

The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium

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CONTENTS

I.	Introduction	347
	A. Introduction	347
	B. International Commercial Arbitration.....	350
	1. Meaning of “International”	351
	2. Meaning of “Commercial”	352
	C. Arbitration in the International Commercial Context.....	352
II.	The Extent to Which Party Autonomy is Embedded in International Instruments and National Laws	354
	A. Party Autonomy	354
	B. Party Autonomy and Sources of Law	356
	1. International Arbitration Conventions	356
	a. The New York Convention	356
	b. European Convention	357
	c. Panama Convention.....	358
	2. National Legislation	359
	a. England.....	361
	b. France	362
	c. Sweden	362
	d. Switzerland	362
	3. Leading Institutional Arbitration Rules	363
	a. International Chamber of Commerce	364

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- b. London Court of International Arbitration 365
 - c. American Arbitration Association and International Centre for Dispute Resolution 365
 - d. Other International Arbitral Institutions .. 366
 - 4. *Lex Mercatoria* or General Principles of Law .. 366
- III. Determination of Applicable Law by the Parties 367
 - A. Designated Choice of Law in Contractual Agreements..... 367
 - B. Choice-of-Law Clauses 368
 - C. Presumptive Applicable Law..... 370
 - D. Timing of the Parties’ Choice of Law..... 371
 - E. *Amiables Compositeurs* and *ex aequo et bono*..... 372
 - 1. Limits of an Arbitral Tribunal’s Power to Act as *Amiable Compositeur* 375
 - F. Public Policy Limitations on Choice-of-Law Agreements in International Commercial Arbitration: The Three Theories Perspective 376
 - 1. Mandatory Rules of Law and Public Policy 378
 - 2. “Foreign” Mandatory Rules of Law and Public Policy 379
 - 3. International Public Policy 380
- IV. Determination of Applicable Law by Arbitrators 382
 - A. When Parties Do Not Designate a Choice of Law in Their Contractual Agreement 382
 - B. The Three Methods of Determining the Applicable Law 384
 - 1. The UNCITRAL Method: Application of a Choice-of-Law Rule Identified by the Arbitrators That They Deem “Applicable/ Appropriate” 384
 - 2. The Swiss Method: Application of a Specific Choice-of-Law Rule of the Seat..... 385
 - 3. The Direct Choice Method 386
 - C. Contemporary Choice-of-Law Rules Applied by Arbitral Tribunals 387
 - 1. Choice-of-law Rules of the Arbitral Seat..... 387
 - 2. The “Cumulative” Application of Choice-of-Law Rules of All States Having a Meaningful Connection to the Parties’ Dispute 388

- 3. The “International” Choice-of-Law Rules 389
- D. Arbitral Tribunals versus Transnational Law as Applicable Law 390
- V. The Quest for an Arbitral Equilibrium 392
 - A. Safeguarding the Sanctity of Party Autonomy through Transnational Convergence and Uniform Application 392
 - 1. The Requirements of “International” and “Commercial” 394
 - 2. Timing of the Choice 394
 - 3. Choice of Law 395
 - 4. Mandatory Law and Public Policy 396
 - B. Defining the Power of Arbitrators to Determine the Applicable Law 397
- VI. Conclusion 398

I. INTRODUCTION

A. *Introduction*

Disputes are a regular consequence of international commerce. With increasing globalization and cross-border trading, international commercial disputes are on the rise.¹ Given the need for an efficient method for resolving disputes, international commercial arbitration has emerged as a preferred option for resolving commercial disputes of an international nature without the need for recourse to a court of law.² The foundation of international arbitration is based on a mutual agreement between the parties to submit their disputes or any differences between them to an arbitration proceeding.³ This agreement may take the form of a clause in their contract or may stand as a separate contract in itself.⁴ The agreement can be of two types, an arbitration agreement or a submission agreement.⁵ The former is an agreement to submit future disputes to arbitration, while the latter is

1. See NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION para. 1.01 (6th ed. 2015).

2. See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION para. 73 (2nd ed. 2014).

3. See BLACKABY & PARTASIDES, *supra* note 1, at para. 1.40.

4. See MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2 (1st ed. 2008).

5. See *id.*

an agreement to submit existing disputes to arbitration.⁶ Unlike national court systems, an arbitration panel exists only when the parties consensually decide to create one.⁷ Therefore, arbitration is a creature of contract, whereby the parties are the authors of the said contract and they decide on the purview of that contractual agreement, which becomes binding on both the arbitrators and on the parties.⁸ International commercial arbitration offers flexibility and speed to disputing parties as it provides the parties with the freedom to design the arbitration procedures and decide on the applicable law to complement their needs. These characteristics are central to the principle of party autonomy.⁹

This principle, which is widely accepted at both national and international levels, is the “cornerstone” of international commercial arbitration.¹⁰ Accordingly, parties are free to decide on issues such as the place of arbitration, the applicable law, the language of the arbitration, the composition of the arbitral tribunal, and the confidentiality of the proceedings.¹¹ Although party autonomy is a critical aspect of the process, it is not absolute, and has its limitations.¹² These limitations on party autonomy are ongoing and are contentious issues in the performance of arbitration, as private commercial disputes will inevitably be subject to several national rules and policies.¹³ Major limitations to party autonomy are the implications of mandatory rules or laws and public policy.¹⁴

This Article focuses on the law applicable to the substantive matter of the dispute or to the merits of the dispute. While reference will be made to procedural law, the primary focus of this Article is the

6. See BLACKABY & PARTASIDES, *supra* note 1, at para. 2.02.

7. See Richard Garnett, *International Arbitration Law: Progress Towards Harmonisation*, 3 MELBOURNE J. INT'L L. 400, 402 (2002).

8. See Giuditta Cordero-Moss, *The Arbitral Tribunal's Power in respect of the Parties' Pleadings as a Limit to Party Autonomy On Jura Novit Curia and Related Issues*, in LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION 289, 293 (Franco Ferrari ed., 2016).

9. See HONG-LIN YU, COMMERCIAL ARBITRATION 67, 67 (2014).

10. Jamshed Ansari, *Party Autonomy in Arbitration: A Critical Analysis*, 6 RESEARCHER 47 (2014).

11. See Garnett, *supra* note 7, at 402.

12. See YU, *supra* note 9, at 67.

13. See Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration* 6 MELBOURNE J. INT'L L. (2005), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/MelbJIL/2005/9.html>.

14. See Giuditta Cordero-Moss, *Limits on Party Autonomy in International Commercial Arbitration*, 4 PENN ST. J. L. & INT'L AFF. 186 (2015); Cordero-Moss, *supra* note 8, at 293; Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23, 24 (1997).

substantive law of arbitration. If the chosen applicable law offends economic, social, and political interests or if the applicable law contravenes international public policy of certain connected states, thus contravening their mandatory laws and public policy, the choice of the parties will be overridden.¹⁵ The parties' ability to choose the applicable law that will govern their dispute is often equated with party autonomy, a "defining characteristic" of arbitration.¹⁶ Therefore, if the parties have made a choice of law, and the latter does not contravene mandatory laws and public policy, arbitrators will have to give effect to their chosen applicable law. In the alternate situation, where parties have not made a choice of law, arbitrators will have to read between the lines of the agreement and look for a tacit choice of law by the parties. Ultimately, if the arbitrators fail to find such a choice of law, they will have to apply conflict-of-law rules that they deem appropriate to determine the applicable law. In these circumstances, the freedom of arbitrators to select the applicable law as they deem fit leads to a lack of predictability and certainty for disputing parties.¹⁷ Therefore, there is a need to explore the possibility of global convergence, as a solution to the problem of legal uncertainty and the lack of a uniform application of party autonomy.¹⁸ This Article discusses the importance of the principle of party autonomy in designating the choice of law and the aim of this principle in international commercial arbitration. The Article then analyzes the need to regulate the powers of arbitrators, absent a choice of law by the parties.

The first Part of this Article introduces arbitration in the international commercial context and provides an overview of the issues that the Article will address.

Part Two provides a descriptive overview of party autonomy, followed by a discussion about how the principle of party autonomy finds its roots in international instruments, in the rules of some arbitration institutions, and in some national laws that have developed their own arbitration rules of law.

Part Three looks at the scope of party autonomy where parties have designated their choice of law through a choice-of-law clause in their contractual agreement, whether expressly or tacitly. The scope

15. See generally Barraclough & Waincymer, *supra* note 13.

16. See Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 59 (2012); JULIAN D.M. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 69 (1978).

17. See María Mercedes Albornoz & Nuria González Martín, *Towards the uniform application of party autonomy for choice of law in international commercial contracts*, 12 J. PRIV. INT'L L. 437, 437 (2012).

18. See *id.* at 438.

of *amiable compositeurs* is also assessed in the event that parties decide to delegate their right to choose the applicable law to the arbitral tribunal and have the arbitrators act as *amiables compositeurs* or decide *ex aequo et bono*. Accordingly, events where the choice of law of the parties will not be followed, such as when there are issues of mandatory laws and public policy, are discussed. The Article also discusses the issues surrounding implications of international public policy.

Part Four examines the context where parties have not made a choice of law in their arbitration agreement and arbitrators have to determine the applicable law through conflict-of-law rules. This Part also analyzes the far-reaching freedom that arbitrators possess to use the conflict rules that they deem appropriate, and the increasing power that arbitrators have in determining the applicable law or rules of law where conflict-of-laws rules are not necessary. This Part also explains how arbitral tribunals have the discretion to apply transnational law and rules.

Part Five discusses and analyzes the effectiveness of The Hague Principles on Choice of Law in International Commercial Contracts, approved in March 2015, as a panacea for preserving the sanctity of party autonomy. It also discusses the possibility of an international consensus on the regulation of the powers of arbitrators to determine the applicable law, absent a choice of law by the parties.

Part Six summarizes the first four Parts and reflects on the paradoxical roles played by party autonomy and the powers of arbitrators in the context of determining the applicable law. This Part also draws together the addressed issues and proposes reforms to regularize the powers of arbitrators to decide the applicable law while simultaneously affirming and promoting party autonomy.

B. *International Commercial Arbitration*

International commercial arbitration is part of international commercial law.¹⁹ What makes it attractive are its “international” and “commercial” aspects. It is therefore necessary to have a proper understanding of these two elements, and each requires explanation to attain a complete understanding of the context of international commercial arbitration.

19. See Giuditta Cordero-Moss, *Lectures on International Commercial Law*, 162 PUBLICATIONS SERIES PRIV. L. U. OSLO 1, 8 (2003).

1. *Meaning of “International”*

The term “international” in the context of international commercial arbitration can have at least three possible interpretations.²⁰ This word distinguishes between wholly “national” or “domestic” arbitrations and “international” arbitrations. However, the nature of the arbitration is often considered before determining the internationality of the arbitration. Relevant factors include (1) the type of dispute; (2) the nationality of the parties; and (3) the combination of the first two factors, additionally making reference to the chosen place of arbitration.²¹ The third approach is adopted in the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law 1985, as amended in 2006 (the “Model Law”).²² “International” is defined differently and depends on the criteria used by the interpreter, as different state laws and different international conventions have their own definitions of what is international.²³

The Model Law, designed to apply to international commercial arbitration, defines arbitration as being international in Article 1.3. As noted, it combines the first two factors mentioned above, and includes the mere determination by the parties that the subject matter of the dispute relates to more than one state.²⁴ Article 1.3 states:

An arbitration is international if:

- (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.²⁵

20. BLACKABY & PARTASIDES, *supra* note 1, at para. 1.26.

21. *Id.*

22. UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, 24 I.L.M. 1302 (amended July 7, 2006) [hereinafter “UNCITRAL Model Law”]; BLACKABY & PARTASIDES, *supra* note 1, at para. 1.26.

23. Cordero-Moss, *supra* note 19, at 9.

24. BLACKABY & PARTASIDES, *supra* note 1, at para. 1.32.

25. UNCITRAL Model Law, *supra* note 22, at art. 1.3.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”) uses the term “foreign” to describe an award that is made in the territory of a state other than the state in which recognition and enforcement is sought and an award that is “not considered as domestic awards” by the enforcement state.²⁶ Consistent with such definitions, for the purpose of this Article, commercial arbitration will be deemed international if it has a foreign element that connects it with at least two different states.²⁷

2. *Meaning of “Commercial”*

The simplest and most logical way to define the term “commercial” is to refer to transactions entered into between parties in the course of their business activities.²⁸ It is worth highlighting that this definition excludes consumer contracts and other aspects of private law. Defining the term “commercial” is not an easy task, as shown by the definition given in the endnote of the Model Law.²⁹

The Model Law mandates that the term “commercial” be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not, and provides a long, non-exhaustive list of transactions that are deemed to be of a commercial nature.³⁰ This Article shall follow the definition of “commercial” as provided in the Model Law.

C. *Arbitration in the International Commercial Context*

International commercial arbitration is a private and consensual way of obtaining a final and binding decision on a dispute.³¹ This form of dispute resolution excludes court jurisdiction through an arbitration clause or agreement, thus operating outside the scope of a court of law.³² However, if the losing party is unwilling to enforce an award voluntarily, court assistance might be required for enforcement, along with the assistance of international treaties such as the New York Convention.³³

26. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter “New York Convention”].

27. See Cordero-Moss, *supra* note 19, at 11.

28. *Id.* at 8.

29. See UNCITRAL Model Law, *supra* note 22, at art. 1(1), n.2.

30. See *id.*

31. BLACKABY & PARTASIDES, *supra* note 1, at paras. 1.04–.05.

32. *Id.*

33. *Id.* at para. 1.87.

The existence of an arbitration clause gives the impression of detachment from national systems of law because international commercial arbitration is a method of resolving disputes that is based on the parties' will: the principle of party autonomy.³⁴ In the absence of an arbitration clause agreed to by the parties, the arbitral tribunal would not have jurisdiction to determine the dispute, and no arbitral tribunal would be constituted without the appointment of arbitrators by the parties.³⁵ In short, the parties determine the jurisdiction of the arbitral tribunal, its composition and the scope of its competence. They determine the procedural rules that the tribunal shall follow and the applicable law that it shall apply, subject to law or public policy limitations. If the arbitral tribunal does not follow the instructions of the parties, the award may become invalid and unenforceable, because the tribunal has exceeded the power that the parties had conferred on it.³⁶

The most significant aspect is the parties' autonomy to choose the applicable law as it applies to the substance of the case, since this autonomy can have a significant and material impact on its outcome.³⁷ Having cognizance of the applicable law can be akin to being able to predict the outcome of the case, and this cognizance is primordial in the international commercial world.³⁸ As the Article will discuss, parties have different possibilities when choosing which law or principles will apply to their dispute. The Article will also review what happens when parties fail to make a choice of applicable law and allow the far-reaching freedom of arbitrators to apply any conflict-of-law rules in order to determine the applicable law. Applying different conflict-of-law rules gives different outcomes; therefore, to achieve better convergence in international commercial arbitration, conflict-of-law rules and the principle of party autonomy must both be applied uniformly.³⁹

34. See Cordero-Moss, *supra* note 19, at 27–28.

35. See *id.*

36. BLACKABY & PARTASIDES, *supra* note 1, at para. 1.201.

37. See Rachel Engle, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 *TRANSNAT'L L.* 323, 324 (2002).

38. See Albornoz & Martín, *supra* note 17, at 440.

39. *Id.* at 438.

II. THE EXTENT TO WHICH PARTY AUTONOMY IS EMBEDDED IN INTERNATIONAL INSTRUMENTS AND NATIONAL LAWS

A. Party Autonomy

The agreement to have recourse to arbitration gives parties the freedom and possibility to design the arbitration proceedings according to their needs and ultimately reach a final and binding decision. As noted above, this basic principle of arbitration is known as party autonomy.⁴⁰

Party autonomy is the guiding principle in determining the procedure that must be followed in international commercial arbitration.⁴¹ Under this principle, the will of the parties prevails. In addition to avoiding courtroom proceedings, parties can decide on issues such as the place of arbitration, the applicable law, the language of the arbitration, the composition of the arbitral tribunal, and the confidentiality of the proceedings.⁴² This principle of party autonomy has been endorsed and is widely accepted by national laws, and international arbitration institutions and organizations.⁴³ Party autonomy is so important in international commercial arbitration that the latter would not exist if parties were not offered the flexibility to decide on the multiple aspects of the arbitral proceedings.⁴⁴

The freedom to choose the applicable law is the most significant and often the most contentious aspect of international commercial arbitration, since the applicable law is determinative of the arbitral award.⁴⁵ As discussed earlier, an international arbitration would manifestly involve more than one system of law or rules. It can be subject to at least five different systems of law, such as (1) the law that governs the arbitration agreement and its performance; (2) the law that governs the existence and proceedings of the arbitral tribunal (the *lex arbitri*); (3) the law, or the relevant legal rules, that govern the substantive issues in dispute (generally described as the “applicable law,” the “governing law,” the “proper law of the contract,” or the “substantive law”); (4) other applicable rules and non-

40. C. Chatterjee, *The Reality of Party Autonomy Rule in International Arbitration*, 20 J. INT'L ARB. 539, 540 (2003).

41. See Yu, *supra* note 9, at 67.

42. See JULIAN M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, para. 1-3 (2003).

43. See Karl-Heinz Böckstiegel, *Party Autonomy and Case Management—Experiences and Suggestions of an Arbitrator*, 11 SCHIEDS 1, 1 (2013).

44. See *id.*

45. See Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depechage*, 12 NW. J. INT'L L. & BUS. 163, 165 (1991).

binding guidelines and recommendations (soft-law norms); and (5) the law that governs the recognition and enforcement of the award.⁴⁶ The freedom to choose the law as per the parties' aspirations is the main advantage of party autonomy and the virtue of the doctrine of *dépeçage*.⁴⁷ This doctrine covers circumstances where the rules of different states are applied to determine different issues in the same case, and is now said to be an integral part of the modern approach to choice of law.⁴⁸ Parties can select the law with which they are familiar and can accommodate any contractual risks and obligations that may arise.⁴⁹ Other advantages are that the doctrine enables parties to make risk calculations that consequently provide for legal certainty and predictability because the parties are aware of what to expect.⁵⁰

As different systems of law may regulate various aspects of the proceeding, it is important to know which law or rules govern an arbitral proceeding to ensure some degree of certainty and predictability. This is afforded by the principle of party autonomy whereby parties can choose the applicable law. Parties usually choose the substantive law to be applied to their dispute through a choice-of-law clause.⁵¹ This choice of law usually refers to the law governing the contractual relationships of the parties. Such choice does not automatically refer to the conflict rules arising under private international law.⁵² When choosing which system of law will apply, parties can choose from a wide pool of laws and principles including trade usage; such as national law, transnational law, *lex mercatoria*, general principles of law or general principles of international law.⁵³

46. BLACKABY & PARTASIDES, *supra* note 1, at para. 3.07.

47. Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973).

48. *Id.* at 75.

49. Okezie Chukwumerije, *Applicable Substantive Law in International Commercial Arbitration*, 23 ANGLO-AM. L. REV. 265, 266 (1994).

50. Yuko Nishitani, *Party Autonomy in Contemporary Private International Law: The Hague Principles on Choice of Law and East Asia*, 59 JAPAN Y.B INT'L L. 300, 309 (2016).

51. *See* BORN, *supra* note 2, at para. 2616.

52. *See* MOSES, *supra* note 4, at 73.

53. *See* Cordero-Moss, *supra* note 8, at 21–27.

B. *Party Autonomy and Sources of Law*

Practically all modern international arbitration laws recognize the traditional principle of party autonomy.⁵⁴ Hence, parties are free to determine the law applicable to the merits of the dispute and their choice of law is binding on the arbitrators, circumscribed by mandatory laws and public policy. The principle of party autonomy also appears in institutional arbitration rules. Governed by a multi-tier legal regime such as (2.21) international arbitration conventions, (2.2.2) national arbitration legislation, (2.2.3) institutional arbitration rules, (2.2.4) *lex mercatoria*, or general principles of law, the principle may be incorporated by parties into their arbitration agreement and model arbitration rules.⁵⁵

1. *International Arbitration Conventions*

a. *The New York Convention*

The first international commercial arbitration conventions that established modern pro-arbitration standards were the 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters (the “Protocol”) and the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards (the “Convention”).⁵⁶ While the Protocol laid down the foundation for the worldwide development of international arbitration by providing for the recognition of international arbitration agreements, the Convention in turn contained uniform conditions for the recognition and enforcement of foreign arbitral awards.⁵⁷ As international trade kept growing, the weaknesses of these two instruments became very apparent.⁵⁸ Therefore, international arbitration needed more sophistication and the Protocol and Convention were succeeded by the New York Convention.⁵⁹

54. PHILIPPE FOUCHARD ET AL., FOUCHARD GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 1421 (Emmanuel Gaillard & John Savage eds., 5th ed. 1999).

55. ALLAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL ARBITRATION 98 (4th ed., 2004); Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?* 6 J. SUSTAINABLE DEV. L. & POL’Y 222, 231 (2015).

56. Geneva Protocol on Arbitration Clauses, July 28, 1924, 678 L.N.T.S. 27; Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302.

57. FOUCHARD ET AL., *supra* note 54, at paras. 242, 245.

58. See GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 18 (2nd ed. 2016).

59. See generally New York Convention, *supra* note 26.

As the title of the New York Convention suggests, it relates to “the recognition and enforcement of foreign arbitral awards” and is the principal legislative instrument that regulates international commercial arbitration.⁶⁰ One of the most significant improvements achieved by the New York Convention is its recognition of the substantial importance of party autonomy with respect to choice of arbitral procedures and law applicable to the arbitration agreement as provided in articles V(1)(a) and 1(d).⁶¹ Over the years, the New York Convention has accomplished its drafters’ aspirations and has served as a universal constitutional charter for international commercial arbitration and international arbitration in general.⁶² As of April 2018, it has been acceded by 159 Member States and ratified by 157 Member States, with Angola as the latest contracting state to adopt it.⁶³ The aim of this convention is uniformity, and it focuses on enforcement and recognition. Therefore, it does not elaborate on other aspects of international commercial arbitration when choosing the applicable law before reaching the award stage of the process.

b. *European Convention*

The European Convention on International Commercial Arbitration 1961 (the “European Convention”) was designed to treat obstacles such as “archaic and divergent” aspects of national laws that were compromising the efficiency of international arbitration during the stages prior to an arbitral award.⁶⁴ The European Convention is a regional convention, but its application is not limited to arbitration within Europe.⁶⁵ Any state can join the convention by becoming a signatory.⁶⁶ It addresses the three stages of arbitration, namely arbitration agreements, arbitral procedure and awards.⁶⁷ The convention is the first international instrument to cater for all spheres of international commercial arbitration and it also provides rules that are specific to all stages for this type of arbitration.⁶⁸

60. BORN, *supra* note 58, at 18.

61. *Id.* at 19; New York Convention, *supra* note 26, at arts. V(1)(a), 1(d).

62. *See* BORN, *supra* note 58, at 19.

63. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Apr. 29, 2018).

64. FOUCHARD ET AL., *supra* note 54, at para. 275.

65. *See* European Convention on International Commercial Arbitration art. X, Apr. 21, 1961, 484 U.N.T.S. 349 [hereinafter “European Convention”].

66. *See id.*

67. *See* BORN, *supra* note 58, at 21.

68. FOUCHARD ET AL., *supra* note 54, at para. 277.

Article VII (1) of the European Convention “embodies” the principle of party autonomy.⁶⁹ Accordingly, parties have the freedom to choose which law will be applicable to the substance of their dispute.⁷⁰

(1) The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing 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. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

(2) The arbitrators shall act as *amiables compositors* if the parties so decide and if they may do so under the law applicable to the arbitration.⁷¹

The convention goes even further and makes provisions for explicit rules on matters such as the composition of the arbitral tribunal and the arbitral procedure.⁷² The provisions of the European Convention are therefore a remarkable effort to keep international commercial arbitration independent from national regimes with distinct substantive rules.⁷³

c. *Panama Convention*

The Latin American region was quite hostile towards international commercial arbitration in the early 20th century, but in 1975 the United States of America and most South and Central American nations created and ratified the Inter-American Convention on International Commercial Arbitration, often referred to as the “Panama Convention” or the “Inter-American Convention.”⁷⁴

The provisions of the Panama Convention are in part a fair replication of the New York Convention because they provide for identical or similar solutions for certain issues, such as the grounds on which recognition and enforcement may be refused.⁷⁵ It is applicable only regionally, but has been successful in the Latin American region due

69. European Convention, *supra* note 65, at art. VII (1).

70. Dominique T. Hascher, *Commentary on the European Convention on International Commercial Arbitration of 1961*, 36 Y.B COMM. ARB. 504, 532 (2011).

71. European Convention, *supra* note 65, at art. VII.

72. See FOUCHARD ET AL., *supra* note 54, at para. 281.

73. *See id.*

74. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.S.T. 249 [hereinafter “Inter-American Convention”]; BORN, *supra* note 58, at 20; FOUCHARD ET AL., *supra* note 54, at para. 294.

75. Compare Inter-American Convention, *supra* note 74, at arts. 1, 4, 5, 6 with New York Convention, *supra* note 26, at arts. II, III, V, VI.

to the provisions that demarcate it from the New York Convention.⁷⁶ It adds substantive rules concerning the arbitration proceedings under Articles 2 and 3, in the same way as the European Convention.⁷⁷ However, the substantive rules are simpler and less draconian than those of the European Convention.⁷⁸ The most significant of the rules stipulates that:

[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.⁷⁹

However, there is no specific provision that affirms the parties' autonomy to choose the applicable law. The convention is silent on the mechanism to be adopted in the event that a party has omitted to make a choice of law. Instead, the commission adopted rules closely resembling those of the UNCITRAL Arbitration Rules, which were promulgated by the U.N. General Assembly in 1976 and revised in 2010.⁸⁰ As a consequence, it may be confusing for parties and arbitrators if they are to be directed to different instruments to resolve their issues each time a dispute arises.

2. *National Legislation*

The law of international commercial arbitration has endured numerous reforms within the national legal systems of countries. Numerous jurisdictions have attempted to make their domestic legislation more arbitration-friendly in order to increase their chances to be chosen as a seat of arbitration, given that the *lex arbitri* can influence the procedural law of an arbitral proceeding.⁸¹ Along with the ratification of the New York Convention to facilitate the enforcement of arbitral awards, the Model Law has played an enormous role in making modern arbitration statutes more supportive of international arbitration.⁸² It is therefore imperative to understand the

76. See BORN, *supra* note 58, at 20.

77. Compare Inter-American Convention, *supra* note 74, at arts. 2, 3 with European Convention, *supra* note 65, at arts. III, IV.

78. See FOUCHARD ET AL., *supra* note 54, at para. 296.

79. Inter-American Convention, *supra* note 74, at art. 3.

80. See FOUCHARD ET AL., *supra* note 54, at para. 296; Rules of Procedure of the Inter-American Commercial Arbitration Commission, as amended and in effect Apr. 1, 2002, <https://www.adr.org/sites/default/files/Inter-American%20Commercial%20Arbitration%20Commission%20Rules-%20English.pdf> (last visited Mar. 4, 2018).

81. See FOUCHARD ET AL., *supra* note 54, at para. 130.

82. See generally UNCITRAL Model Law, *supra* note 22.

implications of the Model Law on national legislation to further understand the new pro-arbitration legislation of countries that adopted the Model Law or enacted legislation based on the Model Law.

The Model Law is the main statutory instrument adopted globally to provide domestic legislation facilitating international commercial arbitration. Out of 111 jurisdictions, it has been adopted in full in 80 countries,⁸³ and has served as a model in many other jurisdictions.⁸⁴ The aim of the Model Law is to serve as a benchmark for the harmonization of arbitration laws and statutes worldwide, and it has been drafted in such a way as to ensure its compatibility with the New York Convention.⁸⁵ The two instruments work in unison, each filling the gaps of the other. The Model Law covers contentious issues relating to recognition, enforcement and annulment of awards, including grounds for court intervention.⁸⁶ The Model Law is a form of soft-law and needs to be adopted on a national level in order to have effect. Some countries have adopted the Model Law as is, some have derogated from certain provisions, and others have enacted statutes similar to the Model Law but with discrete amendments.⁸⁷ Nevertheless, the Model Law has remained the prototype for many national arbitration laws and more significantly it has become a standard against which arbitration laws can be drafted.⁸⁸ After more than 30 years of existence, the Model Law and subsequent jurisprudence serve as a useful reference point for adopting jurisdictions.⁸⁹

However, there remain some countries that did not adopt the Model Law but are among the most chosen destinations as the seat

83. *Status: UNCITRAL Model Law on International Commercial Arbitration*, United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, (last visited Apr. 29, 2018).

84. See BORN, *supra* note 58, at 23.

85. See Cordero-Moss, *Risk of Conflict Between The New York Convention and Newer Arbitration-Friendly National Legislation?*, STOCKHOLM ARB. REP. (2003), <http://folk.uio.no/giudittm/Form%20of%20arbitration%20clause.pdf>.

86. *Legal Instruments and Practice of Arbitration in the EU*, DIRECTORATE GENERAL FOR INTERNAL POLICIES, POL'Y DEP'T C: CITIZENS' RIGHTS & CONST. AFF. 23 (2014), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU%282015%29509988_EN.pdf.

87. See Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 ARB. INT'L 1, 1 (1995).

88. See *Legal Instruments and Practice of Arbitration in the EU*, *supra* note 86, at 23.

89. See United Nations Commission on International Case Law, *Case Law on UNCITRAL Texts (CLOUT)*, <http://www.uncitral.org/clout/index.jsp> (last visited Oct. 16, 2017).

for international arbitration.⁹⁰ They are England, France, Sweden, and Switzerland. These countries have refined their arbitration legislation to become fully supportive of the international arbitral process.⁹¹ Generally, many countries have progressively developed their legislation to provide more leeway for parties to decide on different aspects of their arbitration. As a result, party autonomy is now embedded in both national and international laws. Nevertheless, national laws generally provide more specifications on the choice-of-law rules where parties have failed to make a choice of law, unlike in international instruments.

a. *England*

Arbitration in England and Wales is governed by the Arbitration Act of 1996 and it does not distinguish between domestic and international arbitration.⁹² The 1996 Act creates a sophisticated set of procedures for arbitration to preserve the country's top-tier position as a venue for international arbitration.⁹³ The Act is divided between mandatory and non-mandatory provisions, and the principle of party autonomy is expressed in the non-mandatory and permissive terms of the Act. The non-mandatory provisions allow parties to negotiate their own provisions by agreement, but absent such an agreement the Act provides the applicable rules.⁹⁴ Article 46(1)(a) provides that the arbitral tribunal shall decide the dispute according to the law chosen by the parties and that this law shall apply to the substance of the dispute.⁹⁵ However, idiosyncratic English tradition persists. The court's powers of intervention remain substantial, and include the powers to determine preliminary points of law and to hear appeals on points of law where English law is applicable to the merits, although the court can be excluded by the agreement of the parties.⁹⁶

90. See *Legal Instruments and Practice of Arbitration in the EU*, *supra* note 86, at 13.

91. See BORN, *supra* note 58, at 22.

92. See generally Arbitration Act 1996, c. 23 (UK) [hereinafter "UK Arbitration Act"].

93. See SUSAN BLAKE ET AL., A PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION para. 26.03 (4th ed. 2016).

94. UK Arbitration Act, *supra* note 92, at § 4(2).

95. *Id.* at § 46(1)(a).

96. *Id.* at §§ 45, 69.

b. *France*

France was among the first countries to reform its arbitration legislation in line with contemporary arbitration and it is still considered an essential point of reference.⁹⁷ French international arbitration law comes from two sources, the Code of Civil Procedure and well-established case law jurisprudence. France treats domestic and international arbitration separately.⁹⁸ With regard to applicable substantive rules relating to international arbitration, general principles of party autonomy are found in Article 1496 of the Code of Civil Procedure.⁹⁹

c. *Sweden*

Sweden's political neutrality has played a vital role in making Stockholm a preferred place of international arbitration, especially for former socialist states and China.¹⁰⁰ Arbitration law is governed by the 1999 Arbitration Act, which repealed two statutes of 1929. The 1999 Act applies to both domestic and international arbitration.¹⁰¹ There are nevertheless some specific provisions related to "international matters" and recognition and enforcement of foreign awards.¹⁰² Principles of party autonomy are embedded in Article 48, which provides:

Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.¹⁰³

d. *Switzerland*

Switzerland devoted a specific chapter of its federal Private International Law Statute of December 18, 1987, which came into effect

97. FOUCHARD ET AL., *supra* note 54, at paras. 131–35.

98. *See Legal Instruments and Practice of Arbitration in the EU*, *supra* note 86, at 36.

99. CODE DE PROCEDURE CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 1496 (Fr.) [hereinafter "France Civil Procedure Code"].

100. FOUCHARD ET AL., *supra* note 54, at para. 164.

101. Swedish Arbitration Act (SFS 1999:116) § 46.

102. *Id.* at §§ 47–60.

103. *Id.* at § 48.

on January 1, 1989, to “international arbitration.”¹⁰⁴ Switzerland’s latest Act contains liberal substantive rules governing international arbitration, from the validity of the arbitration agreement to the enforcement of the award. The arbitral procedure and applicable law are determined primarily by the intentions of the parties or the arbitration rules to which they refer.¹⁰⁵ However, choice-of-law rules or conflict-of-law rules are generally used only on a “subsidiary basis, with very flexible connecting factors.”¹⁰⁶ Swiss law provides that in the absence of a choice prescribing applicable rules of law by the parties, the rules of law are to be determined by reference to those with which the case has the closest connection.¹⁰⁷

3. *Leading Institutional Arbitration Rules*

Parties to an international commercial arbitration agreement have a choice between *ad hoc* and institutional arbitration.¹⁰⁸ The latter is conducted according to the arbitration rules of the chosen institutions, if the parties so require, while the former is conducted subject to the parties’ agreement and applicable national arbitration legislation.¹⁰⁹ International commercial arbitration entails specialized arbitration services to cater for the needs of the parties. Therefore, appointing an arbitral institution specialized in the matter in dispute is very popular. According to a relatively recent survey conducted by Queen Mary, University of London, the five most preferred arbitral institutions are the International Chamber of Commerce (“ICC”), the London Court of International Arbitration (“LCIA”), the Hong Kong International Arbitration Centre (“HKIAC”), the Singapore International Arbitration Centre (“SIAC”) and the Stockholm Chamber of Commerce (the “SCC”).¹¹⁰ According to the same survey, the percentage of arbitrations administered by institutions amounts to 79% of respondents’ arbitrations over the five years between 2010 and 2015, and this is consistent with findings from previous surveys

104. See generally Switzerland: Statute on Private International Law, Dec. 18, 1987, 29 I.L.M. 1244 (1990) [hereinafter “Switzerland Statute on Private International Law”].

105. *Id.* at art. 182.

106. FOUCHARD ET AL., *supra* note 54, at para. 162.

107. Switzerland Statute on Private International Law, *supra* note 104, at art. 187.

108. See MOSES, *supra* note 4, at 9.

109. See BORN, *supra* note 58, at 26; see also FOUCHARD ET AL., *supra* note 54, at para. 157 (discussing institutional arbitration in the United Kingdom).

110. Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration 2*, <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

where 73% of arbitrations in 2006 and 86% of arbitrations in 2008 were institutional rather than *ad hoc*.¹¹¹

a. *International Chamber of Commerce*

The ICC ranked first as the preferred institution in the 2006 and 2010 surveys conducted by Queen Mary University.¹¹² The ICC has remained the leader in its field for the ten years prior to 2015.¹¹³ It promulgated its most recent set of ICC Rules of Arbitration in 2012, with amendments as recent as March 2017 that did not alter the rules on party autonomy or the applicable law.¹¹⁴ The ICC also has its International Court of Arbitration (the “ICC Court”), which helps to resolve difficulties in international commercial and business disputes. Its name may be misleading as it does not adjudicate cases and plays a solely administrative role. It exercises judicial supervision on arbitration proceedings while ensuring a proper application of the ICC Rules, and assists parties and arbitrators in overcoming procedural obstacles.¹¹⁵ Therefore, it is the arbitrators that the ICC Court appoints who normally decide the cases.

The ICC Rules provide a broad procedural framework for arbitral proceedings, with parties and arbitrators having considerable freedom to adopt procedures that suit their disputes.¹¹⁶ As the ICC Rules are the most popular institutional arbitration rules in the field, it is not surprising that they are sophisticated and well defined.¹¹⁷ It is worth highlighting that through the provisions of the ICC Rules of Arbitration, arbitrators are afforded far-reaching freedom to decide on the applicable law, provided the parties agree. Under Article 21 of the Rules, the provisions on applicable Rules of Law are stipulated as:

1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

111. *Id.* at 17.

112. *Id.*

113. *Id.*

114. *See generally* ICC Rules of Arbitration (2017), <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [hereinafter “ICC Rules”].

115. *Id.*

116. BORN, *supra* note 58, at 29.

117. *See* MOSES, *supra* note 4, at 10.

3. The arbitral tribunal shall assume the powers of an *amiable compositeur*¹¹⁸ or decide *ex aequo et bono* only if the parties have agreed to give it such powers.¹¹⁹

b. *London Court of International Arbitration*

The LCIA is the second most popular institution for international commercial arbitration.¹²⁰ Established in 1893 as the London Chamber of Arbitration, it is the world's oldest arbitration institution.¹²¹ Like all private arbitral institutions, it has its own set of arbitration rules.¹²² The LCIA procedural rules do not appear to be as structurally organized as the arbitration rules of the ICC.¹²³ Nonetheless, the LCIA arbitration rules portray party autonomy under article 22.3 as follows:

The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.¹²⁴

c. *American Arbitration Association and International Centre for Dispute Resolution*

The American Arbitration Association ("AAA") is the leading arbitral institution in the United States and provides specialist rules for specific areas of arbitration.¹²⁵ The International Centre for Dispute Resolution ("ICDR") is the international division of the AAA.¹²⁶ Where parties have agreed to arbitrate disputes of an international nature by the ICDR or the AAA, without designating any particular rules, the arbitration is usually conducted in conformity with the International Arbitration Rules of the ICDR (the "ICDR Rules").¹²⁷ The ICDR Rules were modelled according to the UNCITRAL Arbitration

118. For future reference, *amiable compositeur* means "friendly arbitrator" and *ex aequo et bono* means "according to equity, justice and fairness."

119. ICC Rules, *supra* note 114, at art. 21.

120. Queen Mary University of London, *supra* note 110, at 12.

121. LEW ET AL., *supra* note 42, at para. 3-27.

122. See generally LCIA Arbitration Rules (2014) [hereinafter "LCIA Rules"].

123. See BORN, *supra* note 58, at 31.

124. LCIA Rules, *supra* note 122, at art. 22.3.

125. *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, INT'L CENTRE FOR DISP. RESOL., (2018), <https://www.icdr.org/about>.

126. *Id.*

127. ICDR Arbitration Rules (2014), art. 1 [hereinafter "ICDR Rules"].

Rules and there is less supervisory power than that exercised by the ICC and LCIA Courts.¹²⁸ The principle of party autonomy is codified under Article 31.1 of the ICDR Rules:

The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.¹²⁹

d. *Other International Arbitral Institutions*

There are other international arbitral institutions that are less in demand but are very successful and popular in their region or in the industry they are focused on.¹³⁰ Such institutions include the SIAC, the SCC, or the HKIAC, and many others. It is outside the scope of this Article to study all of these international arbitral institutions and their respective rules. However, most of their rules are similar to the UNCITRAL Arbitration Rules and those of the ICC.¹³¹ Most importantly, they all allow parties to choose their applicable law.¹³²

4. *Lex Mercatoria or General Principles of Law*

Parties who do not wish to be embroiled in peculiar technicalities of national legal systems may instead submit to customs and usages, rules of law or general principles of international trade.¹³³ This is a judicial process of selecting rules that are independent from domestic law and are generally accepted in international trade.¹³⁴ It is called the application of the *lex mercatoria*.¹³⁵ Amongst the elements of the “law merchant,” there can be rules of international organizations such as those enacted by the UNCITRAL, which can be described as “soft law.”¹³⁶ The two most common rules in the area of international

128. See BORN, *supra* note 58, at 32.

129. ICDR Rules, *supra* note 127, at art. 31.1.

130. See BORN, *supra* note 58, at 31–33.

131. See *id.*

132. See, e.g., SIAC Rules, r. 31.1 (2016); SCC Arbitration Rules, art. 27.1 (2017); HKIAC Administered Arbitration Rules, art. 35.1 (2013).

133. See Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP L.Q. 747, 748 (1985); Emmanuel Gaillard, *General Principles of Law in International Commercial Arbitration—Challenging The Myths*, 5 WORLD ARB. & MEDIATION REV. 161, 161 (2011).

134. See Lando, *supra* note 133, at 747.

135. See *id.*

136. Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 J. INT'L DISP. SETTLEMENT 283, 283 (2010), <https://doi.org/10.1093/jnlids/idq009>.

commercial arbitration are the UNCITRAL Arbitration Rules and the Model Law. The UNCITRAL Arbitration Rules are optional and apply only if the parties have referred to them in writing in the arbitration agreement.¹³⁷ These rules are intended for parties opting for *ad hoc* arbitrations, as they create a procedural framework and mechanisms to facilitate arbitration.¹³⁸ Even institutional arbitration rules have welcomed the UNCITRAL Arbitration Rules and work in collaboration with them.¹³⁹ Again, the principle of party autonomy is denoted by article 35 of the rules, similar to those found in most institutional arbitration rules.¹⁴⁰

The choice to arbitrate is determined by the consensual decision of the parties, who design their own arbitration agreement. Assuming the parties made a valid arbitration agreement, arbitrators derive their authority from that agreement. Ideally, according to the principle of party autonomy, arbitrators are bound by and must follow everything expressly prescribed in the agreement. Party autonomy is omnipresent in virtually all international instruments and national laws. Moreover, countries have demonstrated a strong willingness to make international commercial arbitration uniform by adopting the Model Law or statutes based on the Model Law. While parties have the autonomy to choose the applicable law according to stipulated provisions in all the sources of law discussed above, arbitrators are afforded considerable freedom to choose the applicable substantive law with the frequent occurrence and application of the principle “rules of law/law they deem appropriate,” whenever the parties have failed to indicate a choice of law. The next Part discusses choice of applicable law through choice-of-law clauses and the capacity of parties to vest their right to make a choice of law to *amiable compositeurs*. The limitations to party autonomy are also discussed.

III. DETERMINATION OF APPLICABLE LAW BY THE PARTIES

A. *Designated Choice of Law in Contractual Agreements*

As indicated in Part Two, different laws can apply to distinct parts of an arbitration agreement. Therefore, an arbitral proceeding can be multifaceted. Also, parties can choose which law will apply to which specific aspect of the proceeding, provided it is not against

137. See generally UNCITRAL Arbitration Rules at art. 1.

138. See James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT'L L. 785, 787 (1994).

139. See FOUCHARD ET AL., *supra* note 54, at paras. 103–07.

140. UNCITRAL Arbitration Rules, *supra* note 137, at art. 35.

mandatory laws or public policy of the *lex arbitri*. If parties do not exercise their freedom to choose the law or rules of law according to the principle of party autonomy, or in cases where specialized institutional rules are absent, the arbitral tribunal will be incapable of continuing the proceeding without knowing the applicable law. Therefore, it is imperative that both the tribunal and the parties are aware of the applicable law. Of further importance, parties should be able to specify which rules of law they wish to use in the arbitration. Making a choice of law provides parties with some degree of certainty and predictability, allowing them to make some forecast of the proceedings. The legal and non-legal standards that measure the rights and obligations of the parties are the most critical aspect to be aware of in any international arbitration.¹⁴¹ It is usual practice for parties to include in their principal contract a clause that specifies a law governing the substantive issues of the dispute.¹⁴² Such a clause is also known as a “choice-of-law,” “governing law,” “proper law,” or the “applicable law” clause.¹⁴³ Having looked at the different sources of law from which parties can choose their applicable law, this Part will discuss the types of choice-of-law clauses and the applicability of the chosen law to the merits of the dispute where the parties have made a choice of law. Additionally, it will review the consequences when parties have expressly allowed arbitrators to act as *amiable compositors* (friendly arbitrators) or decide on the merits of the dispute *ex aequo et bono* (according to equity, justice and fairness)¹⁴⁴. Lastly, this Part will consider circumstances that preclude the parties’ choice from being followed, such as in the occurrence of mandatory law and public policy.

B. Choice-of-Law Clauses

Choice-of-law clauses can take two forms, express or tacit.¹⁴⁵ The former is normally in the “written contract or either in written or oral submissions before the arbitrators.”¹⁴⁶ The latter is in words or acts that “manifest the intention and expectation of the parties that a particular law that will govern their relations.”¹⁴⁷ A tacit, or implied,

141. See LEW ET AL., *supra* note 42, at para. 17-13.

142. See generally RICHARD GARNETT, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 23 (2000).

143. *Id.*

144. Chukwumerije, *supra* note 49, at 282.

145. FOUCHARD ET AL., *supra* note 54, at para. 1427.

146. LEW ET AL., *supra* note 42, at para. 17-3.

147. *Id.*

choice is considered as good as an express choice, relevant in circumstances where the parties' intention is clear but appears through means other than a choice-of-law clause, such as in the conduct of the parties or circumstances of the case.¹⁴⁸ Under the Model Law, French law, and Swiss law, there are no specific requirements of form.¹⁴⁹ Inasmuch as the parties have made a "clear choice," arbitrators will have to give effect to that law.¹⁵⁰

However, unlike some common international conventions in the area of commercial law, modern arbitration statutes do not require parties' choice to "unambiguously result from the provisions of the contract"¹⁵¹ or be "clearly demonstrated by the terms of the contract or the circumstances of the case."¹⁵² Therefore, practically none of the modern arbitration statutes contain "requirements as to the form of the parties' consent."¹⁵³ Hence, arbitrators can very well infer from the conduct of the parties the existence of an implied agreement concerning the applicable law. As an illustration, if the parties are arguing their case on a particular law, arbitrators can draw an inference that the parties may have intended that the same law is to be applied, though they have not expressly agreed to apply it. Such a decision was discussed in the *ICC Award No. 1434*, where it was decided that there was an implicit agreement between the parties to apply the law referred to in their pleadings.¹⁵⁴ Nevertheless, a substantive requirement that arbitrators cannot ignore is that the parties' intentions must be certain.¹⁵⁵ The acceptance of a tacit choice of law is "actually an extension of the principle of party autonomy to encompass situations in which the parties [have] failed to designate the applicable law."¹⁵⁶

148. See Garth J. Bouwers, *Tacit Choice of Law in International Commercial Contracts—A Turkish Study*, SCI. COOPERATIONS 2ND INT'L CONF. SOC. SCI., 169, 172 (2016).

149. See, e.g., UNCITRAL Model Law, *supra* note 22, at art. 28(1); France Civil Procedure Code, *supra* note 99, at art. 1496; Switzerland Statute on Private International Law, *supra* note 104, at art. 187, para. 1.

150. FOUCHARD ET AL., *supra* note 54, at para. 1427.

151. Hague Convention on the Law Applicable to International Sales of Goods, art. 2(2) (1955).

152. Commission Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I), O.J. L. 177/6 (2008).

153. FOUCHARD ET AL., *supra* note 54, at para. 1427.

154. ICC Case no. 1434, Multinational group A. v. State B., 103 J.D.I. 978 (1976).

155. See ICC Case no. 5865, Panamanian Company v. Finnish Company, 125 J.D.I. 1008 (1998).

156. Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 518 (2006).

There is always an exception to the general rule, as is the case in China, where a well-established judicial rule requires that in determining the validity of the choice of law by the parties to a contract, the parties' choice of law must be explicit, and their "intention regarding the governing law of their contract may not be assumed."¹⁵⁷ When deciding on whether there is an implied choice of law, arbitrators will usually look at the circumstances of the particular case, the conduct of the parties, the surrounding facts and "other objective factors . . . including the language used in the contractual documentation and the parties' relationship."¹⁵⁸

C. *Presumptive Applicable Law*

For many years, national courts and arbitration tribunals have asserted that when parties choose a particular place of arbitration, it is implied that "the law of that place will apply to the substance of the dispute."¹⁵⁹ However, this is "no longer an absolute presumption."¹⁶⁰ The choice of a place of arbitration should not, in and of itself, be considered the definitive choice of applicable law.¹⁶¹ English jurisprudence, for instance, has held for some time that the decision to hold an arbitration in England is a strong indication that English law is chosen as the parties' applicable law.¹⁶² This was held in *Tzortzis and Another v. Monark Line A/B*,¹⁶³ where the English Court of Appeal ruled that "although the transaction in question had closer links with Sweden, the parties had implicitly chosen English law to govern the contract by agreeing on London as the seat of the arbitration."¹⁶⁴ Commentators believe that this position is still valid under the 1996 Arbitration Act, as the Act contains no specific provision to the contrary.¹⁶⁵ In this respect, it would be correct to assume that when England is chosen as the seat of arbitration and there is no indication as to the applicable law, it may be presumed that English law has been implicitly chosen. Conversely, there is prior case law upholding the parties' freedom to choose the applicable law. In these

157. *Id.* at 524.

158. LEW ET AL., *supra* note 42, at para. 17-14.

159. *Id.* at para. 17-15.

160. *Id.*

161. FOUCHARD ET AL., *supra* note 54, at para. 1428.

162. *Id.*

163. *Tzortzis & Another v. Monark Line A/B* [1968] 1 All E.R. 949.

164. *Id.*

165. *Id.*

cases, the court ascertained that the substantial intention of the parties and the parties' express choice of law are conclusive and should be followed, while affirming party autonomy.¹⁶⁶

However, international arbitration has evolved and in contemporary international arbitration, less importance is given to the choice of the seat of arbitration. This is further supported by contrasting the awards rendered in two different ICC cases, the first of which determined the choice of applicable law based on the choice of the seat of arbitration.¹⁶⁷ In the other case, which was decided more than a decade later and dealt with the law applicable to the merits of the case, the award contained:

The choice of London as the place of arbitration and English as the language of the contract does not, in itself, indicate an intention of the parties that English law should govern the validity of the agreement to arbitrate.¹⁶⁸

It is therefore in the best interests of the parties to give unambiguous indications or simply provide their choice of law in writing to avoid any kind of difficulty when faced with an arbitral dispute.

D. *Timing of the Parties' Choice of Law*

It is presumed to be settled law that parties can exercise their autonomy to choose the applicable law not only after the arbitration agreement is completed, but also before an arbitration has commenced, as the parties have the freedom to modify their agreement.¹⁶⁹ When negotiating a submission agreement after disputes have arisen, despite the existence of a previously drafted arbitration agreement, parties may have an opportunity to agree on the applicable law again.¹⁷⁰ As is widely accepted in comparative law, "concurring written submissions provided in writing by the parties" remain equally binding on the arbitrators.¹⁷¹ However, one issue that the

166. See, e.g., *R v. International Trustee for the Protection of Bondholders, A.C.* 500, 529 (1937); *Vita Food Products Inc v. Unus Shipping Co Ltd., A.C.* 277, 289 (1939); *Whitworth Street Estates (Manchester) Ltd v. James Miller and Partners, A.C.* 583, 603 (1970).

167. ICC Case no. 2735, *Yugoslavian Seller v. U.S. Purchaser*, 104 J.D.I. 947 (1977).

168. ICC Case no. 5717, 1(2) ICC Bulletin 22 (1990).

169. FOUCHARD ET AL., *supra* note 54, at para. 1430; see also Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, ICCA 2 (2008), http://www.arbitration-icca.org/media/4/48108242525153/media012223895489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf.

170. FOUCHARD ET AL., *supra* note 54, at para. 1430.

171. *Id.*

law of international commercial arbitration disregards is the pre-existing rights of third parties. There is a widely held view that a modification to the choice of law should not adversely impact upon third-party rights.¹⁷² No such protection is generally accorded to third parties under the laws and rules of international commercial arbitration. One notable exception is The Hague Principles on the Choice of Law in International Contracts.¹⁷³

E. *Amiable Compositeurs* and *ex aequo et bono*

Rather than choosing the applicable law, parties may require arbitrators to settle a dispute by determining it based on what is “fair and reasonable,” rather than on the basis of law.¹⁷⁴ Arbitrators are vested with such powers by so-called “equity clauses,” which generally appear as follows in national legislation, international instruments, and institutional arbitration rules: “the arbitral tribunal shall decide *ex aequo et bono* (according to equity, justice and fairness) or as *amiable compositeur* (friendly arbitrator) only if the parties have expressly authorized it to do so.”¹⁷⁵ In the practice of international commercial arbitration, there are two conditions to be fulfilled to validate an “equity clause.” First, the parties must have expressly agreed to it, and second, it should be permitted by the applicable law.¹⁷⁶ Both conditions are codified in the UNCITRAL Arbitration Rules, which provide:

The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.¹⁷⁷

Failure to respect these two requirements will certainly render the award invalid and unenforceable. Limited information exists on the distinction between *amiable compositeur* and *ex aequo et bono*,

172. See Commission Regulation 593/2008 of June 17, 2008, on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177/6) art. 3(2).

173. See generally HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (2015), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> [hereinafter “Hague Principles”].

174. BLACKABY & PARTASIDES, *supra* note 1, at para. 3.192.

175. See, e.g., UNCITRAL Model Law, *supra* note 22, at art. 28(3); Switzerland Statute on Private International Law, *supra* note 104, at art. 187(2); France Civil Procedure Code, *supra* note 99, at art. 1512; ICC Rules, *supra* note 114, at art. 21(3); LCIA Rules, *supra* note 122, at art. 22(4); UNCITRAL Arbitration Rules, *supra* note 137, at art. 35(2).

176. See BLACKABY & PARTASIDES, *supra* note 1, at para. 3.195.

177. UNCITRAL Arbitration Rules, *supra* note 137, at art. 35(2).

though they are perceived differently by jurists.¹⁷⁸ Some also use the two concepts interchangeably and treat them as having the same meaning.¹⁷⁹ Some legal systems draw a distinction between arbitration “in equity.” In Switzerland, for example, the power to act *ex aequo et bono* entitles the arbitrator to disregard the relevant legal rules, including mandatory rules, subject only to international public policy, while an *amiable compositeur* “must comply with mandatory rules of law.”¹⁸⁰ However, it is assumed that these two concepts work in synergy and an arbitrator acting as *amiable compositeur* can also decide *ex aequo et bono* on a dispute.¹⁸¹

Therefore, the power to act as *amiable compositeurs* and decide *ex aequo et bono* enables arbitrators to rely on notions of justice and fairness in resolving disputes on equitable grounds.¹⁸² *Amiable compositeurs* do not have the burden of applying “systemized principles of law and are vested with the authority to utilize their sense of fairness and justice in rendering an award based on equity and good conscience.”¹⁸³ Although the arbitrators are not bound to apply strict legal principles and can rely on their common sense and sense of fairness to decide on a dispute, the award remains as enforceable as any other award of an arbitration conducted according to normal procedures through which parties decide on almost all aspects of the proceedings.¹⁸⁴ After all, arbitrators are empowered to perform the judicial function of rendering legally enforceable awards.¹⁸⁵

In the same light, while arbitrators are not bound by strict application of the law, their power as *amiable compositeurs* does not mandate a disregard of the law either. They have to act within the ambit

178. See Mauro Rubino-Sammartano, *Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law): Apparent Synonyms Revisited*, 9 J. INT'L ARB. 5, 14–16 (1992).

179. See Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 50, 70 (Julian D.M. Lew ed., 1987).

180. Concordat sur l'arbitrage du 27 août, 278.91 at art. 31(3) (Switz.); Switzerland Statute on Private International Law, *supra* note 104, at art. 187(2).

181. See A.F.M. Maniruzzaman, *The Arbitrator's Prudence in Lex Mercatoria: Amiable Composition And Ex Aequo Et Bono In Decision Making*, 18 MEALEY'S INT'L ARB. REP. 1, 2 (2003).

182. See, e.g., ICC Case No. 4567 of 1986, 11 Y.B. Comm. Arb. 143, 147 (noting that when determining the amount of incidental damages “[t]he Tribunal, when acting as amiable compositeur, was entitled to judge according to principles of fairness and equity”).

183. Chukwumerije, *supra* note 49, at 283.

184. See *id.*

185. See *id.*

of reasonableness and fairness.¹⁸⁶ Judge Hudson of the Permanent Court of International Justice set out the framework for acting *ex aequo et bono* as such:

Acting *ex aequo et bono*, the Court is not compelled to depart from applicable law, but it is permitted to do so, and it may even call upon a party to give up legal rights. Yet it does not have a complete freedom of action. It cannot act capriciously and arbitrarily . . . [The arbitrator] must proceed upon objective considerations of what is fair and just . . . [T]he Court would not be justified in reaching a result which could not be explained on rational grounds.¹⁸⁷

Therefore, the aim of *amiable compositeurs* is not to irrationally circumvent the law or exclude assistance of legal provisions in the performance of their duties. Instead, *amiable compositeurs* should adopt an objective approach and take the support of legal rules where the taking of such support would prove to be consistent with “common sense justice.”¹⁸⁸ Alternatively, where the legal rules prove to be inequitable, *amiable compositeurs* should be ready to depart from those rules and make determinations by taking into consideration the principles of equity.¹⁸⁹

In contemporary international commercial arbitration, the relevance of *amiable compositeurs* is mostly felt in complex technical cases where the parties would prefer to appoint technical experts as arbitrators who, although not lawyers, are knowledgeable in the subject matter of the dispute and conversant with the technicalities of the subject matter.¹⁹⁰ As the appointed arbitrators would be expected to use their common sense, professional experience, and objectivity while deciding the case, lack of legal training should not affect the case outcome.¹⁹¹

It is significant that the concept of *amiable compositeurs* and its functionalities are not explicitly provided for in the form of guidelines or codes of conduct and rules. Arbitrators are vested with this discretion on the basis of a written agreement only. If parties wish to further define the scope of the arbitrators’ discretion, they can personalize the arbitration agreement according to their desires and

186. FOUCHARD ET AL., *supra* note 54, at para. 1502.

187. MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 620 (1943).

188. Chukwumerije, *supra* note 49, at 284.

189. *See id.*

190. *See id.* at 285.

191. *See id.*

provide a framework for the *amiable compositeurs*.¹⁹² The drafters of the Model Law agreed, which is evident from the following commentary:

No attempt is made in the model law to define this type of arbitration which comes in various and often vague forms. It is submitted, however, that the parties may in their authorization provide some certainty, to the extent desired by them, either by referring to the kind of *amiable compositeurs* developed in a particular legal system or by laying down the rules or guidelines and, for example, request a fair and equitable solution within the limits of the international public policy of their two states.¹⁹³

1. *Limits of an Arbitral Tribunal's Power to Act as Amiable Compositeur*

An *amiable compositeur* clause confers upon the arbitral tribunal the authority to not apply the law, but an issue arises regarding the extent to which it can disregard legal provisions.¹⁹⁴ National legal systems would be hesitant or even unwilling to enforce awards that go against mandatory provisions of law or fundamental public policies.¹⁹⁵ Thus, while *amiable compositeurs* may disregard strict legal rules, it is widely accepted that they cannot overlook mandatory rules, just as arbitrating parties cannot derogate from these mandatory rules. As one tribunal noted, *amiable compositeurs* are “not authorized to make a decision contrary to an absolutely constraining law, particularly the rules concerning public order or morals.”¹⁹⁶

Therefore, an *amiable compositeur* cannot enforce a contract that is contrary to fundamental public policy or mandatory rules of a national legal system. Nor can they disregard or alter contractual provisions in the name of equity and justice, if the logic of equity is followed. That is, if the arbitrators have been vested with the power to rule in equity, then they should also have the implicit power to disregard contractual provisions that they deem inconsistent with equitable results. But this is not the case, as arbitrators derive their

192. *Id.*

193. U.N. Secretary-General, *Analytical commentary on draft text of a model law on international commercial arbitration*, ¶¶ 102104, 6263, U.N. Doc. A/CN.9/264 (Mar. 25, 1985).

194. See Mark Hilgard & Ana Elisa Bruder, *Unauthorised Amiable Compositeur?*, 8 DISP. RES. INT'L 51, 53 (2014).

195. See Chukwumerije, *supra* note 49, at 286.

196. ICC Case No. 1677 of 1978, 3 Y.B Comm. Arb. 217.

powers from the same agreement that contains those contractual provisions. Thus, in the absence of an express agreement by the parties empowering arbitrators to do so, an arbitrator should not be able to rewrite the parties' agreement.¹⁹⁷ While *amiable compositeurs* may disregard non-mandatory legal rules, they cannot disregard clear contractual provisions. This principle was acknowledged by the arbitral tribunal in *ICC Case No.3267*.¹⁹⁸ The Tribunal stated that:

[T]he paramount duty of the arbitrator, even as “amiable compositeurs” is to apply the contract of the parties, unless it is shown that the provisions relied on are clearly against the true intent of the parties, or violate a basic commonly accepted principle of public policy . . . In the view of the Arbitral Tribunal this principle is a basic requirement for the security of international trade.¹⁹⁹

This approach is also in line with the principle of party autonomy. Article 28(4) of the Model Law also clearly expresses that “[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”²⁰⁰

F. *Public Policy Limitations on Choice-of-Law Agreements in International Commercial Arbitration: The Three Theories Perspective*

Perhaps it would have been legitimate to say that party autonomy was absolute in the 18th century, when classical contractual theory was of greater relevance and parties enjoyed an absolute freedom of contract.²⁰¹ With changing social and economic environments, party autonomy became fettered as states became increasingly sovereign, and the contract theory started to lose ground in explaining international arbitration.²⁰²

Consequently, the jurisdiction theory became more prominent. As renowned author Dr. Francis A. Mann famously stated, “no arbitration can exist in a legal vacuum.”²⁰³ A strong proponent of the jurisdiction theory, he believed that each arbitration is effectively a national one and that it should be governed by the municipal laws of

197. See Chukwumerije, *supra* note 49, at 287.

198. ICC Case No. 3267 of 1980, 105 *Clunet* 969.

199. *Id.*

200. Arzu (Sen) Kalyon, *Arbitrators Acting as An Amiable Compositeur Under International Commercial Law*, 8 *L. & JUST. REV.* 95, 102 (2017).

201. See Yu, *supra* note 9, at 74.

202. *Id.*

203. *Id.*

the state where it takes place.²⁰⁴ He explained that in the strict legal sense, international commercial arbitration does not exist, as “every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.”²⁰⁵ Therefore, according to this theory, it is imperative for an international arbitration to be subject to a national law, such as the *lex loci arbitri* (law of the seat of arbitration), which provides a legal framework for arbitral proceedings.²⁰⁶

In addition to classical contract theory and jurisdiction theory, hybrid or “mixed” theory encompasses the modern approach and is widely accepted.²⁰⁷ According to this theory, both the contractual and jurisdictional nature of arbitration should be considered.²⁰⁸ An arbitration is contractual because parties are in control of certain aspects, such as the agreement to arbitrate and the selection of the arbitrators. At the same time, it raises jurisdictional issues, as it is states which decide on the arbitrability of disputes.²⁰⁹ Commentators have agreed with this theory, as international commercial arbitration starts as a private agreement between the parties and ends with a binding award that requires implementation by public authorities (courts) and the national law of relevant enforcing states.²¹⁰ Therefore, since validity of the agreements and enforcement of awards are determined by national law, the agreements and awards should conform to mandatory rules or public policy of those relevant laws—for instance, the *lex fori* and the law of the country where enforcement is sought.²¹¹ This theory is further supported by Article V(1)(b) and V(2)(b) of the New York Convention, which states that enforcement and recognition of the award may be refused if “[t]he 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” and where “[t]he recognition or enforcement of the award

204. F. A. Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157, 162 (Pieter Sanders ed., 1967).

205. Yu, *supra* note 9, at 75.

206. See Barraclough & Waincymer, *supra* note 13.

207. Hong-Lin Yu, *A Theoretical Overview of the Foundations of International Commercial Arbitration*, 1 CONTEMP. ASIA ARB. J. 255, 274 (2008).

208. *Id.*

209. *Id.*

210. See ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION para. 4.20 (2012).

211. See Yu, *supra* note 207, at 276–77.

would be contrary to the public policy of that country.”²¹² Similar exceptions are found in other conventions, arbitral institutions rules, and national law previously discussed in Part Two above.

1. *Mandatory Rules of Law and Public Policy*

Because national law is essential to international arbitration, mandatory rules of law and public policy will vary from jurisdiction to jurisdiction. The content and nature of these laws and public policies are specific to the jurisdiction where they apply; therefore, there is no uniform convergence as to what exactly amounts to mandatory laws and public policy.²¹³ However, it is widely accepted that such mandatory laws and policies may limit parties’ autonomy in choosing the law applicable to the merits of the case.²¹⁴ It may even render the award invalid or unenforceable.²¹⁵ A significant body of commentators agree that the arbitral tribunal must automatically apply the mandatory laws of the national system of law governing the dispute, unless it is not in compliance with international public policy requirements.²¹⁶

Mandatory rules have been defined as those rules that are capable of overriding the will of the parties.²¹⁷ Parties cannot derogate from these rules by way of contract and these rules will, with very limited exceptions, apply in setting aside a contract along with the governing law selected by the parties.²¹⁸ The purpose of these mandatory rules is to protect the state’s internal or international public policy, as well as its economic, social, and political interests.²¹⁹ Mandatory rules can be of two types, either procedural (such as rules focused on due process) or substantive (laws that address specific issues, such as tax, trading, or competition).²²⁰ Rome I distinguishes

212. New York Convention, *supra* note 26, at arts. V(1)(d), V(2)(b).

213. See BORN, *supra* note 2, at para. 2690.

214. See DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES 347 (3rd ed. 2016).

215. See BORN, *supra* note 2, at para. 2691.

216. See GIRSBERGER & VOSER, *supra* note 214, at 347. See also BORN, *supra* note 2, at para. 2706.

217. See Okezie Chukwumerije, *Mandatory Rules of Law of International Commercial Arbitration*, 5 AFR. J. INT’L & COMP. L. 561, 563 (1993).

218. See BLACKABY & PARTASIDES, *supra* note 1, at para. 3.128.

219. See Barraclough & Waincymer, *supra* note 13.

220. See *id.*

between mandatory rules and “overriding mandatory rules,” the latter requiring a higher threshold and regarded as more crucial and applicable regardless of any situation.²²¹

Another restriction on party autonomy is public policy, which falls under the umbrella of mandatory rules but is generally treated as a separate issue.²²² Despite their use as grounds for setting aside awards in various instruments and rules, those instruments and rules are all silent as to what public policy really means in international arbitration. The ambiguity of the concept is highlighted well by an English judge who said that public policy “is never argued at all but where other points fail.”²²³ This criticism arises from the ambiguous boundaries of public policy, even though it is often regarded as a “notion of pre-eminent importance in a number of legal areas.”²²⁴ Even today, the concept of public policy remains vague, but case law from various jurisdictions can provide some guidance on what can be considered a matter of public policy.

2. “Foreign” Mandatory Rules of Law and Public Policy

Apart from applying the mandatory law and public policy of the law applicable to the merits of the dispute, the national law of the tribunal’s seat and the national law of the place where enforcement is sought may also override the parties’ choice-of-law agreement and other contractual terms.²²⁵ Commentators have for many years challenged the traditional view that did not encourage arbitral tribunals to apply the mandatory laws and public policy of third countries.²²⁶ A revolutionary decision in the U.S. Supreme Court case *Mitsubishi Motors Corporation vs. Soler Chrysler-Plymouth* made clear that under certain circumstances, the mandatory rules of third countries must be applied in the overall interests of arbitration.²²⁷ In that case,

221. Rome I, *supra* note 172, at art. 9(1). See also Michael Hellner, *Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles*, 5 J PRIV. INT’L L. 447 (2009).

222. See CORDERO-MOSS, *supra* note 19, at 132.

223. Burrough, J., *Richardson v. Mellish* (1824) 2 Bing. 229; [1824] All E.R. Rep. 258, 266.

224. Francisco Blavi, *The Role of Public Policy in International Commercial Arbitration*, 82 ARB. 2, 5 (2016) (quoting Franz Schwarz & Helmut Ortner, *The Arbitration Procedure—Procedural Ordre Public and the Internationalization of Public Policy in Arbitration*, in AUSTRIAN ARBITRATION YEARBOOK 2008 135 (Christian Klausegger et al. eds., 2008).

225. See BORN, *supra* note 2, at paras. 2696–97.

226. See GIRSBERGER & VOSER, *supra* note 214, at 348.

227. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

the law chosen by the parties to govern the contract was Swiss law, but the arbitrators were required to determine antitrust claims under US antitrust law; otherwise, the award may have been susceptible to United States public policy if any enforcement attempt were made.²²⁸ After all, arbitrators have the duty not only to follow the will and intent of the parties, but also to render an award that will be enforceable.

Generally, national courts largely accept the mandatory rules of the forum and the substantive law chosen by the parties to govern the merits of the dispute, but only if those rules are not contrary to international public policy.²²⁹ Furthermore, courts may take into consideration the mandatory rules of a law other than the law of the forum or the applicable law, provided that those mandatory rules are closely connected to the subject matter of the dispute. This approach is reflected in Article 9(1) of Rome I Regulation and Article 19 of the Swiss International Private Law Act.²³⁰

3. *International Public Policy*

Though commentators have tried to explain the juridical nature of international commercial arbitration as either a purely contractual or jurisdictional matter, a blend of the two lenses of interpretation is often necessary. The hybrid theory treats both the contract and domestic law as validating arbitration agreements, and thus represents a middle ground between the contractual and jurisdictional theories of interpretation.²³¹ Another theory, however, suggests that international arbitration has an autonomous juridical nature because it should not be subject to local law.²³² This autonomous theory, developed by Rubellin-Devichi, puts arbitration on a “supra-national” level and argues that the use and purpose of arbitration should be considered.²³³ The theory views unfettered party autonomy, unrestricted by national law, and the speedy and flexible character of proceedings as the primary merits of international arbitration.²³⁴ However, whether international public policy exists as a concept depends on the theory

228. See *id.* at 629.

229. See GIRSBERGER & VOSER, *supra* note 214, at 348.

230. Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, art. 9(1); Switzerland Statute on Private International Law, *supra* note 104, at art. 19.

231. See LEW ET AL., *supra* note 42, at para. 79.

232. See *id.* at 81.

233. Yu, *supra* note 207, at 278.

234. See *id.*

to which one subscribes. Despite these notions, states may understandably seek to have the right to refuse the recognition and enforcement of an arbitral award if it violates the state's own domestic notions of public policy.²³⁵ The question remains, however, of how domestic courts should apply international public policy.

Some authors maintain that a violation of domestic public policy might be permissible in the context of international public policy because international trade is to be encouraged, free from the specific interests of any particular state.²³⁶ They argue that the distinction between domestic and international public policy means that issues falling within the realm of domestic public policy do not necessarily pertain to international public policy.²³⁷ Accordingly, some jurisdictions have developed a concept of international public policy to refer to the policy of the forum with respect to international transactions.²³⁸ For example, in France, the notion of international public policy is explicitly adopted in the New Code of Civil Procedure 1981 article 1502(5), which provides that an award can be challenged on the ground that it is "contrary to international public policy."²³⁹ Other jurisdictions have enacted similar provisions in their domestic laws.²⁴⁰ Furthermore, the Court of Appeals of Milan has held, similarly, that the public policy referred to in the New York Convention article V(2)(b) is a concept of international public policy.²⁴¹

Moreover, in an attempt to achieve harmonization, the International Law Association's Committee on International Commercial Arbitration has defined international public policy as the:

body of principles and rules recognized by a state, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international

235. See BLACKABY & PARTASIDES, *supra* note 1, at para. 3.105.

236. See Troy L. Harris, *The 'Public Policy' Exception to Enforcement of International Arbitration Awards Under the New York Convention*, 24 J. INT'L ARB. 9, 12 (2007).

237. See Blavi, *supra* note 224, at 12–13.

238. See Amokura Kawharu, *The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards*, 24 J. INT'L ARB. 491, 510 (2007).

239. FOUCHARD ET. AL., *supra* note 54, at 860–62.

240. See BORN, *supra* note 2, at para. 3223.

241. See Blavi, *supra* note 224, at 13.

public policy) or of its contents (substantive international public policy).²⁴²

Accordingly, arbitral tribunals in international commercial cases should rarely face challenges from domestic courts advancing their own notions of public policy, thus providing a narrower interpretation of public policy and greater uniformity for grounds for annulment of an award.

As discussed above, in international commercial arbitration, parties can choose the applicable law that will govern the merits of their dispute through their common intention—whether expressly, in the form of a choice-of-law clause, or tacitly, where arbitrators have the task to look for the intent of the parties and deduce the applicable law. Moreover, a departure from the traditional approach where the seat of arbitration was presumed to be an indication of the choice of applicable law by the parties is evident from case law. Also, parties may give written authority to arbitrators to act as *amiable compositeurs* or decide *ex aequo et bono*. As discussed, when acting as *amiable compositeurs*, arbitrators can disregard provisions of law and decide on notions of justice and fairness in resolving disputes on equitable grounds. However, they are not exempted from mandatory laws and public policy. In the same vein, these are limits to party autonomy and those limitations are interpreted differently across jurisdictions, as well as depending on the theory to which a given state subscribes. Having looked at the scenario where parties designate the choice of law, the next Part of this Article turns to situations in which parties do not designate a choice of law and in which arbitrators must have recourse to conflict-of-law rules to determine the applicable law.

IV. DETERMINATION OF APPLICABLE LAW BY ARBITRATORS

A. *When Parties Do Not Designate a Choice of Law in Their Contractual Agreement*

It has been demonstrated in the previous Part that the first step when choosing the applicable law is party autonomy—that is, parties are free to have their disputes governed by the law they desire according to the principle of party autonomy. Even though it is widely accepted that parties are at liberty to choose the applicable law, the parties may fail to exercise this power. It may be unusual for parties

242. International Law Association, *Final Report on Public Policy, New Delhi Conference*, INT'L L. ASS'N CONF. 5 (2002).

in international arbitration to omit as important a clause as the applicable law, but it happens in a substantial number of cases.²⁴³ This may happen when parties have fail to reach a mutual agreement on which law shall apply to the merits of their dispute or when parties focus more on commercial aspects of the agreement than on its legal aspects.²⁴⁴ At worst, it can happen when parties take advice from incompetent lawyers who have overlooked such a salient element of international commercial arbitration. However, a contract's failure to provide for the applicable law should not automatically be attributed to the carelessness of the parties. It may be that parties have intentionally chosen not to include such a clause in their agreement.²⁴⁵ Regardless of the reasons, in the absence of an express choice of law or instructions by the parties concerning how the choice of law is to be made through a reference to arbitration rules, the arbitrators have the same duty as the judges sitting in a national court to choose the applicable law for the parties. Therefore, the private international law of a state needs to apply to identify the applicable law.²⁴⁶ Private international law is the branch of the law that contains the so-called conflict-of-laws rules, or choice-of-law rules, which facilitate the identification of which state law governs a situation that has connections with more than one state.²⁴⁷ Each state has its own private international law. Therefore, it is necessary to identify which state's conflict rules are applicable, and it is left to the discretion of arbitrators to decide which method to apply.

In practically all contemporary legal instruments in international commercial arbitration, arbitrators are provided with broad discretion to determine the applicable substantive law, absent a choice of law by the parties.²⁴⁸ If one rules out an outdated jurisdictional theory, by which domestic choice-of-law rules of the seat of arbitration would have been applied, there exist three principal approaches that arbitrators can adopt to determine the applicable

243. See BORN, *supra* note 2, at para. 2625.

244. See Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L L. 613, 623 (1982).

245. See *id.*

246. See CORDERO-MOSS, *supra* note 8, at xvii.

247. See *id.*

248. See Emmanuel Gaillard, *The Role of the Arbitrator in Determining the Applicable Law*, THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 185, 191 (Lawrence W. Newman & Richard D. Hill eds., 2004); Markus A. Petsche, *Choice of Law in International Commercial Arbitration*, PRIV. INT'L L. 19, 21 (S. R. Garimella & S. Jolly eds., 2017).

law in the absence of a choice of law by the parties.²⁴⁹ This Part examines the situation where parties have not made a choice of law and arbitrators must determine the applicable law through conflict-of-law rules. It also shows how arbitrators are granted far-reaching freedom to use the conflict rules under all three methods.

B. *The Three Methods of Determining the Applicable Law*

There are three principal methods utilized by arbitral tribunals to determine the applicable law: (1) granting arbitral tribunals the freedom to have recourse to the conflict-of-law norms that they consider “applicable/appropriate”; (2) allowing arbitral tribunals to apply a closest-connection test; and (3) permitting arbitral tribunals to directly apply the law or rules of law that they consider appropriate without having recourse to any particular choice-of-law rule, the so-called *voie directe* method.²⁵⁰

1. *The UNCITRAL Method: Application of a Choice-of-Law Rule Identified by the Arbitrators That They Deem “Applicable/ Appropriate”*

The first method, which grants arbitral tribunals the discretion to choose the conflict-of-laws rule that they consider applicable or appropriate, is reflected in the approach embraced by the UNCITRAL Arbitration Rules and the Model Law. This approach was followed in the European Convention, which provides 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.”²⁵¹ Similarly, both Article 28(2) of the Model Law and Article 33 of the UNCITRAL Arbitration Rules require that an appropriate choice-of-law rule is identified first and the applicable law determined by the selected choice-of-law rule is applied to the dispute after.²⁵² The English Arbitration Act is equally representative and provides in Section 46(3) that “[i]f or to the extent that there is no such choice or agreement [on the applicable substantive law] the tribunal shall apply the law determined by the conflict-of-laws rules which it considers applicable.”²⁵³

249. See Gaillard, *supra* note 248, at 191.

250. Born, *supra* note 2, at para. 2637 [D].

251. European Convention, *supra* note 65, at art. VII (1).

252. See UNCITRAL Model Law, *supra* note 22, at art. 28(2); UNCITRAL Arbitration Rules, *supra* note 137, at art. 33.

253. UK Arbitration Act, *supra* note 92 at § 46(3).

This approach, also known as the *voie indirecte*, is not indicative of any conflict-of-laws rules that the arbitral tribunal must apply. In other words, arbitrators are not bound to apply the conflict-of-laws rules of the arbitral seat or of any other specialized choice-of-law system.²⁵⁴ This approach actually grants arbitrators extensive freedom and authority to apply a system of conflict-of-laws rules that they consider most appropriate for the case. One commentator observes 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.”²⁵⁵ It can consequently be concluded that in this approach, arbitrators have absolute freedom over the choice of the specific choice-of-law rule they wish to apply. The possibilities available to arbitrators when choosing specific choice-of-law rules are discussed in part 4.3 below.

2. *The Swiss Method: Application of a Specific Choice-of-Law Rule of the Seat*

A second method is to allow arbitral tribunals to apply a “closest-connection” test.²⁵⁶ According to this method, arbitrators can apply a choice-of-law rule of the seat of arbitration that has specifically been designed to apply in international arbitration matters, as opposed to choice-of-law rules that are meant to apply to domestic arbitration.²⁵⁷ This method also rejects the jurisdictional theory and has been endorsed in several contemporary arbitration statutes, such as those in Switzerland and Germany.²⁵⁸ Article 187 of the Swiss Private International Law Act of 1987 provides that where a choice of law by the parties cannot be determined, the arbitral tribunal shall decide the dispute “according to the rules of law with which the case has the closest connection.”²⁵⁹ Likewise, when Germany adopted the Model Law, it modified Article 28 to include a mandatory choice-of-law formula, which stipulates that “[f]ailing any designation by the parties, the arbitral tribunal shall apply the law of the State with which

254. See BORN, *supra* note 2, at para. 2634.

255. Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 24 (1986).

256. Born, *supra* note 2, at para. 2654–55.

257. See Gaillard, *supra* note 248, at 204.

258. See Marc Blessing, *Introduction to Arbitration—Swiss and International Perspectives*, 10 SWISS COM. L. SERIES 1, 105 (1999).

259. Switzerland Statute on Private International Law, *supra* note 104, at art. 187(1).

the subject-matter of the proceedings is most closely connected.”²⁶⁰ Incorporating a statutory formula such as the “closest connection test” does not radically limit the freedom of arbitrators in choosing the correct conflict-of-laws rule. It still offers arbitrators great flexibility and broad freedom to apply the law they favor.²⁶¹

3. *The Direct Choice Method*

The third and last method—the so-called *voie directe* or direct choice method—permits arbitral tribunals to directly apply the law or rules of law that they consider appropriate without having recourse to any choice-of-law rule.²⁶² This method owes its origin to the 1981 French decree on international arbitration, where the freedom to choose the applicable law or rules of law was first granted.²⁶³ Under the French law, absent a choice of law by the parties, arbitral tribunals “shall decide the dispute in accordance with the rules of law [they] consider . . . appropriate.”²⁶⁴ Similarly, popular international arbitral institutions contain similar provisions, as in the ICC, LCIA, and AAA Rules.²⁶⁵

In practice, the direct choice method is more of an approach rather than a method, granting arbitrators the freedom, or in this context the autonomy, to do as they like.²⁶⁶ Emmanuel Gaillard elaborates on this “autonomy,” which is recognized by a number of arbitration statutes and rules, and posits that “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.”²⁶⁷

Of the approaches that arbitrators may adopt when determining the applicable substantive law in international commercial arbitration, all three entail a degree of discretion, far superior to that enjoyed by domestic courts.²⁶⁸ However, the most liberal approach of all is the direct choice method, as it allows arbitrators to directly choose

260. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 1051(2) (Ger.).

261. See Gaillard, *supra* note 248, at 204.

262. See Doug Jones, *Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties: A discussion of voie directe and voie indirecte*, 26 SING. ACAD. L. J. 911, 911 (2014).

263. CODE DE PROCEDURE CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 1496 (Fr.).

264. *Id.*

265. See, e.g., ICC Rules, *supra* note 114, at art. 21(1); LCIA Rules, *supra* note 122, at art. 22(3); AAA International Arbitration Rules (2014) at art. 31(1) [hereinafter “AAA Rules”].

266. See Gaillard, *supra* note 248, at 205.

267. *Id.*

268. See *id.*

the rules of law that they consider appropriate, without selecting choice-of-laws or conflict-of-laws rules. The functions of conflict-of-laws rules are “channeling and structuring” the arbitrator’s discretion and giving parties some degree of certainty about the substantive law governing their dispute.²⁶⁹ Directly applying a substantive law without a conflict-of-laws analysis can constrain the certainty, predictability and fairness of the proceedings, which can result in the parties’ substantive rights being left to the mercy of the subjective, unarticulated instincts of individual arbitrators.²⁷⁰

C. *Contemporary Choice-of-Law Rules Applied by Arbitral Tribunals*

Having looked at the methods adopted by arbitrators to determine the applicable law in the absence of a choice of law by the parties, this section will analyze some contemporary choice-of-law rules that arbitral tribunals apply in modern international commercial arbitration. There are three main choice-of-law rules: (1) the traditional choice-of-law rules of the arbitral seat; (2) the “cumulative” application of choice-of-law rules of all states having a meaningful connection to the parties’ dispute; and (3) the “international” choice-of-law rules.²⁷¹

1. *Choice-of-law Rules of the Arbitral Seat*

As previously discussed, there has been a significant erosion of the jurisdictional theory behind the traditional “arbitral seat” rule. Nonetheless, arbitral tribunals continue to apply the choice-of-law rules of the arbitral seat in many cases to determine the substantive law of the arbitral seat.²⁷² For instance, one award concluded:

It can be reasonably argued that the parties who fail to explicitly agree on an applicable substantive law, but agree on arbitration at a specified place pursuant to specified arbitration rules and procedures . . . impliedly also agree—or at least impliedly accept a determination to that effect—on the conflict-of-laws rules of the law of the jurisdiction in which the place of arbitration is located.²⁷³

269. BORN, *supra* note 2, at para. 2647.

270. *See id.*

271. Petsche, *supra* note 248, at 21.

272. *Id.* at 22.

273. BORN, *supra* note 2, at para. 2648; ICC Case No. 9771 of 2001, 29 Y.B. Comm. Arb. 46, 52–53 (2004).

The rationale for the continued reliance on conflicts rules of the arbitral seat is due to the fact that some countries such as Switzerland and Germany prescribe the applicable conflict-of-laws rule in their arbitration legislation and treat it as mandatory, while some arbitral tribunals believe that choosing a seat of arbitration is an implied choice made by parties to have their applicable law determined by the conflict-of-law rules of the seat of arbitration.²⁷⁴

2. *The “Cumulative” Application of Choice-of-Law Rules of All States Having a Meaningful Connection to the Parties’ Dispute*

Under this rule, the conflict rules of all states having a meaningful connection to the parties’ dispute are applied.²⁷⁵ There can also be some variations of this rule whereby the conflict of laws rule of the parties’ respective legal system and that of the seat of arbitration are applied.²⁷⁶ The aim of this rule is to determine whether all potentially relevant conflicts rules point to the same national law and therefore have an “internationalizing” effect that is convenient for application in international commercial arbitration.²⁷⁷ Also, under this rule, the award cannot be challenged for alleged failure to apply the proper law and rules.²⁷⁸

This rule is efficient in simple cases where any other rule would have provided the same answer. In more complex cases, however, where the outcome provides two or more applicable laws, the cumulative rule does not provide further guidance. Instead, other conflict-of-law rules must be applied to the outcome in order to determine the ultimate applicable law. This rule can therefore be applied only where there is convergence between the relevant conflict-of-laws rules of the different states that have a meaningful connection with the dispute. One case that applied this rule is the *ICC case No. 628126*, where the tribunal considered connecting such factors as where the contract was signed, the place of principal office of the seller, and the habitual residence of the seller before deciding among the three states involved in the case whose conflict-of-law rules were to be applied.²⁷⁹

274. See BORN, *supra* note 2, at para. 2648.

275. See *id.* at para. 2649.

276. See Petsche, *supra* note 248, at 24.

277. BORN, *supra* note 2, at para. 2650.

278. See *id.*

279. Petsche, *supra* note 248, at 24.

3. *The “International” Choice-of-Law Rules*

Bearing the same idiosyncrasies as the autonomous theory, this rule entails the application of “international” or general principles of choice of law. Some discrepancies can be noted in the application of the rule in that some awards derive conflict-of-laws rules from sources of transnational laws while others derive their conflicts rules from international instruments.²⁸⁰ The rationale of having international conflict-of-law rules was well reasoned in this arbitral award:

Application of international standards offers many advantages. They apply uniformly and are not dependent on the peculiarities of any particular national law. They take due account of the needs of international intercourse and permit cross-fertilization between systems that may be unduly wedded to conceptual distinctions and those that look for a pragmatic and fair resolution in the individual case . . . [T]he Tribunal therefore judges it preferable to apply the standards of international commerce dictated by the needs of the international market place.²⁸¹

Similarly, in *ICC case No. 6149*, the arbitral tribunal, while basing its decision on the cumulative rule, specified that its decision was “further supported by some other general principles prevalent in modern conflict-of-laws,” such as the 1955 Hague Convention on the Law Applicable to the International Sale of Goods and the Rome Convention on the Law Applicable to Contractual Obligations.²⁸²

Unfortunately, there is no universally accepted body of international conflict-of-law rules. Though the field of conflict of laws remains inconsistent, as discussed further below, there is potential for the creation of a framework encompassing international conflict-of-law rules with reference to arbitral awards and international instruments. A proper framework for the determination of applicable law in arbitration would integrate well with the objectives of international arbitration, which are “neutrality, efficiency, predictability and effective international enforcement.”²⁸³ International conflict rules would then be unfettered from national laws and allow for more certainty, as arbitrators would not have to randomly choose a conflict-of-law rule to determine the applicable law.

280. See BORN, *supra* note 2, at para. 2650.

281. *Id.*

282. ICC Case no. 6149 of 1990, *Seller v Buyer*, 20 Y.B. Comm. Arb. 41, 53–54 (1995).

283. BORN, *supra* note 2, at para. 2651.

D. *Arbitral Tribunals versus Transnational Law as Applicable Law*

The use of transnational law to determine the applicable law is warranted by most modern arbitration statutes and institutional rules. Two requirements have been identified before arbitral tribunals can apply transnational law.²⁸⁴ First, they should completely disregard the idea of applying conflict-of-laws rules, since resorting to a conflict norm will automatically revert to the application of a domestic law.²⁸⁵ Second, they must have the right to do so.²⁸⁶ Some instruments that refer to “law” do not recognize such a right and generally require domestic law to apply, while others that mention “rules of law” agree to the validity of transnational law as applicable law.²⁸⁷ However, the main instruments for international commercial arbitration are quite conservative and do not grant arbitrators the freedom to choose conflict rules from transnational sources.²⁸⁸ The Model Law, the European Convention, and English law are representative of this view.²⁸⁹ More permissive instruments are French Law and Swiss law, although the latter provides for the closest-connection test as a rule.²⁹⁰ Also, the ICC, LCIA, and AAA permit arbitral tribunals to choose from transnational sources of law.²⁹¹

Applying transnational rules of law to the merits of a dispute can be useful in situations where two or more legal systems have an equally close connection to the dispute, yet would produce significantly different results.²⁹² The landmark arbitration award *Norsolor* illustrates a situation where the tribunal was faced with the difficulty of choosing compelling national laws but instead preferred to refer to international *lex mercatoria*, given the international nature of the agreement.²⁹³ Similarly, in *ICC case No. 10422*, the parties did not choose the applicable law but instead agreed that the applicable law should be a neutral one. The arbitral tribunal interpreted this

284. See Petsche, *supra* note 248, at 29.

285. See *id.*

286. See *id.*

287. *Id.*

288. See Jones, *supra* note 262, at 923.

289. See, e.g., UNCITRAL Model Law, *supra* note 22, at art. 28(2); European Convention, *supra* note 65, at art. VII(1); UK Arbitration Act § 46(3).

290. See CODE DE PROCÉDURE CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 1511 (Fr.); Switzerland Statute on Private International Law, *supra* note 104, at art. 187.

291. See, e.g., ICC Rules, *supra* note 114, at art. 21(1); LCIA Rules, *supra* note 122, at art. 22(3); AAA Rules, *supra* note 265, at art. 31(1).

292. See Gaillard, *supra* note 248, at 210.

293. See *id.*

desire as a requirement to apply “general rules and principles of international contracts, the so-called *lex mercatoria*.”²⁹⁴ Additionally, applying transnational principles is an effective way to avoid the application of idiosyncratic rules that are present in domestic legal systems, thus serving to meet the expectations of parties.²⁹⁵

Arbitral tribunals can also apply the *trunc commun* doctrine. Accordingly, rules that are common to each party’s legal systems are applied. Parties can either instruct arbitrators to opt for this doctrine, as evidenced in *ICC case No. 2272*, or arbitral tribunals can apply it at their own discretion.²⁹⁶ However, this doctrine can prove to be pragmatic only if the potentially applicable laws are identical or converging. In reality, finding common elements by comparing these rules can be extremely complicated. Nevertheless, arbitral tribunals have effectively applied this doctrine absent a choice of law by the parties. For instance, in *ICC case No. 2886* and *ICC case No. 5103*, arbitrators have applied rules common to two different legal systems.²⁹⁷

As discussed in this Part, where a choice of law has not been determined by parties, arbitrators enjoy a wide discretion in choosing the applicable law. Such discretion extends to the choice of specific methods and approaches that arbitrators can undertake to select the conflict-of-laws rule, which subsequently will help them determine the applicable law. This freedom is enshrined in various instruments and rules. Furthermore, arbitrators may go as far as applying transnational rules that they deem appropriate. Although the freedom of arbitrators to make the best selection is compelling, it fails to provide a clear framework and method for choosing the applicable law in international commercial arbitration, undermining the predictability, uniformity and legal certainty expected from the proceedings. Therefore, the increasing powers of arbitrators would be detrimental to the attractiveness of arbitration as a dispute resolution mechanism in international trade. The goal of this Article is to find the balance between the sanctity of party autonomy and the powers of arbitrators to

294. ICC Case no. 10422 of 2001, <http://www.unilex.info/case.cfm?pid=1&do=case&id=957&step=FullText> (last visited Oct. 19, 2017).

295. See Gary Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SING. ACAD. L.J. 815, 820 (2014).

296. See ICC Case no. 2272 of 1975, Italian claimant A v Belgian respondent B, 2 Y.B Comm. Arb. 151 (1977); Petsche, *supra* note 248, at 30.

297. See Petsche, *supra* note 248, at 31.

determine the applicable law. The next Part will analyze the way forward for party autonomy and the determination of the substantive applicable law in international commercial arbitration.

V. THE QUEST FOR AN ARBITRAL EQUILIBRIUM

It has been discussed above that virtually all modern legal systems espouse the principle of party autonomy. However, the boundaries, scope, and limitations of party autonomy remain largely undefined. For instance, as discussed throughout this Article, parties are mostly allowed to choose the applicable law in contracts provided that the contract is a commercial and international one.²⁹⁸ Some legal systems require that there be a close connection, whether contractual or geographic, for the contract to qualify as an international commercial one, and in order to apply the principle of party autonomy.²⁹⁹ These variations in the scope of party autonomy witnessed in different legal systems defeat the purpose of granting parties this autonomy to choose the applicable law. Other asymmetries that have been addressed in this Article and that affect the uniform application of party autonomy are the form which choice-of-law clauses take, the transnational character of the chosen law, and the threshold of overriding mandatory rules and public policy. There is thus a need to have clearer and explicit guidance on the yardstick to be used when ascertaining the scope and limits of party autonomy. Expressed in proverbial terms by Symeonides, “party autonomy is like “motherhood and apple pie”: virtually nobody is against it and most commentators enthusiastically endorse it.”³⁰⁰ This is indeed a truism; however modern arbitration requires greater predictability and a uniform structure needs to be put in place to promote the desired characteristics expected from international commercial arbitration.

A. *Safeguarding the Sanctity of Party Autonomy through Transnational Convergence and Uniform Application*

The first step to bring about such uniformity and convergence has already been laid out by The Hague Principles on Choice of Law in International Commercial Contracts (the “Hague Principles”), a creation of The Hague Conference on Private International Law (the “Hague Conference”), which was approved on the 19th of March

298. See Symeon C. Symeonides, *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple*, 39 BROOK. J. INT'L L. 1123, 1128 (2014).

299. See *id.* at 1129.

300. *Id.* at 1124.

2015.³⁰¹ This instrument has further benefitted from the endorsement of UNCITRAL at its General Assembly on July 8, 2015.³⁰² The Hague Principles are a set of soft-law norms and are the first of their kind to be drafted by the Hague Conference.³⁰³ This non-binding instrument consists of 12 Articles and an accompanying commentary. As the preamble to the Hague Principles states, the instrument is intended to be used as a model for “national, regional, supranational or international” laws, and may be used to “interpret, supplement and develop rules of private international law.”³⁰⁴ They follow closely the model of the 1980 Rome Convention and its successor, the Rome I Regulation of the European Union, yet diverge with some innovative provisions that will be discussed below.³⁰⁵

The Hague Principles primarily reinforce party autonomy and espouse a principle according to which the law chosen by the parties will govern the contract to the greatest possible extent, subject to clearly defined limits.³⁰⁶ Upholding the sanctity of party autonomy in choice-of-law clauses has been routinely advocated by commentators, citing the increased control and predictability that it allows in domestic and international commercial transactions.³⁰⁷ Therefore, the purpose of these principles is to serve as a guide to states that do not sufficiently recognize party autonomy, to refine the principle of party autonomy for those that do, and to fill in the gaps for states that lack a developed body of conflict-of-laws rules governing international contracts.³⁰⁸ Some of its innovative provisions are those that; allow for the choice of non-state law,³⁰⁹ enunciate the principle of severability,³¹⁰ declare a choice of law by formless consent as valid,³¹¹ provide

301. Hague Principles, *supra* note 173.

302. United Nations Commission on International Trade Law, Principles on Choice of Law in International Commercial Contracts, A/CN.9/847 (Apr. 15, 2015).

303. Christophe Bernasconi, *Foreword to HAGUE CONF. PRINCIPLES ON CHOICE OF L. IN INT'L COM. CONT.*, 7 (2015).

304. Hague Principles, *supra* note 173, at pmb1.

305. *Compare* Convention on the Law Applicable to Contractual Obligations (Rome Convention), June 19, 1980, 19 ILM 1492 *with* Commission Regulation 293/2008 of June 17, 2008, on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177/6).

306. Hague Principles, *supra* note 173, at pmb1.

307. *See* Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 876 (2013).

308. *See* Marta Pertegás & Brooke Adele Marshall, *Party Autonomy and Its Limits: Convergence Through the New Hague Principles on Choice of Law in International Commercial Contracts*, 39 BROOK. J. INT'L L. 975, 982 (2014).

309. Hague Principles, *supra* note 174, at art. 3.

310. *Id.* at art. 7.

311. *Id.* at art. 5.

for special rules on the battle of forms³¹² and comply with overriding mandatory provisions in arbitration,³¹³ and merge overriding mandatory rules and public policy into a single provision.³¹⁴ The Hague Principles are meant to apply to disputes resolved through either arbitration or litigation. Therefore, provisions relevant to the issues in international commercial arbitration addressed throughout this Article will be critically analyzed below.³¹⁵

1. *The Requirements of “International” and “Commercial”*

The term “international” is defined very broadly in the Hague Principles, unlike in the Model Law, as discussed earlier. It is defined in the negative, to exclude purely domestic situations and confers the broadest possible scope to its interpretation.³¹⁶ The Principles even use “establishment” instead of the usual usage of “place of business” to expand the possibilities of qualifying a contract as international, considering the list of locations which the term “establishment” encompasses.³¹⁷ As for the commerciality of the contract, both or all of the parties must be engaging in the exercise of its trade or profession, and it also expressly excludes consumer and employment contracts.³¹⁸ Therefore, parties are able to trigger the necessary internationality more freely and the flexibility inherent in the “establishment” term, since its catchall phrase allows for commercial parties to freely draft choice-of-law provisions in light of the innovative provisions of the Hague Principles.³¹⁹

2. *Timing of the Choice*

The Principles state that the choice of the applicable law “may be made or modified at any time.”³²⁰ A very similar phrase is used in Article 3(2) of Rome I.³²¹ Like the EU rule, the Hague Principles seem to open the possibility for parties to agree on the application of

312. *Id.* at art. 6(1)(b).

313. *Id.* at art. 11(5).

314. *Id.* at arts. 11(1), (3).

315. *Id.* at pmbl.

316. Hague Conference on Private International Law, *Commentary on the Principles on Choice of Law in International Commercial Contracts*, para 1.14 (2015) [hereinafter “Hague Commentary”].

317. *Id.* at paras. 1.17, 12.3.

318. Hague Principles, *supra* note 174, at art. 1.1.

319. Jonathan Levin, *The Hague Principles on Choice of Law in International Commercial Contracts: Enhancing Party Autonomy in a Globalized Market*, 13 N.Y. UNIV. J. L. & BUS. 271, 282 (2016).

320. Hague Principles, *supra* note 174, at art. 2.3.

321. See Commission Regulation 293/2008, *supra* note 305, at art. 3(2).

a certain legal system even after the beginning of legal proceedings, as it is in the practice of arbitration in China and Japan.³²² As noted above, while it was presumed to be “legally settled” that parties can modify their choice after finalizing the arbitration agreement, this explicit provision clarifies that presumption in the sphere of international commercial arbitration.³²³ It also ensures the protection of the rights of third parties, a provision that does not appear in the Model Law.³²⁴

3. *Choice of Law*

Underpinned by the principle of party autonomy, the Hague Principles allow parties to choose the law applicable to their contract and also expressly state that there need be no connection between the chosen law and the parties or their transaction.³²⁵ It is intended to promote certainty and predictability with regard to the parties’ prior arrangement, as parties know beforehand which law shall apply and the parameters within which they must perform their obligations to conclude their transaction without complications.³²⁶ As for the form which choice-of-law clauses should take, as discussed above, most legal systems recognize an implicit choice of applicable law, albeit to varying degrees. Under the Hague Principles, for a tacit choice of law to be valid, there must be a real intention between the parties and it must be clearly evident from the provisions of the contract or the circumstances.³²⁷ This shows a level of strictness of the criteria for a tacit choice of law, which is necessary to avoid unpredictable decisions and legal uncertainty that otherwise could undermine the conflicts rule that applies in the absence of a choice of law.³²⁸ Furthermore, Article 3, the most progressive and controversial provision of the Principles, stipulates that “[t]he law chosen by the parties may be rules of law that are generally accepted in an international, supranational or regional level as a neutral and balanced set of rules,

322. See Andreas Schwartz, *New Trends in Parties’ Options to Select the Applicable Law—The Hague Principles of Choice of Law in International Contracts in a Comparative Perspective*, 12 UNIV. ST. THOMAS L.J. 87, 91 (2015).

323. Hague Principles, *supra* note 174, at art. 2.3 (“The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.”).

324. *Id.*

325. *Id.* at arts. 2.1, 2.4.

326. See Pertegás & Marshall, *supra* note 308, at 984.

327. Hague Principles, *supra* note 174, at art. 4.

328. See Jan L. Neels & Eesa A. Fredericks, *Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts*, 44 DE JURE 101, 106 (2011).

unless the law of the forum provides otherwise.”³²⁹ This indicates that parties can opt for “rules of law” that emanate from non-state sources of law such as the *lex mercatoria* and transnational law. Similar provisions are present in other legal instruments; however, they are construed in more general terms as “rules of law.” The Hague Principles add some conditions to this choice. For instance, the set of rules should be “generally accepted” and “neutral and balanced.” This narrows the variety of rules of law that parties may choose.

4. *Mandatory Law and Public Policy*

Party autonomy, as is universally recognized, is not absolute. As discussed above, it operates within limits that take the form of overriding mandatory law and public policy. The Hague Principles acknowledge these limitations and do “not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties.”³³⁰ It is clear that overriding mandatory laws and public policy are “closely connected” and are united in the result that they achieve—the result of setting aside the chosen law—to the extent of an inconsistency with the law against which it is being assessed.³³¹ While these exceptions affect the applicable law differently, they are addressed in a single article. However, the intended meaning is that they are to be treated separately.³³² Article 11 of the Hague Principles is spread out over five paragraphs. Paragraph 5 of Article 11 applies strictly to arbitral tribunals and does not compel arbitrators to apply overriding mandatory laws of the forum or rules of *ordre public*.³³³ Rather, it calls on arbitrators to exercise their discretion as to whether and in what circumstances they ought to do so, unlike for courts.³³⁴

The Hague Principles are a novel approach to international contract law and in turn to international commercial arbitration. As a non-binding instrument or so-called “soft-law,” its impact on international business transactions depends on the potency it will derive from several groups of addressees, such as private parties, academics, courts, arbitral tribunals, and legislatures.³³⁵ Mostly, they are

329. Hague Principles, *supra* note 174, at art. 3.

330. *Id.* at art. 11.5.

331. Pertegás & Marshall, *supra* note 308, at 1000.

332. *See id.*

333. Hague Principles, *supra* note 174, at art. 11.5.

334. *See id.*

335. *See* Jurgen Basedow, *The Hague Principles on Choice of Law: Their Addressees and Impact*, 22 UNIF. L. REV. 1, 4 (2017).

expected to serve as guides to current best practice in the fields of private international law and international trade.³³⁶ However, the Hague Conference does not exclude the possibility of improving and converting this soft law into a binding instrument in the future.³³⁷ The Hague Principles are primarily significant as they are the only set of rules that expressly promulgate the principle of party autonomy with the aim of harmonizing its application worldwide. The assistance of such a set of rules should be taken into account by parties and arbitrators when drafting agreements and conducting proceedings. Nevertheless, the Hague Principles are still in their infancy and remain incomplete since they do not provide rules for determining the applicable law in the absence of a choice of law by the parties.

B. *Defining the Power of Arbitrators to Determine the Applicable Law*

The Hague Principles provide a panacea for preserving the sanctity of party autonomy when parties have made a choice of law. In the alternate situation, where parties have failed to make a choice of law for one reason or another, the question arises as to the appropriate formula to maintain foreseeability and legal certainty required in international commercial arbitration. To date, no convention or any other form of legal instrument has been agreed upon or enacted to delineate the powers of arbitrators when determining which substantive law to apply, due to the lack of international consensus.

The discretion of arbitrators to freely choose the conflict-of-law rules to determine the applicable law promotes chaos and uncertainty in international commercial transactions. All analysis conducted in the attempt to draft arbitration agreements invulnerable to this uncertainty hitherto seem inadequate.³³⁸ However, the conflicts rules are not defective themselves; rather, they have been designed to serve a substantial purpose in domestic cases and in their respective jurisdictions. The problem lies in their application to international commercial arbitration. Perhaps national conflict rules are not compatible or appropriate to apply in the context of international commerce, in which case a new international legal regime must be established to address such issues of choice of law by arbitrators.

336. See Hague Commentary, *supra* note 316, at para. I.5.

337. See *id.* at para. I.9.

338. See Arden C. McClelland, *Toward a More Mature System of International Commercial Arbitration: The Establishment of Uniform Rules of Procedure and the Elimination of the Conflict of Laws Question*, 5 N. CAROLINA J. INT'L L. & COM. REG. 169, 179 (2016).

Again, an adequate solution can be reached only if a majority of those who subscribe to the new legal regime subscribe to one particular theory. The theory that could have the greatest chance of success is the autonomous theory, as it warrants its own rules and legal protections and ought not to be interfered with by national legal regimes, save in the most extreme circumstances.

Another option is to merge all popular and existing conflict-of-laws rules to produce an all-in-one conflict rule that arbitrators should implement when a choice of law is absent. This would be similar to the "cumulative" method, which looks for a common denominator. Alternatively, absent a choice of law, arbitrators may decide the dispute on what is equitable under the circumstances, including the accepted principles of international commercial transactions. This is equivalent to *amiable compositeurs*, except that under this hypothetical new legal regime, the requirement to give consent to this alternative would not have to be in writing. Regardless of the different approaches possible, the aim should be to regulate the power of arbitrators to determine the applicable law in order to promote predictability and legal certainty. In the commentary to the Hague Principles, the working group of the Hague Conference mentioned that they were not against the idea of developing rules for the determination of the applicable law for contracts in the absence of a choice-of-law agreement.³³⁹ An international agreement or set of rules on this issue, enforced by a credible international organization, with a track record of producing rules and model laws in the area of arbitration, would probably be most effective. If the leadership for this initiative were to come from UNCITRAL, it would be more likely to be viewed with credibility and would consequently be more likely to attain universal support, lead to better convergence and hence satisfy the need for an arbitral equilibrium between party autonomy and the power of arbitrators to determine the applicable law.

VI. CONCLUSION

Within the context of international commercial arbitration, the principle of party autonomy has always been the bedrock of arbitration agreements. This is an acknowledgement that parties are well suited to determine fundamental aspects of arbitration such as the place of arbitration, the applicable law, the language of the arbitration, the composition of the arbitral tribunal, and the confidentiality

339. See Hague Commentary, *supra* note 316, at para. I.14.

of the proceedings. Though not absolute, party autonomy in international commercial arbitration plays a key role in the predictability and legal certainty of the award, and more conspicuously, in determining the applicable substantive law, absent a choice of law by the parties.

The sanctity of party autonomy is observed in both national and international law, including in arbitral institutions' rules, subject to limited restrictions. The two most plausible restrictions that received international consensus are "overriding" mandatory law and public policy (*ordre public*). Unless the choice of law by the parties contravenes these two restrictions, the law chosen by the parties prevails under the principle of party autonomy. When choosing which law will apply to the merits of the dispute, parties have the freedom to choose from national legal systems to the general principles of law that exist in the sphere of international trade, usually referred to as the *lex mercatoria*. The choice of the applicable law is usually embodied in an express choice-of-law clause; however, jurisprudence has shown that a tacit or implied choice-of-law clause is accepted in most states. It is also generally accepted, albeit without firm statutory support, that parties can modify and completely change their choice of law at any time before the commencement of the arbitral proceedings, though there is a lack of guidance on the rights of third parties.

Moreover, parties may wish to resolve their dispute according to equitable principles by authorizing arbitrators to act as *amiable compositeurs* and decide *ex aequo bono* in writing. Accordingly, *amiable compositeurs* do not have the obligation to apply systemized principles of law and can decide the dispute by relying on notions of justice and fairness, and can give their award based on equitable grounds. Notwithstanding their freedom to decide disputes independently of strict legal rules, they cannot however disregard mandatory provisions of law and render an award that will end up being unenforceable. Given that they have absolute discretion to decide the case based on reasonableness and fairness, and given that there are no established rules on the boundaries of this discretion, arbitrators still have the prime duty to deliver a valid and enforceable award. Therefore, arbitrators should always bear in mind questions of mandatory law and public policy. Depending on the theory to which one subscribes, there is also the concept of "international" or "foreign" public policy.

Four theories have developed: the contractual theory, the jurisdictional theory, the hybrid theory, and the autonomous theory. According to the latter, international arbitration must be placed on a

supranational level, unrestricted by national law of any state. It must have its own set of rules and legal structure in the same way as an international tribunal. This theory gave birth to the concept of international or foreign public policy that considers only fundamental aspects of a state and provides narrower grounds for rendering an award unenforceable. The autonomous theory would have been the "ideal" theory in the context of international commercial arbitration. However, the idea of having a legal framework and mechanism completely free from national legal systems' intervention, and at the same time having awards that are valid and enforceable, is still an aspiration rather than a reality. This theory may prove more relevant at a later stage when states would be ready to give up or pool their sovereignty, depending upon one's perspective, and execute international awards and judgments without reviewing their compatibility with domestic law.

Where the boundaries of party autonomy stop, the arbitrators' autonomy starts. In the absence of an express choice of law or failure of any subjective or objective test to determine the applicable law, arbitrators have the far-reaching freedom to determine the law applicable to the merits of the dispute. There can be as many different possibilities to determine which substantive law applies as the number of states that exist. Each state has its own private international law and this in turn guides arbitrators as to which means to adopt so as to determine the applicable law. However, arbitrators usually converge towards a more popular method and approach. Analyzing all of the possibilities is a considerable task, but this Article has reviewed the three most utilized methods: (1) the method adopted by UNCITRAL, which grants arbitrators the autonomy to choose the conflict-of-law rule they deem appropriate or applicable to determine the applicable law; (2) the Swiss method, which applies the choice-of-law rule of the state with which the dispute has the closest connection; and (3) the direct method, which bypasses the use of choice-of-law rules and directly designates the applicable law.

Similarly, as each state has its own private international law, it as a result has its own choice-of-law rule. The choice-of-law rule to embrace is fully at the discretion of the arbitrators unless instructed otherwise by parties or specialized arbitration rules. The three most popular choice-of-law rules discussed above are (1) the choice-of-law rule of the arbitral seat, which is supportive of the jurisdictional theory; (2) the cumulative method, which applies the conflicts rules of all states having a meaningful connection to the parties' dispute and selecting the applicable law which has the common denominator; and

(3) the international choice-of-law rules derived from transnational sources of law.

While party autonomy mandates foreseeability and legal certainty, the autonomy of arbitrators to decide on the substantive applicable law clearly contravenes these qualities. There is no uniformity in the way to determine and select the applicable law. Arguably, it is outside the capacities of parties to predict which law will be applied to the merits of their dispute. It is therefore important to find an arbitral equilibrium between the autonomy of parties and autonomy of arbitrators. There are currently no instruments to clarify the process of choosing the applicable law in the absence of a choice of law by the parties, given the lack of international consensus. It is therefore vital to regularize the powers of arbitrators to decide the applicable law, while at the same time affirming and promoting party autonomy.

It is recommended that the non-binding and optional Hague Principles provide a panacea for the different issues that arise when making a choice of law in international transactions. At their core, the Hague Principles are designed to promote party autonomy, albeit subject to defined limits. They therefore represent a balanced fusion between tradition and innovation. Although the Hague Principles are new to the list of existing rules and law, they contribute to the uniform application of the flexible principle of party autonomy in the field of cross-border transactions. In reality, how efficient they are will depend on their propagation and application by courts and tribunals. The use of these principles is highly recommended and their adoption as a universal international convention, adapted to international commercial arbitration, is further encouraged in the future. While party autonomy reflects the notion of legal certainty, reliance on choice-of-law rules enhances predictability.³⁴⁰ As noted above, even though the Hague Conference proposed to draft a rule on the harmonisation of conflict-of-law rules, the adoption and acceptance of such an international instrument is more likely to gain acceptability if championed by UNCITRAL, given its track record and leadership in the area of international commercial arbitration.

With regard to the powers of arbitrators to decide on the applicable law, absent a choice of law, the international nature of international commercial arbitration must be observed. The latter must be truly international, free from the interference of national rules, and

340. See Giuditta C. Moss, *International Arbitration and the Quest for the Applicable Law*, 8 *GLOBAL JURIST* 1, 5 (2008).

the choice of place of proceedings should be purely a matter of convenience and should have no impact on the applicable law. These are the features of the delocalized theory and it advocates that arbitrators do not have a forum, therefore, should not be bound by national conflict-of-laws rules.³⁴¹ However, the schism between international choice-of-law rules and national choice-of-law rules has been discerned in Part four and the sphere of international trade still suffers from a lack of a universally accepted rule when it comes to which choice-of-law rule should be applied. It would be an advancement if an international choice-of-law rule that promotes transparency and predictability could be developed. Nevertheless, the use of the *voie direct* method, which reflects the influence of delocalized theory, is prevalent in both international commercial arbitration and especially in investor-state arbitration.³⁴² Accordingly, arbitrators do not have the obligation to apply choice-of-law rules and consequently do not have to have recourse to the private international law of states, and can directly apply a particular applicable law. On the other hand, where arbitrators have to choose a choice-of-law rule, choice-of-law rules that have attained universal recognition and common acceptance should be chosen. This is what has been referred to as general principles of private international law.³⁴³ According to the ICC Tribunal, the conflict rule that has received worldwide support is the closest-connection rule or the so called “center-of-gravity test,” because it is common to most national conflict-of-laws systems.³⁴⁴ Considering the international dimension of parties’ agreements, such a conflict-of-law rule, derived from the international legal order, must be used. Even though the Model Law allows parties to choose rules of law, it is explicit from its explanatory note that:

The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.³⁴⁵

341. See MOSES, *supra* note 4, at 56; JEAN-FRANCOIS POUURET & SEBASTIEN BERTON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 573 (2007).

342. See HEGE E. KJOS, *APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW* 82 (2013).

343. See *id.* at 84.

344. ICC Case No. 7375 of 1996, *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.*

345. UNCITRAL Secretariat, *Explanatory Note on the Model Law on International Commercial Arbitration*, para. 39 (2006).

Therefore, making a reference to conflict-of-laws rules excludes the application of international/transnational law. To permit arbitrators to apply choice-of-law rules derived from general principles of private international law, the wording of Article 28(2) of the Model Law should be changed from “[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict-of-laws rules which it considers applicable” to “[f]ailing any designation by the parties, the arbitral tribunal shall apply the rules of international law which it determines to be appropriate.” In this way, international commercial arbitration will be able to truly thrive in its international dimension.

The quest to achieve the aspired arbitral equilibrium suggests that predictability should be garnered from an international choice-of-law rule and that legal certainty should be sustained by the continuous and uniform application of the principle of party autonomy in international commercial arbitration. While an inclination towards a stronger doctrine of party autonomy would enhance or at least not harm arbitration in international commerce, an inclination otherwise would be detrimental to both parties and arbitration generally as an alternative dispute mechanism in international trade. Thus, it is advocated that an international set of rules on the applicable conflict-of-laws rules, absent a choice of law by the parties, be established. Such a set of rules, supported by international consensus, would guide arbitrators in choosing the appropriate conflict norm when determining the applicable law and hence reinforce predictability and legal certainty in international commercial arbitration.

