the choice of law rules of the seat:

“Within Australia (and Singapore) in circumstances where the Model Law applies, the Arbitral Tribunal is not bound to apply the choice of law rules which a judge would apply but has much broader discretion. In the absence of a designation of the applicable law of the parties, article 28(2) [of the 1985 UNCITRAL Model Law on International Commercial Arbitration] authorises the Arbitral Tribunal to apply ‘the law determined by the conflict of laws rules which it considers applicable’. This clearly frees the Arbitral Tribunal from having to follow the choice of law rules which would be applied by a local court.”

The fact that this particular arbitral tribunal, with its strong common law flavor, would choose to follow the modern, international approach to limiting the role of the seat over the traditional common law view of the importance of the seat is in itself an excellent demonstration of how well-established it is today that arbitrators are not bound to apply the choice of law rules of the seat of the arbitration when determining the applicable law.²⁴

²⁴ For other examples of awards rejecting the application of the choice of law rules of the seat, see FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 8, ¶ 1541.

B. *No Requirement to Apply the Limits Set By the Law of the Seat to the Validity of the Law Chosen by the Parties*

The second important consequence of the fact that arbitrators are not bound by the choice of laws rules of the seat of the arbitration is that they are not required to apply the limitations that these rules may impose on the validity of the law chosen by the parties. These limitations are generally based on policy considerations of the seat of the arbitration. However, they are only binding on national courts, not on arbitral tribunals.

Thus, arbitrators sitting in France for example are under no obligation to follow the requirements of Article 7 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which allows courts to give effect to the mandatory rules of the law of a third country with which the dispute has a close connection, and which mandates the application of the mandatory rules of the forum, irrespective of the law chosen by the parties. Similarly, arbitrators sitting in the United States are not bound to apply the exception to the choice of law of the parties set forth in §187 (2)(b) of the Restatement (Second) of Conflict of Laws, according to which the law chosen by the parties will be applied, unless “application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rules of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”

While the view has been expressed that Article 19 of the Swiss Private International Law Act should — in light of the importance of mandatory rules of third countries in international commerce — be applied by arbitrators sitting in Switzerland,²⁵ this position is in direct

²⁵ For an overview of the debate, see François Knoepfler, *L'article 19 LDIP est-il adapté à l'arbitrage international?*, in ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 531–41 (C. Domincé, R. Patry, C. Reymond eds., 1993). Article 19 of the 1987 Swiss Private International Law Act (in force as of January 1, 1989) provides as follows: “When interests that are legitimate and clearly

contradiction with the language and philosophy of the most modern international arbitrations statutes, including that of Switzerland, and in our view should not be accepted. Indeed, the provisions of the Swiss Private International Law Act that govern international arbitration (Chapter 12) make no reference, express or implied, to Article 19, and the case law of the Swiss Federal Tribunal strongly suggests that mandatory rules other than those belonging to the *lex contractus* are not to be taken into account in international arbitration.²⁶ The same is true in all legal systems in which, as is the case for example in France and in all countries having adopted the UNCITRAL Model Law, a specific set of rules determine the law applicable in international arbitration. Where this is the case, these specific rules should be applied by the arbitrators, rather than the general choice of law rules which are exclusively addressed to the national courts.

An exception to this principle arises where the limitations set by the law of the seat, or for that matter of any other legal system, amount to principles of genuinely international public policy.²⁷ This subject will be discussed in more detail below at Section IV (B) (3).

preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to in this Act may be taken into consideration, provided that the situation has a close connection with such other law.” F.A. Mann had previously taken a similar view, but under the mistaken impression that an arbitral tribunal sitting in Switzerland would be bound by Article 19 of the Swiss Private International Law Act. *See* F.A. Mann, *New Dangers of Arbitration in Switzerland*, FIN. TIMES, Nov. 24, 1988, at 43.

²⁶ *See, e.g.*, the Feb. 1, 2002 decision of the Swiss Federal Tribunal, 20 ASA BULL. 337 (2002), expressing strong skepticism regarding the application of EU antitrust rules by arbitrators sitting in Switzerland when the parties have chosen the law of a non-EU country to govern their contract. In this particular instance, however, one may consider that antitrust rules amount to international public policy requirements which as such are binding on international arbitrators. *See* below at Section IV (B) (3).

²⁷ This approach to mandatory rules is reflected by Article 9 of the 1991 Resolution of the Institute of International Law on the “Autonomy of the Parties in International Contracts Between Private Persons or Entities,” which provides that foreign mandatory rules should not be taken into account by arbitrators, unless they concern universal values: “If regard is to be had to mandatory provisions [...]

III. THE DUTY TO RESPECT THE INTENTIONS OF THE PARTIES

Although it is now well established in international arbitration that arbitrators are not constrained by the choice of law rules of the seat of the arbitration, this is not to say that there is no legal framework for their determination of the law applicable to the merits of the dispute. First and foremost, arbitrators have the duty to respect the parties' intentions regarding the choice of law. This duty encompasses not only the parties' choice and intentions as to the governing law of the arbitration, but also, in the absence of a direct choice, the intentions of the parties concerning the methodology to be applied for the determination of the applicable law.

Often, the parties will have chosen the law to be applied to their contract, either expressly or implicitly, and the arbitrators are bound to apply that law. Indeed, the principle of party autonomy is now recognized by virtually all modern arbitration laws and international conventions on international arbitration. The resolution adopted by the International Law Institute on September 12, 1989 at Santiago de Compostela similarly provides in its Article 6 that "[t]he parties have full autonomy to determine the procedural and substantive rules and principles that are to apply in the arbitration."²⁸ Arbitrators may (and

of a law other than that of the forum or that chosen by the parties, then such provisions can only prevent the chosen law from being applied if there is a close link between the contract and the country of that law and if they further such aims as are generally accepted by the international community." Resolution adopted during the Basel Session, August 26 - September 3, 1991, INSTITUT DE DROIT INTERNATIONAL, TABLEAU DES RÉSOLUTIONS ADOPTÉES (1957-1991), at 408, 413 (1992); for the French version, see 1992 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 198.

²⁸ Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises, XVI Y.B. COM. ARB. 236, 238 (1991), and observations by A.T. von Mehren at 233. For a discussion of the principle of party autonomy in arbitration statutes, international conventions and institutional arbitration rules, see FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 8, ¶¶ 1421 *et seq.*

should) disregard the parties' choice only in certain limited and highly exceptional situations (*see* the discussion below at Section IV (B) (3)).

In some instances, without going so far as to designate the applicable law, the parties nonetheless provide some indication to the arbitrators as to how the applicable law should be determined. This often consists of an indication by the parties, either expressly or by reference to arbitral rules, of a particular method to be applied by the arbitrators. In rare cases, the parties specifically request that the arbitrators apply the choice of law rules of a given country in order to determine the applicable law.²⁹ A general reference to arbitration rules is, however, more commonly encountered. Modern arbitration rules generally grant arbitrators wide freedom in determining the applicable law. This is the case of the rules of the ICC, the AAA and the LCIA in particular. Occasionally, however, the arbitrators' obligation to respect the choice of the parties can lead to the application of other methods, including the application of the private international law of the seat. For instance, Article 4 of the 1989 International Arbitration Rules of the Zurich Chamber of Commerce provides that in the absence of a choice of law by the parties, "the Arbitral Tribunal decides the case according to the law applicable according to the rules of the Private International Law Statute." In such a case, although arbitrators sitting in Switzerland are not obliged to have recourse to choice of law rules applicable by the courts (*see* above at Section II (A)), this will nonetheless be the case in Zurich Chamber of Commerce matters, by virtue of the indirect choice made by the parties through their reference to these rules. Similarly, Article 13 (2) of the 1993 Rules of Procedure of the Court of Arbitration of the Hungarian Chamber of Commerce refers the arbitrators back to the rules of Hungarian private international law.

²⁹ *See, e.g.*, ICC Award No. 1250 (1964), V Y.B. COM. ARB. 168 (1980), where both parties had declared at a hearing that the arbitrators should determine the law applicable to the contract according to the French choice of law rules; ICC Award No. 2680 (1977), cited by Yves Derains, 105 JOURNAL DU DROIT INTERNATIONAL 997 (1978), in which the parties expressly requested the arbitrators to apply Swiss choice of laws rules to determine the applicable law.

The method selected by the parties may also consist of the choice of transnational rules, for it is widely accepted today that in choosing the rules of law applicable to the merits of the dispute, the parties are free to choose any body of legal rules, even without any national origin. In cases where parties select transnational rules of law as their governing law, they may provide some guidance to the arbitrators for the identification of these rules. Thus, parties can, in keeping with what has become known as the “*tronc commun*” method,³⁰ set the geographical parameters of the transnational rules to be applied to their dispute. For example, arbitrators have been asked to apply “general principles of law applicable in Western Europe,”³¹ “general principles of law applicable in Northern Europe,”³² or the “laws and regulations applying to members of the European Economic Community.”³³ However, this type of specific determination by the parties of the content of the applicable transnational rules remains exceptional. A more common manner for parties to determine the content of the transnational rules to be applied to their contract is to make reference to a collection or codification of such rules, such as the UNIDROIT Principles of International Commercial Contracts, the Lando Principles on European Contract Law or the CENTRAL list of Principles.³⁴

³⁰ For a discussion of this method, see Mauro Rubino-Sammartano, *The Channel Tunnel and the Tronc Commun Doctrine*, 10 J. INT’L ARB. 59 (1993); Bertrand Ancel, *The Tronc Commun Doctrine*, 7 J. INT’L ARB. 65 (1990); Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. – FOREIGN INV. L.J. 208, 224 (1995).

³¹ ICC Case No. 6378 (1991), 120 JOURNAL DU DROIT INTERNATIONAL 1018 (1993).

³² Unpublished.

³³ ICC Case No. 7319 (1992), cited in ICC BULLETIN SPECIAL SUPPLEMENT, INTERNATIONAL COMMERCIAL ARBITRATION IN EUROPE 41 (1994).

³⁴ On the determination of the content of transnational principles, see Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT’L 59 (2001); Gaillard, *supra* note 30, at 208 *et seq.*

IV. THE FREEDOM OF THE ARBITRATORS TO CHOOSE THE APPLICABLE LAW

In the absence of a choice of law by the parties, or instructions by the parties regarding how the choice of law is to be made, arbitrators generally enjoy wide freedom to determine the applicable law. If one leaves aside the outdated reference to the ordinary choice of law rules of the seat of the arbitration,³⁵ three methods currently exist for arbitrators to determine the applicable law in the absence of a choice of law by the parties. Although contemporary legal writing tends to contrast the three methods, in reality all three allow arbitrators wide freedom in their choice of applicable law (A). The three methods are thus mainly of conceptual interest; the reality of how arbitrators approach the task of defining the applicable law is, in practice, quite different (B).

A. Three Apparently Distinct Methods of Determining the Applicable Law

(1) The UNCITRAL Method: Application of a Choice of Law Rule Identified by the Arbitrators

The first method, that of the UNCITRAL Rules and Model Law, involves the identification of an appropriate choice of law rule by the arbitrators, followed by its application to the dispute. This is the oldest of the modern approaches to the choice of applicable law by the arbitrators, dating back to the 1961 European Convention on International Commercial Arbitration, which provides in its Article VII, paragraph 1 that “[f]ailing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable.”

This approach was subsequently adopted in the UNCITRAL Arbitration Rules of 1976, which provide at Article 33 that in the absence of a choice of law by the parties, “the arbitral tribunal shall

³⁵ See above at Section II (A).

apply the law determined by the choice of law rules which it considers applicable.” An identical provision was included at Article 28 (2) of the 1985 UNICTRAL Model Law on International Commercial Arbitration. The 1996 English Arbitration Act has adopted a similar rule at Sec. 46 (3), as has the 1997 German arbitration statute (Article 1051 (2) ZPO). While requiring arbitrators to apply a choice of law rule in order to determine the applicable law to the merits of the dispute, this approach gives arbitrators absolute freedom over the choice of the specific choice of law rule they will apply,³⁶ the only constraint being to resort to such a rule as opposed to selecting directly the applicable law.³⁷

Rather than selecting at their entire discretion what they consider to be the most appropriate rule, arbitrators having to resort to such choice of law rules can follow two different approaches, known as the “cumulative method” and the method of general principles of private international law. Pursuant to the cumulative method, arbitrators simultaneously consider all of the choice of law rules of all legal systems with which the dispute in question is connected. If all of these different choices of law rules point to the same substantive law, the arbitrators will apply this law to the merits of the dispute.³⁸ This method has the merit of producing highly predictable results

³⁶ For a critical view, see Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNATIONAL L. 9, 24 (1986), observing that such a rule “gives the arbitrator flexibility where it counts least, for he is given the freedom to choose the choice of law rule he likes best, but not the rule of substantive law he deems best suited to the occasion.”

³⁷ On the direct choice method, see below at Section IV (A) (3).

³⁸ Yves Derains, *L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige (A la lumière de la Cour d'Arbitrage de la Chambre de Commerce Internationale)*, 1972 REVUE DE L'ARBITRAGE 99; Pierre Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 REVUE DE L'ARBITRAGE 155; A.F.M. Maniruzzaman, *Conflict of Law Issues in International Arbitration: Practice and Trends*, 9 ARB. INT'L 371, 387 *et seq.* (1993); Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law – The 2000 Freshfields Lecture*, 17 ARB. INT'L 235, 238 (2001); for references to arbitral case law applying the cumulative method, see FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 8, ¶ 1547.

and thereby respecting the parties' expectations. However, its inherent limits are evident in cases where the various choices of law rules of the legal systems connected with the dispute lead to different results.

Another approach used by arbitrators to identify the conflict of law rule to be applied is the method of general principles of private international law. This involves finding common or widely-accepted principles in the main systems of private international law, as will be discussed below at Section IV (B) (1).

(2) The Swiss Method: Application of a Specific (but Flexible) Choice of Law Rule of the Seat

The second method is for arbitrators to apply a choice of law rule of the law of the seat of the arbitration which is specifically designed to be applied in international arbitration matters. While arbitrators are not bound to apply the ordinary choice of law rules of the seat of the arbitration, as discussed above at Section II, a number of recent arbitration statutes include choice of law rules specifically designed for international arbitration. The prime example of this can be found at Article 187 of the Swiss Private International Law Act of 1987, which provides that in the absence of a choice of law by the parties, the arbitral tribunal shall decide the case "according to the rules of law with which the case has the closest connection."³⁹ Given the flexibility of this rule, which in practice gives arbitrators virtually total freedom to apply the law they favor, it escapes the criticism made of the application of purely domestic choice of law rules in the context of international arbitration.⁴⁰ It is thus in practice very close to the direct choice method.

³⁹ For a very similar wording, see also Article 39 of Egyptian Law No. 27 of 1994.

⁴⁰ For a discussion of these provisions, see Gaillard, *supra* note 30, at 208 *et seq.*

(3) The Direct Choice Method

Finally, while the two methods described above grant arbitrators broad discretion in determining the applicable law to the merits of the dispute, the most liberal approach is to allow arbitrators to choose directly the rules of law they consider to be appropriate for the resolution of the dispute, without reference to choice of law rules. The direct choice method (“*voie directe*”) has been adopted by a number of modern national arbitration statutes, the foremost examples being Article 1496 (1) of the French New Code of Civil Procedure and Article 1054 (2) of the Netherlands Code of Civil Procedure (introduced by the 1986 Netherlands Arbitration Act). This method has gained enormous ground through its recent adoption by the majority of the most widely used arbitrations institutions including the AAA, the LCIA, the ICC and the Stockholm Chamber of Commerce.⁴¹

In reality, the direct choice method is not a method at all, rather an approach that grants the arbitrators the freedom to do as they like. In exercising this freedom granted by a number of arbitration statutes, arbitrators may decide to resort to choice of law rules, even where they are not bound to do so, or they may choose — or even invent — the rules to apply to the dispute in accordance with the direct choice method. In practice, as discussed below, arbitrators will often have recourse to the transnational rules approach.

B. *Practical Approaches to the Determination of the Applicable Law by the Arbitrators*

In legal commentary, the three methods discussed above for the determination of the applicable law by the arbitrators are typically presented as distinct, contrasting approaches. In our view, however, the three methods are merely three paths leading to the same result,

⁴¹ See, e.g., Article 28 (1) of the 1997 AAA International Arbitration Rules; Article 22.3 of the 1998 LCIA Rules; Article 17 (1) of the 1998 ICC Rules; Section 24 (1) of the 1999 Rules of the Stockholm Chamber of Commerce.

the freedom of the arbitrators to select the most appropriate applicable law. This freedom can sometimes constitute a burden; arbitrators are faced with the task of selecting the applicable rules of law without clear guidelines for carrying out this duty. On a panel of several arbitrators, the difficulty may well be amplified by the fact that the arbitrators have varying legal backgrounds.

As a result, in practice, arbitrators frequently have recourse to the transnational rules approach for guidance in their determination of the applicable rules of law, be it transnational principles of private international law to be applied to designate the governing law (1), substantive transnational rules of law to apply to the merits of the dispute (2), or general principles containing limitations to their choice of law, *i.e.*, principles of transnational public policy (3).

(1) Transnational Principles of Private International Law

As noted earlier at Section IV (A), arbitrators are frequently confronted with the need to identify choice of law rules. In so doing, arbitrators obviously cannot reinvent choice of law rules for each individual case. Rather, through the analysis of arbitral (or State court) case law concerning similar disputes, as well as the rules contained in the numerous international conventions on private international law and in national choice of law systems, arbitrators are able to identify “general conflict rules” or “transnational principles of private international law,” which they may then apply to the case at hand.⁴²

The approach adopted by the arbitral tribunal in ICC Case No. 7071⁴³ provides a clear illustration of the method of general principles of private international law. The dispute in this arbitration arose from two contracts for the design and sale of goods concluded

⁴² Generally on this topic, see for example Smit, *supra* note 36, at 23; for examples of the application of such principles by ICSID Tribunals and by the Iran-United States Claims Tribunal, see Maniruzzaman, *supra* note 38, at 389 *et seq.*

⁴³ Interim Award of March 2, 1994, unpublished.

between a government agency of a Middle Eastern State and an English company. The contract did not contain a choice of law by the parties. As a preliminary question, the arbitral tribunal sitting in The Hague had to decide which choice of law rules to apply in order to determine the applicable law. Having rejected the application of the domestic choice of law rules of either party and the choice of law rules of the seat of the arbitration, the arbitral tribunal held that the parties could have reasonably contemplated that the arbitral tribunal would apply generally accepted principles of private international law. The arbitral tribunal found that the applicable law under these principles would be that of the country with the closest connection to the contract, and held that this should be presumed to be “the law of the place of the habitual residence of the party who is to effect the characteristic performance of the contract, i.e. in the case of contracts for the transfer of the title, the seller’s performance.” In reaching this conclusion, the arbitral tribunal referred to the choice of law rules of Swiss, U.S., English and Australian law. It further referred to a number of academic writings, to Article 3 (1) of the 1955 Hague Convention on the Law Applicable to the International Sale of Goods and to Article 4 of the Rome Convention on the Law Applicable to Contractual Obligations. Finally, while expressly stating that it was not bound to follow as precedent other awards made under the ICC Rules, the arbitral tribunal referred to “support” for its findings in two previous ICC awards.⁴⁴

A similar comparative analysis was undertaken by the arbitral tribunal in ICC Case No. 6149.⁴⁵ The arbitral tribunal, having its seat in France, had to determine the applicable law to a series of sales contracts between a Korean seller and a Jordanian buyer. The defendant had further contracted to deliver the goods to a buyer in Iraq. In this case, the arbitral tribunal relied on general principles of

⁴⁴ The arbitral tribunal referred to ICC Case No. 4996 (1985), 113 *JOURNAL DU DROIT INTERNATIONAL* 1131 (1986), and Y. Derains’ note, and to ICC Case No. 5713 (1989), XV *Y.B. COM. ARB.* 70 (1990).

⁴⁵ Interim Award of 1990, *COLLECTION OF ICC ARBITRAL AWARDS 1991–1995*, at 315 (J.J. Arnaldez, Y. Derains, D. Hascher eds., 1997).

private international law in two respects. First, referring to French, English, German, and U.S. choice of law rules, as well as to Article 10 (1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the arbitrators extended the scope of the applicable law to all matters directly or indirectly related to the contract, irrespective of their legal nature. Having determined the scope of the applicable law in this way, the arbitral tribunal further referred to transnational rules of private international law for the determination of the applicable law to the contract, and decided that:

“The other set of conflict of law rules regarded to be ‘appropriate’ in the sense of the said Article [13.3 of the ICC Rules of Conciliation and Arbitration], materializes in the general principle of conflicts of law that the substantive law most closely connected with the contract should be applied and that the ‘home law’ of the seller is such substantive law.”

The arbitral tribunal made its determination of the applicable law based on both the common principles of choice of law set out in the legal systems most closely connected with the contracts at issue (Korea, Jordan, Iraq and France), and “some other general principles prevalent in modern conflict of laws,” notably found in the 1955 Hague Convention on the Law Applicable to International Sales of Goods and the 1980 Rome Convention on the Law Applicable to Contractual Obligations. The arbitral tribunal thus applied both the cumulative method and method of general principles of private international law to reach the conclusion that Korean law should apply to the dispute.

The application of transnational choice of law principles is not restricted to cases where the arbitrators’ task is to determine the applicable law on the basis of choice of law rules. Arbitrators tend to adopt a very similar approach in cases where their mandate is to determine directly the substantive law to be applied, for instance pursuant to the direct choice method. The same is true where arbitrators have to determine the law which has the “closest connection” with the dispute at hand. In order to perform their task,

in all these cases, they tend to apply, either expressly or implicitly, generally accepted principles of private international law.⁴⁶ The true alternative to this method is for the arbitrators to directly choose the rules of law to be applied to the dispute, which may be substantive principles of transnational law, without reference to choice of law rules.

(2) Substantive Principles of Transnational Law

Modern arbitration statutes and institutional rules frequently provide that when directly determining the governing law, arbitrators may choose transnational rules of law to apply to the merits of the dispute. Similarly to the application of transnational choice of law principles, this will involve deriving the solution to the legal issue at hand from a comparative law analysis taking into account national legal systems, arbitral case law, international conventions on arbitration and compilations of general principles of law such as the UNIDROIT Principles of International Commercial Contracts.

The issue of the validity of the choice of transnational rules as governing law has been discussed at great length in legal writing and in the case law of both arbitral tribunals and domestic courts. The debate is no longer of any real practical importance, at least in the numerous jurisdictions that permit arbitrators to select as governing law the “rules of law,” as opposed to the “law” that they deem appropriate, in the absence of a choice of law by the parties. This will be the case for example where the arbitrators are acting under the French, Swiss or Dutch arbitration statutes,⁴⁷ as opposed to English or German law⁴⁸ or other arbitration statutes following the example of the UNCITRAL Model Law. However, even arbitrators sitting in

⁴⁶ See Lalive, *supra* note 38; ANDREAS BUCHER, LE NOUVEL ARBITRAGE INTERNATIONAL EN SUISSE ¶ 249 (1988); Gaillard, *supra* note 30, at 218.

⁴⁷ See Art. 1496 of the French New Code of Civil Procedure; Art. 187 (1) of the Swiss Private International Law Statute; Art. 1054 (2) of the Netherlands Code of Civil Procedure.

⁴⁸ See Sec. 46 (3) of the 1996 English Arbitration Act; Art. 1051 (2) of the German ZPO (Law of December 22, 1997).

England or Germany may choose to apply “rules of law,” and thus potentially general principles of law, when the arbitration rules chosen by the parties have enlarged the scope of the arbitrators’ options by granting them the freedom to apply “rules of law,” as do the 1998 ICC Rules (Article 17 (1)), the 1998 LCIA Rules (Article 22.3) or the 1997 AAA International Arbitration Rules (Article 28 (1)).⁴⁹

The application of transnational rules of law to the merits of a dispute can be particularly helpful as a means to overcome a situation of stalemate in cases where two or more legal systems are equally closely connected to the dispute, but lead to significantly different results. One of the earliest and best-known examples of such recourse to transnational rules is the decision of the arbitral tribunal in the *Norsolor* arbitration.⁵⁰ The dispute in this case arose over an agency agreement entered into between the French claimant and the Turkish defendant. The seat of the arbitration, designated by the ICC Court of Arbitration, was Vienna. In the absence of a choice of law by the parties, the arbitral tribunal found that both Turkish and French law were connected with the dispute, with no compelling reason to prefer either law to the other. The arbitral tribunal therefore decided not to apply any national law at all, but instead to decide the dispute on the basis of generally accepted principles of law:

“Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*.”

⁴⁹ See Gaillard, *supra* note 34 at 59.

⁵⁰ Oct. 26, 1979 Award in ICC Case No. 3131, *Pabalk Ticaret Limited Sirketi v. Norsolor S.A.*, by Messrs. Cremades, Chairman, Ghestin and Steiner, arbitrators, 1983 REVUE DE L'ARBITRAGE 525; for an English translation of excerpts, see IX Y.B. COM. ARB. 109–10 (1984).

Another advantage of transnational principles is to avoid the application of a domestic law connected to the dispute, but which contains idiosyncratic rules of law that clearly run against the international consensus on a specific point and would be unlikely to meet the legitimate expectations of the parties. To find examples for such rules, it is not necessary to look so far as the legal systems of developing nations. Entirely unexpected and atypical rules continue to exist in many systems of law that are generally regarded as very advanced. For example, until quite recently, French law distinguished itself from most other legal systems of the world by considering distribution agreements to be null and void if they did not contain a clause determining the price of goods to be sold in subsequent sales contracts.⁵¹ While the existence of this rule in French law may have been justified in a domestic context, it was entirely unpredictable — and arguably unreasonable — to have the rule prevail in international situations.⁵² Understandably, arbitrators were reluctant to apply this rule of French law in international arbitrations. Thus, for instance, in the *Valenciana* arbitration, another famous example of the application by an arbitral tribunal of transnational principles of law to the merits of the dispute, the sole arbitrator applied transnational rules rather than the otherwise closely connected French law, presumably in order to avoid having to annul the contracts in dispute on the basis of this idiosyncratic rule of French law.⁵³ In the Franco-Portuguese example discussed above at Section I, the application of general principles of law — permitting the parties to agree to limitations of liability as accepted in most countries — would also have led to a

⁵¹ For a detailed discussion of the French law on this issue, see for example MARTINE BEHAR-TOUCHAIS AND GEORGES VIRASSAMY, *TRAITÉ DES CONTRATS – LES CONTRATS DE DISTRIBUTION* 108 *et seq.* (1999). In 1995, the French Supreme Court reversed its case law to allow the master distributorship agreement not to determine the price in most circumstances.

⁵² See Pierre Mayer, *L'arbitre et la loi*, in *LE DROIT PRIVÉ FRANÇAIS À LA FIN DU XXIÈ SIÈCLE – MÉLANGES PIERRE CATALA* 225, 236 (2001).

⁵³ Sept. 1, 1988 Partial Award in ICC Case No. 5953, *Primary Coal Inc. (USA) v. Compania Valenciana de Cementos Portland*, by Xavier A. de Mello, sole arbitrator, 1990 *REVUE DE L'ARBITRAGE* 701.

more predictable result than that of the peculiar provisions of Portuguese law in this respect.⁵⁴

While substantive principles of transnational law are admittedly by no means always the appropriate solution, in a number of circumstances the application of general principles of law will enable the dispute to be decided on the basis of rules of law that meet the parties' legitimate expectations.

(3) Transnational Public Policy Principles

A final area where in practice arbitrators often refer to transnational rules is the identification of public policy principles that set limits to the law applicable to the merits of the dispute. This is of particular relevance, given that an arbitral award can be set aside or denied recognition and enforcement if it is contrary to international public policy. This rule is stated in most national arbitration statutes⁵⁵ and international conventions, most significantly at Article V para. 2(b) of the 1958 New York Convention, which provides for the review of the conformity of an award with the public policy of the country in which recognition or enforcement are sought. The classic examples of international public policy matters are cases involving corruption, customs offences, embargo, apartheid, drug trafficking and antitrust violations.⁵⁶

⁵⁴ For a commentary on this award, see Emmanuel Gaillard, *General Principles of Law: More Predictable After All?*, N.Y.L.J., Dec. 6, 2001.

⁵⁵ See, e.g., Arts. 1502 (5) and 1504 of the New French Code of Civil Procedure; Art. 190 (2)(e) of the Swiss Private International Law Statute. Compare Art. 34 (2)(b)(ii) of the UNCITRAL Model Law or Sec. 68(2)(g) of the 1996 English Arbitration Act, which refer to "public policy."

⁵⁶ See, however, the refusal in two awards made in Switzerland in 1990 and 1993 to allow European antitrust law to prevail over Swiss law and the *amiable composition* agreed by the parties (ICC Cases Nos. 6503 and 7097, ICC BULLETIN SPECIAL SUPPLEMENT, INTERNATIONAL COMMERCIAL ARBITRATION IN EUROPE 38 (1994)). For the position of the Swiss Federal Tribunal in this respect, see also *supra* note 26. For an endorsement of this concept in England, see the House of Lords decision in *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] UKHL 19, at 115.

The application of public policy rules is yet another area where the difference between arbitral tribunals and domestic courts has important practical consequences. State courts, in the context of actions to set aside or to recognize or enforce an arbitral award, apply their own understanding of what forms the requirements of international public policy. Their task is to ensure that the award at issue is in accordance with such an understanding. Arbitrators, on the other hand, have no forum and are therefore free — and in fact obliged — to apply transnational or genuinely international principles of public policy, these principles being derived from the comparison of the fundamental requirements of various domestic legal systems and from public international law.⁵⁷

Admittedly, arbitrators must also bear in mind their duty to render an award that is unlikely to be set aside at the seat of the arbitration and that will be recognized in the various jurisdictions of potential enforcement. Article 35 of the 1998 ICC Rules of Arbitration explicitly instructs the arbitral tribunal to “make every effort to make sure that the Award is enforceable at law.” Accordingly, arbitrators must consider the requirements of conformity with the international public policy of the seat of the arbitration and of the various states in which the award is likely to be enforced. However, as compared to their duty to ensure that the requirements of genuinely international public policy are satisfied, this plays only a secondary role.

In most cases, the rules of international public policy of a given national legal system will be in conformity with transnational or genuinely international principles of public policy. If, however, this is not the case, the latter rules must prevail; only this result is in keeping with the nature of international arbitration and with the fact that arbitrators are not directly linked to any national legal system. While limited arbitral case law exists on this issue, the decision in ICC Case

⁵⁷ See Lalive, *supra* note 12; Lambert Matray, *Arbitrage et ordre public transnational*, in *THE ART OF ARBITRATION – ESSAYS ON INTERNATIONAL ARBITRATION – LIBER AMICORUM PIETER SANDERS* 241 (J. Schultz and A.J. Van den Berg eds., 1982).

No. 4695⁵⁸ provides one example. In this case, the defendant had contended, on the basis of Article 26 of the 1988 ICC Rules of Arbitration (the equivalent of Article 35 in the 1998 Rules) that, as a matter of Brazilian public policy, any award made by the arbitral tribunal in the absence of a full submission agreement or a formal submission by the defendant to the arbitral tribunal's jurisdiction, would not be enforceable in Brazil. The arbitral tribunal rejected this argument, finding that:

“In this case there may be difficulties, perhaps not insuperable, in the enforcement of this tribunal's award, in some national jurisdictions. [...] But if the tribunal finds, as it does, that it has jurisdiction, it cannot fail to exercise it. Otherwise, it would be concurring in a failure to exercise its jurisdiction and could even be accused of a denial of justice.”

The arbitrators' duty to render an enforceable award may also lead to conflicts in cases where the applicable law chosen by the parties clashes with the international public policy of a State where the award is likely to be enforced, or with transnational public policy rules. For example, an arbitral tribunal could find itself faced with a dispute over a petroleum concession to be decided under a law which, as a matter of public policy, considers such concessions to be null and void. Before automatically applying the law selected by the parties, the arbitrators should seek to determine the transnational public policy principle in this respect. If the public policy rule of the governing law chosen by the parties is not in conformity with transnational public policy, the arbitrators are entitled to disregard the rule and instead apply the transnational public policy rule.⁵⁹ The arbitrators would thus in principle declare the petroleum concession at issue to be valid and binding, despite the public policy rule of the law applicable to the merits of the dispute.

⁵⁸ Award rendered in 1984 by Messrs. E. Jiménez de Aréchaga, K.H. Böckstiegel, and J.H. Pickering, XI Y.B. COM. ARB. 149 (1986).

⁵⁹ See JEAN-BAPTISTE RACINE, *L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC* ¶¶ 628 *et seq.* (1999).

It goes without saying that to disregard the law chosen by the parties is a drastic measure which arbitrators are, in practice, very reluctant to exercise.⁶⁰ However, it is essential that arbitrators have the courage to disregard the applicable law, if this law would be in conflict with fundamental transnational principles of public policy or with the arbitrators' own fundamental conception of the essential requirements of justice, for in such cases the principle of party autonomy cannot be deemed to prevail. Without the option to disregard at least certain rules of the law chosen by the parties, arbitrators would not be in a position to fulfill their obligation to render an enforceable award meeting the requirements of international public policy.⁶¹

V. CONCLUSION

When the parties are silent as to the governing law, a number of legal systems and the major institutional arbitration rules now give the arbitrators virtually unfettered discretion to determine the applicable rules of law. Freed from the duty to apply the choice of law rules of the seat of the arbitration, the arbitrators are also not required to apply the mandatory rules of the seat. They may choose one of several methods to assist them in identifying the applicable

⁶⁰ See Ibrahim Fadlallah, *L'ordre public dans les sentences arbitrales*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. 249, Year 1994, Part V, at 369 (1994); Arthur T. von Mehren, *Limitations on Party Choice of the Governing Law: Do they Exist for International Commercial Arbitration?* 13 (The Mortimer and Raymond Sackler Institute of Advanced Studies, Tel Aviv, 1986); Mayer, *supra* note 38, at 246; see also the refusal in two awards made in Switzerland in 1990 and 1993 to allow European antitrust law to prevail over Swiss law and the *amiable composition* agreed by the parties, *supra* note 56.

⁶¹ Support for this view may be found in Article 2 of the Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises adopted by the Institute of International Law, which provides that "[i]n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community." Resolution adopted on September 12, 1989 in Santiago de Compostela, XVI Y.B. COM. ARB. 236, 238 (1991).

law, although these methods are all simply variations on the arbitrators' freedom to choose the applicable law. In practice, the arbitrators will choose the law they consider most suitable, and provide the motivation for their choice in the award. In so doing, the arbitrators will often have recourse to transnational principles of private international law to aid them in their selection, unless they decide to have recourse to substantive principles of transnational law. The only overriding requirements that may limit the freedom of the arbitrators are those of genuinely international public policy.

The freedom granted to the arbitrators in their choice of law by modern arbitration statutes and institutional rules is an important component of the ongoing movement in international arbitration towards a uniform transnational mechanism for resolving international disputes, in which local idiosyncrasies are minimized.