COHABITATION AND CONFLICT

BETWEEN DIFFERENT SOURCES OF NORMS

REGULATING INTERNATIONAL COMMERCIAL ARBITRATION

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With eternal gratitude to my mentor, who determined me through his example to pursue a career in arbitration and in academia.

In accordance with the requirements of the Legal Studies Department Doctoral Regulations, I hereby declare that the present thesis contains no materials accepted for any other degrees in any other institution, and it contains no materials previously written and/or published by another person, except where appropriate acknowledgements is made in the form of bibliographical reference.

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ABSTRACT

The present thesis aims to be a comparative analysis of the different sources of norms regulating international commercial arbitration with the scope of identifying the possible conflicts between such sources, and offering possible solutions to avoid or to solve the conflicts whenever occurring in practice. The sources of norms made subject to this analysis are: party autonomy, arbitration rules, state legislation, international conventions, and other non-legal norms (like scripts and customs) influencing the different phases and elements of arbitral proceedings – from the mere existence of arbitration to the recognition and enforcement of arbitral awards. Research and analysis are limited to international and commercial arbitration, as well as to procedural aspects regulated by the different sources of norms; the relationship between these sources being primarily in relation to party autonomy (*i.e.* party autonomy v. arbitration rules; party autonomy v. national laws; party autonomy v. international conventions) and then between each other (*i.e.* rules v. laws, laws v. laws, national v. international norms), with the religious and socio-cultural influences affecting party stipulations, arbitration rules and laws equally.

While all sources of norms could (theoretically) coexist in an efficient way by supplementing and backing up each other, reality reveals that more often it is the conflict between them that attracts the attention of the field. Establishing a clear hierarchy for all sources of norms regulating a given case could avoid these conflicts, but such hierarchy may

not always be self-explanatory, as it is does not follow a clear linear construction. In this sense, while arbitration in general is based on party autonomy – the primary source of norms regulating arbitration –, as soon as this party autonomy chooses the seat or expressly the law to govern the procedure, the mandatory provisions of that law (otherwise applicable only due to party autonomy) become of compulsory application and override any contrary party stipulation – thus raising above party autonomy in a linear ranking. Similarly, pre-established institutional arbitration rules chosen by the parties will have the same reactive affect, with any mandatory rules contained therein prevailing over any contrary party stipulation. As for the non-mandatory provisions of the applicable rules and law, the rules and law themselves will determine which one prevails over the other – *i.e.* which one serves as a primary gap-filling provision for anything the parties did not regulate themselves. Last, but not least, all these regulations are usually supplemented by the arbitrators' discretion, defined (if at all) by the rules to govern the tribunal's work. International norms are only analysed separately for the purpose of the theoretical discussion, as they only become applicable (and find their place in the hierarchy) as part of an applicable state law, while religious and socio-cultural norms rarely have any legal affect over the proceedings – and if so, then only if incorporated in the applicable rules or laws, but not on their own.

In light of this hierarchy (or any other one, if different according to the laws and rules applicable to a given case), the solution against a conflict between the different sources of norms regulating a particular arbitration consists primarily in the parties' thorough research and understanding of the relationship between these norms; and in making an educated

choice in favour of one jurisdiction and institution or another. Exceptionally, for conflicts between different national, as well as between national and international sources of norms, the solution does not lie with the parties, but consists in legislative harmonization and in court practice aiming towards uniform interpretations – for this too, however, individual awareness of unfavourable practices and/or regulations can serve to avoid unnecessary deadlocks by opting for a more pro-arbitration legal environment instead.

INTRODUCTION

Arbitration is gaining more and more ground in the international business world as the years pass, this alternative to classic litigation getting commercial disputes almost entirely out of the national court systems. Arbitration – in its ancient, original form – used to be simple and efficient; by now, however, it became highly regulated and the growing risk of losing the initial advantages of time and cost efficiency is slowly turning into reality. The town elder listening to the disputing parties and making a wise, but simple and fast decision based on his lifelong experience and fairness, has long been replaced by highly educated professional arbitrators navigating within a very complex net of rules and laws and rendering complicated awards, all while carefully observing the parties' often unreasonable desires in a mechanism that one could now call 'simply-complicated'.

Many books were written about the advantages of the arbitral proceedings, analyzing both *ad hoc* and institutional arbitration (and even creating a distinct category for investment-related treaty-based arbitration), experienced professionals offering great insights into the subject, useful recommendations from and for practitioners being now available from all over the world. It is undisputedly true that in most business-related cases arbitration is favored to litigation, but reality also shows that the system is far from being perfect; nor it is as easy to handle as it would appear at a first glance from a superficial listing of its advantages. The literature that exists in the field, although offers a detailed analysis of the different aspects

and elements of arbitration, is often also considerably biased and laudatory, and in order to avoid openly criticizing the system, emphasis on its weaknesses and potential disadvantages is often omitted.

Scope of the thesis

The present research and dissertation has its main purpose an objective analysis of one of such weaknesses, namely the possible complications that can arise from the fact that the flexibility of the system – one of its most attractive features – also means often dangerous combinations of different sets of regulating norms; combinations that can lead to undesired outcomes including even the complete failure of this, otherwise so efficient dispute resolution method.

The basic difference that still exists between litigation and arbitration lays in the very broad, autonomous will of the parties that governs arbitration. Party autonomy, this basic principle of arbitration, gives the right to private individuals to become their own law-makers: to freely choose or to create procedural rules and to choose the procedural and the substantive laws that suit their individual needs best. This party autonomy, however, is not unlimited or absolute; and even if it would be, it would be highly impractical to leave the entire arbitration to be governed solely by the parties' will. Party autonomy does not shape arbitration on its own, but together with other sets of norms, originating in more than only

one source, taking the form of pre-established procedural rules, national legislation or international conventions. These norms not only define the course of the procedure, but also determine its possible outcome, the viability of the award; overall, the fate of arbitration as such.

It is not surprising that within the bundle of existing and continuously developing regulations which, in an ideal world, would supplement and back up each other, a conflict is not difficult to arise. In cases when arbitrating parties understand their autonomy to needlessly combine different sources of norms, and maybe even to top them off with rules created by themselves, the main advantage of arbitration – the freedom of the parties in governing the proceedings – can become its biggest disadvantage, leading sometimes to a complete inefficiency of the system. And while imagination may be more important than knowledge in some cases[1], too much imagination combined with too little knowledge of the relevant arbitration legislation is more likely to lead to unimagined negative outcomes in this field.

It is true that when several sources of norms are intentionally combined by the arbitrating parties – usually at the level of procedural rules – the effects that these have over each other and over the arbitration in general, are clearly visible and often even desired from the outset. However, when it comes to the influence of national or international norms,

[1] Famous quote from Albert Einstein (German-born, US physicist, 1879 – 1955), saying "*imagination is more important than knowledge*".

parties are not always aware of the possible outcome of their choices, risking an unsolvable conflict between the various rules and laws. Combinations affect different phases of the arbitral procedure such as (but not only) appointment of the arbitrators, evidentiary process, challenge and recognition and enforcement of the award. While flexible legislative regulation of some of these elements allows combination of different norms, strict and mandatory provisions will most certainly lead conflicting regulations to a procedural dead-end.

The aim of the present research is to present how the different sets of norms can complete or contradict each other, to establish the way and the rate at which these norms influence each other, the order of priority in their application and the consequences of eventual conflicts between them. While cohabitation of the different sources of norms is a positive element of the present thesis – some of them even indicating a good starting point for solving conflicting relationships through complementary co-existence and legislative harmonization – special emphasis will nevertheless be accorded to the conflicts and the problems originating in the applicability of different sources of norms.

The purpose of the thesis is not to prove that arbitration does not deserve the trust and appraisal of law practitioners or of the business community, but to clarify one of the potential pitfalls that one might come over when choosing this dispute resolution mechanism, and to offer practical solutions for avoiding it. Establishing a clear hierarchy between the various sources of norms and identifying the most dangerous combinations will help understand and better exploit the possible coexistence of these norms, and avoid their potential conflicts.

Delimitation of the thesis

Some of the main questions to be answered in the present thesis are: Is arbitration really, and to what extent, a creation of the parties? To what extent is party autonomy limited by the various mandatory norms? How do institutional and municipal regulations fill in the gaps of party-created procedures and how can they solve the parties' disagreements regarding procedural issues? What are the common mistakes in combining pre-established and party-created rules and what are their consequences? Can the undesired application of certain mandatory norms be avoided? How to determine the hierarchy of applicable rules, and what that hierarchy is? What international regulations must be observed in arbitral proceedings and why? How do pre-arbitral decisions influence post-award procedures? And finally, what should one pay attention to, in order to construct a successful arbitration?

All these question, however, are subject to certain limitations. Most importantly, the present thesis deals with issues related only to international commercial arbitration, with no reference to proceedings having other subject matter or between the nationals of the same state. The reason for the international limitation is that domestic arbitration generally involves only one law, common to the parties, for all phases of arbitration, and therefore a conflict between different sources of norms is rarely met. Nevertheless, for the purpose of exemplification, cases that are not international as such will not be excluded from the analysis, as long as they raise awareness of possible conflicts that may be similar in domestic and international settings (*e.g.* between rules and laws). As for the commercial limitation, for

the purposes of the present thesis (just as in international arbitration in general) a broad interpretation of commerciality is used, covering *"matters arising from all relationships of a commercial nature"*[2]. In light of these limitations, the terms 'arbitration', 'international arbitration' and 'international commercial arbitration' are used interchangeably in the present work, all referring in fact to the latter, *i.e.* to international commercial arbitration.

A further limitation of the research topic is a limitation in time; the hierarchy of the norms discussed being analyzed in regard to an already existing arbitration. The issues to be considered with regard to different procedural phases will be discussed also from the perspective of the preparation of an arbitral agreement, but a clear hierarchy between the applicable laws, rules and other norms can only be construed in light of an existing arbitration; *i.e.* after the identification of such applicable laws, rules and other norms.

Another, though undefined, limitation of the following analyses is on jurisdiction. Besides a theoretical analysis of the main sources of norms regulating international commercial arbitration (like the UNCITRAL Arbitration Model Law, the UNCITRAL Arbitration Rules[3], the New York Convention[4] – all of these being considered as

[2] As defined in a footnote to Art.1(1) by the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985, amended in 2006); hereinafter 'UNCITRAL Model Law' or 'Model Law'.

[3] United Nations Commission on International Trade Law Arbitration Rules (1976, amended in 2010); hereinafter 'UNCITRAL Rules'.

[4] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); hereinafter 'New York Convention' or 'Convention'.

representative regulations, practically standing instead of individual analyses of all the national laws that are based upon them) and a few major national laws and institutional rules, the conflicts revealed by the arbitration and court practice have a major role in the paper. And while there is no clear delimitation of any targeted jurisdiction, it is practically impossible to cover every existing jurisdiction in one research paper; therefore the limitation is one imposed mainly by the availability of relevant resources, more particularly of cases involving conflicting sources of norms.

And finally, considering that different elements of arbitration are governed by different sets of norms, it has to be expressly clarified from the beginning that the present thesis deals only with procedural aspects of arbitration. Although the issue of substantive mandatory rules and the conflicts created by them is a worthy subject, just as the conflict of laws governing the arbitration agreement is, the aim of this thesis is to balance these already well researched topics by filling the gap that currently exists in the literature with regard to the procedural conflict of laws.

Research methodology

The proposed goal of identifying the conditions of cohabitation and the possible conflicts between the different sources of norms regulating international commercial arbitration is achieved by a doctrinal research consisting in legislative analysis combined with

comparative case study. An extensive review of arbitration rules, national legislation and international regulations dealing with arbitration covers the theoretical evaluation of these sources of norms, with a review of their practical application revealing the way they can coexist, their hierarchy, as well as their potential conflictual relationship; a detailed analysis of arbitral awards and court decisions exposes the possible consequences of wrong choices or wrong combinations of governing rules and laws. International regulations inducing a tendency toward globalization are also discussed, in order to see the benefit of legislative harmonization and the influence of such harmonization effort (or the lack of it) over national arbitration laws and institutional rules, but also to see how international norms can conflict with the other sources of norms. Finally, secondary sources (like religion and socio-cultural background) reflecting the perception and experience of scholars and practitioners are also considered, to put the legal and case analysis in perspective.

Structure of the thesis

The topic is discussed from two different angles, in a combined way. The principal criterion for organizing the thesis is based on the different categories of sources of norms, while the second, subsidiary criterion reflects the elements of arbitration. The first chapter offers an overall presentation of the different sources of norms regulating international commercial arbitration, including definitions and examples, with the following chapters then dealing with the various combinations of these different sources of norms.

Party autonomy, as the primary source regulating arbitral procedure, is in the center of the thesis, representing the main point of reference for analyzing the relationship between all sources of norms regulating international commercial arbitration. Accordingly, Chapter II analyzes the relationship between party autonomy and arbitration rules; Chapter III investigates the rapport between party autonomy and national legislation; Chapter IV examines party autonomy in relation to the international sources of norms; the relationship between arbitration rules and state legislation is part of Chapter V; the potential conflicts between different state laws are then the subject of Chapter VI; the interaction of state laws and international regulations are part of Chapter VII; and last, but not least, Chapter VIII is devoted to the not so numerous, but all the more interesting influences of various religious, socio-cultural and political aspects over the procedure of international commercial arbitration.

The different phases of arbitration, as affected by the various combinations of norms, reflect the second criterion for organizing the thesis. They indicate the moments and procedural elements where a particular conflict between the sources of norms analyzed in a given chapter has been encountered or may appear in practice. Consequently, as not each and every procedural element is subject to a possible conflict (although theoretically it is), not all such phases will be represented in the sub-headings or the text itself. At the same time, some procedural phases may appear in more than just one chapter of the thesis, as the multiple combinations and conflicts of governing norms to which these phases are subject are analyzed in different parts of the paper. Such omnipresent procedural phases are, for

example, the taking of evidence and the judicial review of arbitral awards; each being discussed in three different chapters from three different perspectives.

Benefit of the thesis

The different sources of norms regulating international commercial arbitration form a great variety of combinations, with a significant number of possible consequences, that all must be considered in advance when starting an arbitral proceeding, or even better, when constructing the arbitration agreement. The benefit of this research consists in its practical utility, making arbitrating parties and practitioners more aware of how to make use of pre-established norms in an effective way; how to combine them according to the case-specific need of the parties; how to avoid possible pitfalls of an eventual conflict between party intention and mandatory norms; and also how to ensure a future recognition of the award to be rendered.

The thesis is based on a comparative analysis in theory, but through the perspective of consequences happening at a practical level. Nevertheless, the present thesis should not replace the individual case-by-case evaluation of each scenario encountered in everyday practice, its findings being recommended only as a general guidance for establishing the hierarchy of the different sources of norms regulating international commercial arbitration.

CHAPTER I. GENERAL OVERVIEW OF THE DIFFERENT SOURCES OF NORMS GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION

The sources of norms regulating international commercial arbitration are both of public and private nature. Public sources consist of national legislation and international regulations, while private sources consist of party autonomy and arbitration rules. The latter are meant to supplement or to replace some of the national and international regulations, ensuring the flexibility and adaptability of arbitration to the particular needs of each case. Although arbitration in general is mainly based on the parties' will, the public sources (and to some extent the other private sources as well) can represent a serious limitation to party autonomy, as they can be of mandatory nature.

I.1. Private Sources of Norms

All provisions originating from private individuals or organizations are part of the private sources of norms category regulating international commercial arbitration. The source easiest to identify is, naturally, the cornerstone of arbitration itself: party autonomy. Besides this basic principle of any ADR method, arbitration rules are also part of the private category

of norms, as originating from private, rather than from public entities. A special exception is constituted by the UNCITRAL Rules of Arbitration, originating from a public source, but classified as private due to its non-legislative nature and optional applicability.

I.1.1. Party autonomy

The notion of 'party autonomy' can cover various concepts even for lawyers; thus, in order to avoid any misunderstanding, it must be clarified in advance that in arbitration party autonomy is understood to mean the expressed will of arbitrating parties; a source of norms generating a variety of rules, rights and obligations governing the entire arbitration; in practical terms, the freedom of the parties to choose both the procedural and the substantive law applicable to a given case.

For the purposes of the present work, however, in light of the limitations presented above in the Introduction, party autonomy is only understood as regulating procedural aspects – since the choice of substantive law is left out of the scope of this thesis. As 'the red book of arbitration' defines it, "[p]*arty autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and*

organizations"[5]. Party autonomy usually also means party agreement, consent being a basic requirement for any regulation originating from the parties' will; but it does not automatically exclude one-sided requests from the case analyses included in the present thesis.

The principle of party autonomy is based on the contractual nature of arbitration, the freedom of determining the procedural framework of a dispute being recognized directly or implicitly by most national legislations, as well as by international provisions[6]. Modern arbitration laws do not impose the use of a certain national law for the procedure, the parties usually having a legally recognized freedom to determine the proceedings to be followed by choosing any law, from any jurisdiction they like. In addition, parties are also free to create specific procedural rules for their case, or to use the pre-drafted arbitration rules of an institution or of the UNCITRAL; all to supplement and/or to replace the chosen arbitration law – to the extent allowed by the law itself.

An example of clear legislative recognition of such an absolute party autonomy can be observed in the French Code of Civil Procedure, where Art.1509 provides that "[a]*n arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules*"[7]. In spite of this principle

[5] REDFERN AND HUNTER WITH BLACKABY AND PARTASIDES, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 315 (Sweet & Maxwell 4th ed. 2004).

[6] *See* for example UNCITRAL Model Law Art.19(1); New York Convention Art. V(1)(d); or the European Convention Art. IV.

[7] French Code of Civil Procedure Art.1509 (as amended in 2011).

reflecting an enormous individual freedom, arbitration in general is by now highly regulated both at national and at international level. State laws and international conventions influence to some extent every single case, the concept of party autonomy being in fact seriously limited to certain choices. Parties are free to choose the applicable procedural rules to govern their arbitration, the institution to administer it, and to some extent – depending on jurisdiction and on the substance of the dispute – the substantive law to decide on the merits of the case. But as soon as they have made these choices, or even within the framework of the choices made, their rights to further regulate proceedings often become very restricted.

In order to understand these limitations, a differentiation between two timeframes is needed, namely before and after the commencement of arbitration. As already mentioned, a real conflict between party autonomy and any other source of norms can only exist with regard to an existing arbitral agreement, and even more certainly with regard to an existing arbitration. However, limitations imposed to party autonomy also prior to the commencement of arbitration will ultimately influence the arbitration proceedings and thus, must be considered. Accordingly, at the initial phase of drafting an arbitral agreement party autonomy is primarily limited by conditions of validity of that agreement, according to the law governing the agreement itself. This law can be the law governing the entire contract, but due to the principle of separability it can just as well be almost any other law[8]. In addition, any

[8] According to the validity check regulated by the New York Convention, an arbitration agreement must be valid under the *lex* arbitri, but this is not the only approach. For more on the law governing arbitration

procedural rule constructed by the parties must observe the mandatory provisions of the *lex arbitri*, which is generally the law of the seat of arbitration – but again, it can be any other law chosen by the parties[9] – and must keep account of the mandatory provisions of any chosen arbitration rules as well. Thus, with a somewhat sarcastic note, one can indeed say that "[a]*part from mandatory provisions of the law governing the arbitration agreement and the lex arbitri, and subject to 'unacceptable' amendments to institutional rules, the parties enjoy very broad freedom in selecting the arbitration regime they desire and in prescribing the procedure to be followed*"[10].

Although all these limitations are to be observed at an early pre-arbitral phase, their effect unfolds during the arbitral proceedings. Phase, which on its turn brings further limitations to party autonomy, as the constitution of the arbitral tribunal creates new sets of rights and obligations to the participants. Irrespective of whether the arbitrators' rights are based on a contractual relationship exclusively with the parties or on a tri-party relationship also involving an administering arbitral institution, the rights of the tribunal will – to some extent – limit the parties' right to further shape the proceedings. These restrictions, however,

agreements, *see* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 412-414 (Emmanuel Gaillard and John Savage eds., Kluwer Law International 1999).

[9] *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1172 (Emmanuel Gaillard and John Savage eds., Kluwer Law International 1999).

[10] Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, ICCA website, 4 (2008) available at <http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf>.

will largely depend on both the content of the arbitration agreement itself, and on the applicable law and institutional rules, if any – many institutional rules determining the extent and the limits of arbitrators' rights in shaping the procedure[11].

Finally, a third time-frame encompassing post-award procedures has to be mentioned as well. Although at this stage party autonomy has little, if any relevance anymore, due to the extensive effect of the international sources of norms regulating post-award procedures party autonomy can still be influenced and limited by these in an indirect and quasi retroactive manner. In this sense, a party agreement conflicting, for example, with the requirements of the New York Convention, may have no consequences during the arbitral proceedings, but may prove to be fatal at the recognition and enforcement stage; consequently, although the Convention does not influence the agreement or the arbitral proceedings directly, the parties would probably decide to obey its provisions, in order to ensure the enforceability of the award.

The most visible manifestation of party autonomy is in *ad hoc* arbitration, where parties not only can create their own procedural rules, but have full command of their entire case. Parties may also adopt pre-drafted rules for their *ad hoc* arbitration, party autonomy allowing them to even combine such rules from different sources. The freedom of the parties in building up their own procedural rules is almost unlimited in *ad hoc* proceedings, but this freedom also bears a great risk. There is no administering institution to lead the proceedings

[11] *See* in more detail under II.2. below.

step by step, to solve the parties' mistakes or to fill in the procedural gaps, the parties being left alone with their eventual failures. Only the arbitral tribunal – if successfully constituted – can help in the difficult times (for example, if the arbitrating parties fail to indicate the applicable set of rules, or fail to determine the place or the language of the proceedings, normally the appointed arbitrators will make these choices for them). But what if the procedural blockage occurs already before or at the constitution of the tribunal and there is no backup solution in the arbitral agreement; no appointing authority; no seat chosen; and no more agreement between the parties to move the case ahead? And even when the parties do indicate a seat, by this enabling the local courts to intervene and assist in an impasse, the parties may not necessarily understand all the legal consequences of this choice; they may not think to the seat as to a source of regulations supplementing their deficient agreement, and may risk having such laws governing their case that they never intended to use.

Risks generated by party autonomy in *ad hoc* arbitration can be significant even without the intervention of state laws. It is enough, for example, for one to combine the attractive provisions of different pre-drafted rules, for the outcome to become something completely undesired. The number of potentially problematic combinations is almost unlimited – from completely contradictory rules given equal value to procedural aspects left unregulated by any of the rules – with consequences that can vary greatly between unpleasant delays and an absolute deadlock. And while some arbitration rules are viable outside of their institutional framework, the most feasible solution for using pre-drafted rules in *ad hoc* proceedings is not borrowing the rules of an institution, but rather using the UNCITRAL

Arbitration Rules or other similar independent procedural rules[12] specifically created for *ad hoc* arbitration.

Although not a self-standing category of conflict of sources of norms for the purposes of the present work, conflicts within party stipulations are nevertheless worth to be mentioned as one of the possible risks of party autonomy, since parties often create rules that are problematic not only from the perspective of the applicable rules or laws, but are problematic on their own. Self-contradicting or unfeasible provisions can render an arbitral agreement inoperable; pathological clauses forming the subject of an entire independent study field. For the purposes of the present research, such deficient arbitral agreements – even though rather a matter of contract interpretation – will nevertheless be analyzed to the extent to which are the source of conflicts of different norms regulating international commercial arbitration.

In spite of all these risks, *"the principle of party autonomy is of more importance given the contractual basis of arbitration"*[13]*;* but in spite of its importance, it is nevertheless subject to serious legislative limitations. The doctrine of construction (*i.e.* that the specific controls the general[14]) does allow parties to combine or override pre-existing rules and laws with

[12] *See* for example the Uniform Self-Administered Arbitration Rules (2011), created through a LinkedIn collaborative initiative, available at <http://adrresources.com/docs/adr/2-2-2215/uniform-self-administered-arbitration-rules-2011.pdf>.

[13] FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9, at 31.

[14] *"explicit contractual exceptions trump any inconsistent or contrary governing rules"* RLI Ins. Co. v. Kansa Reinsurance Co., Ltd., 1991 WL 243425 (S.D. N.Y. 1991) citing Thomas H. Oehmke.

explicit rules created by themselves, but only to some extent. Thus, considering the unavoidable influence of state laws, institutional rules and even of international conventions, the arbitral procedure is by no means governed only by the parties' will, but is rather extensively controlled; hence, the notion of party autonomy implies a significant freedom only if compared to state court litigation, but it does not in the least reflect the kind of freedom that the term itself would suggest – and that many arbitrating parties expect to have. Accordingly, party autonomy is subject to both mandatory rules of law and to human error; both influences representing a vast resource for the present thesis.

I.1.2. Arbitration rules

The second category of private sources of norms consists of the pre-established procedural rules created to assist arbitrating parties; offering a procedural framework and ensuring procedural security in times when party agreement often does not exist anymore. While most such rules are developed by arbitral institutions, there are rules created by other bodies as well, whether private or public. This latter category is nevertheless still considered part of the private sources, due to the fact that – in spite of their origin linked to a public entity – the applicability of any of these rules is entirely subject to party autonomy.

I.1.2.1. Institutional rules

The rules of different institutions offering administrative services for arbitration are of private character, as they are not originating from a national or international legislative source, and are only applicable if the parties so agree. The increasing role of arbitral institutions in administering and supervising arbitral proceedings – or even just in appointing arbitrators – is expressly recognized by national laws and international conventions, *"officially endorsing the essential functions performed by arbitral institutions"*[15], as a result of an increasing trend to depart from the independent party-created dispute resolution mechanism towards permanent institutions specially created to handle arbitration.

There are many large, well-known international arbitral institutions worldwide, of which only a few are shortly mentioned at this stage (like the Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), etc.). These institutions are not of particular interest on their own for the present thesis, but some of their rules will be discussed in more detail in the following chapters, as they come in conflict with different other sources of norms; or provide for solutions to such conflicts.

[15] FOUCHARD, GAILLARD, GOLDMAN *supra* note 9, at 33.

Arbitral institutions specialized in a certain trade or professional field form another widespread category; and although they are sometimes considered to be more like specialized courts than arbitral institutions, their jurisdiction does have a contractual basis. There are also numerous domestic arbitral institutions with procedural rules worth to research, but both these categories fall outside the scope of the present thesis – according to the limitations explained in the Introduction. While it is an interesting fact to mention that there are countries with hundreds of registered arbitral institutions[16], with people running arbitration as a home business without offering any real variation (or any valuable quality) in services, in the present thesis only the rules of major international arbitral institutions will be analyzed – in part due to the limitations described in the Introduction, but also due to resources being available mostly from major institutions, and because of the influence that these major institutions have over the arbitration practice in general.

Contracting and disputing parties often opt for administered arbitration, choosing to give up a significant part of their direct role in constructing the proceedings in exchange of greater safety and efficiency provided by a specialized institution and its rules. The pre-drafted rules of an arbitral institution are regularly used in all cases administered by that particular institution, but parties may also partially – or even entirely – exclude or replace the rules of the administering institution, since many of them accept to conduct arbitration also under other rules, not only their own. Although the rules of different institutions may be very

[16] *E.g.* Brazil.

similar in most aspects – especially if based on the UNCITRAL Rules, as often is the case – yet, they are each created to work within the framework of a particular institution (for example, by empowering internal organs that only exist within that institution), and using them outside that institution may create confusion. Hence, if one wants to make use of the services of an arbitral institution without also adopting the rules of that institution, one should be careful in applying other rules, as they may not 'fit the box' of the administering body.

Parties are also free to specify the details themselves and leave only the rest of the procedure to be defined by the institutional rules; but they should always keep in mind that "*anything not spelled out in the arbitration clause will be determined by the institution*"[17]. The rules of the administering institution, hence, serve as a welcome backup solution in situations where the parties create their own procedure but fail to provide for all the possible scenarios. For example, when the parties omit to determine the procedure for the appointment of an arbitrator in case of failure to appoint either by the parties or by the party-appointed co-arbitrators, institutional rules can step in and solve an otherwise critical procedural blockage which could lead the parties to bypass the situation in state court – the place they wanted to avoid by choosing arbitration in the first place.

Pre-drafted institutional rules may also be used in *ad hoc* proceedings – an option that, at first sight, may seem less risky than the parties trying to build up the entire arbitration

[17] Carney, Jean T., *A Beginner's Guide to Resolving Transnational Disputes Through Arbitration*, New York State Bar Journal (November 1996).

themselves. By combining *ad hoc* proceedings with institutional rules, the parties usually intend to avoid the risks of self-created and possibly deficient procedures, but also the burden of a laborious and non-transparent administration and a possible 'judicialization' of arbitration by an institution. However, as already mentioned, most of the institutional rules are specifically adapted to work within that institution, and are not created to meet the parties' expectation outside that presumed context. Many provisions of such pre-drafted rules are strictly connected to the institution's internal organization and without the existence of its specific administering bodies the otherwise efficient rules may be condemned to absolute failure. Consequently, using rules with a different purpose than the one for which they were created generates risks that arbitrating parties should carefully consider beforehand.

Even if most major institutions – in an attempt to occupy a bigger slice of the international arbitration market – offer specific variations in services and rules, there is also a general tendency towards globalization and standardization; a trend determined by the permanent increase in number of cross-border arbitrations, which generates a growing necessity for more uniform regulations ensuring familiarity with rules, security and trust in the system irrespective of jurisdiction. Harmonization is mainly guided by the rules and concepts elaborated by the UNCITRAL, reflecting the changing needs of the business world and of the arbitration profession. For this reason, as many institutional rules are based on or are inspired by the UNCITRAL Rules, it is often enough to analyze the UNCITRAL provisions to reach conclusions that are equally valid for other rules as well.

I.1.2.2. UNCITRAL Rules of Arbitration

The classification of the UNCITRAL Rules as a private source is justifiably subject to dispute. Being created by a public institution – the United Nations -, these rules could easily be considered of public origin. But due to the fact that, irrespective of their origin, these rules do not qualify as public legislative regulation, their use being based exclusively on party autonomy, for the purposes of the present thesis the UNCITRAL Rules are considered a private source of norms regulating international commercial arbitration.

Specific to *ad hoc* proceedings, for which they were specifically created on April 28, 1976, the UNCITRAL Rules (last amended and updated in 2010) found their applicability also in administered proceedings, occasionally replacing the rules of institutions that accept to conduct cases also under these rules. The UNCITRAL Rules were initially aimed to offer an alternative to institutional and 'pure' *ad-hoc*[18] proceedings, helping to create viable and well chiseled arbitration outside of arbitral institutions. And although the "*UNCITAL Rules will remain ad hoc forever*"[19], it is equally true that they "*are the mother of all modern arbitration rules*"[20]. Institutions such as the Inter-American Commercial Arbitration Commission (IACAC), the Regional Centers in Kuala Lumpur and Cairo, the HKIAC, the

[18] Where there are no rules at all, but the national arbitration law is the only one to govern the proceedings.

[19] Mr. Jernej Sekolec, former Secretary of UNCITRAL, at a lecture given with the occasion of the 16th Vis Moot in Vienna (2009).

[20] Mr. Kaj Hober, at the same event *supra*.

Spanish Court of Arbitration or the Australian Centers have adopted the UNCITRAL Rules as their own governing rules. Many other institutions were inspired by the UNCITRAL Rules, adapting them to their particular needs[21], while again others – although having their own rules of arbitration – also offer the alternative service of administering proceedings under the UNCITRAL Rules[22].

Thus, the UNCITRAL Rules, although primarily a viable and practical tool for constructing *ad hoc* proceedings, thanks to their flexibility and efficiency also have a major impact on institutional arbitration around the globe, irrespective of the location or the system in which they are applied. Due to this multiple presence, the UNCITRAL Rules will appear in the following analyses both on its own (when directly applied in arbitral proceedings - whether *ad hoc* or institutional) and as a source influencing the development of institutional rules all over the world.

[21] *See* William K. Slate II, Seth H. Lieberman, Joseph R. Weiner, Marko Micanovic, *UNCITRAL. Its Workings in International Arbitration and a New Model Conciliation Law*, available at <http://www.cojcr.org/vol6no1/CAC106.pdf>.

[22] For example the AAA, the LCIA, the SCC and the Arbitral Center of the Federal Economic Chamber of Austria (Vienna Center).

I.2. Public sources of norms

The second major category of sources of norms regulating international commercial arbitration is composed of regulations originating from public legislative entities; state laws and international conventions fall within this category, having their applicability imposed by the state, as supplemented by judicial interpretation on such laws and conventions by state courts from both common law and civil law jurisdictions.

I.2.1. National sources of norms

In spite of the highly valued party autonomy principle, national legislation is a just as (if not even more) important source of international arbitration. Statutory provisions regulating arbitration are to be found within the legal system of almost every country[23], most of them passing a fast evolution during the last decades. With the growing worldwide popularity of alternative dispute resolution mechanisms in general – and of arbitration used in business relations in particular – in the second half of the 20th century many countries started

[23] According to a World Bank survey, there are still countries that do not have arbitration legislation – *see* the statistical data resulted from the Investing across borders project, available at <http://iab.worldbank.org/Data/Explore%20Topics/Arbitrating-disputes>.

to develop their legislation to make their jurisdiction more attractive for arbitral proceedings. Such examples of early legislative reform could be observed in France, one of the first countries to modernize its arbitration legislation[24]. The French reforms were soon followed by other Western European legislative amendments in the Netherlands[25], Switzerland[26], England[27], Germany[28], Belgium[29] and Sweden[30]. But legislative modernization is a continuous process, and countries paying attention to the field's fast development continuously adopt new amendments to satisfy the changing needs of the international arbitration practice - just as France did recently, by the 2011 amendments to its arbitration law[31]. Other countries of the European Union, as well as states from the former communist

[24] Decree No.80-354 of May 14, 1980 concerning French domestic arbitration to be included in the Code of Civil Procedure; Decree No.81-500 of May 12, 1981 enacting Book IV of the French Code of Civil Procedure entitled "Arbitration"; also see FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9, at 63.

[25] Arbitration Act (1986) (Articles 1020-1046 of the Code of Civil Procedure).

[26] Swiss Private International Law Act (1987) Chapter 12: International Arbitration (and selected articles); and Swiss Federal Statute of Private International Law (1988) Chapter 12.

[27] Arbitration Act (1996) Chapter 23.

[28] Act on the Reform of the Law relating to Arbitral Proceedings (1997) (Code of Civil Procedure, Book X: Arbitration).

[29] Law of May 19, 1998, amending the Belgian Judicial Code (Sixth Part: Arbitration).

[30] Arbitration Act (SFS: 1999:116).

[31] Decree No. 2011-48 of January 13, 2011 entered into force on May 1, 2011 amending Book IV on Arbitration of the French Code of Civil Procedure.

bloc, also modernized their arbitration legislation during the last few decades[32]; and a similar continuous legislative change can be observed on other continents too[33]. Statutes are permanently updated to be in line with arbitration practices – as reflected by the 12 legislative amendments enacted only in 2010[34] – and the amendments reflect an increasing tendency towards globalization[35].

For an easier overview of the national sources of norms regulating international commercial arbitration, a short classification is presented below – classification which, nevertheless, will not play an essential role for the purpose of analyzing the conflicts between

[32] *See* for example the Austrian Code of Civil Procedure with its quite frequent amendments (1983, 1992, 2006), and the ample legislative reforms of the Central and Eastern European countries after 1989, by the reintroduction of the old Codes of Civil Procedure having rules on domestic arbitration (like Hungary, Poland and Romania) and also by the enactment of new arbitration statutes (like the Bulgarian Law on International Commercial Arbitration (1988, amended in 1993); the Czech Act on Arbitral Proceedings and Enforcement of Arbitral Awards (1994); the Hungarian Act LXXI on Arbitration (1994); the Romanian Law on the Settlement of Private International Law Relations (1992); and the Law of the Russian Federation on International Commercial Arbitration (1993)).

[33] Like the US Federal Arbitration Act (FAA) adopted in 1925, codified in 1947 and last amended in 2006; or the 2010 amendments to the 1974 Australian Arbitration Act (Cth); see also the legislative reforms in the countries of Latin America, especially influenced by the UNCITRAL Model law, the Inter-American Convention on International Commercial Arbitration (Panama Convention) and the MERCOSUR Agreement on International Commercial Arbitration (1998).

[34] New arbitration acts or amendments were enacted in 2010 in Scotland, Singapore, Spain, Vietnam, Ireland, Australia, Bahama, Hong Kong, Kenya, Belize; Fiji became a NY Convention member state; Qatar signed the ICSID Convention.

[35] *See* for example the modernization and regional harmonization of the legislation in many African countries, induced by the Organization for the Harmonisation of Business Law in Africa (OHADA Treaty).

the various sources of norms, since irrespective of these classifications, "*it is the law or laws, if any, chosen by the parties which will govern the arbitration agreement itself, the arbitration proceedings and the merits of the dispute*"[36]. Thus, the following chapters will only detail the hierarchy and the applicability of the different mandatory or optional relevant provisions of the most representative national laws on international arbitration, discussing them on a case-by-case basis, irrespective of any classification.

Within the state legislation category, the different norms regulating international commercial arbitration can be classified according to their different characteristics, scope, source or nature. In this sense, a relevant differentiation can be based on the territorial or extraterritorial effect of such legislation. According to Fouchard, Gaillard and Goldman[37], one of the most important features of arbitration legislation is the extent to which it accords 'specific treatment' to international arbitration. While the wording may be somewhat confusing, from the categories identified by these authors it seems to be a classification determined by the nationality – the seat – of arbitration. In this respect, three categories of laws can be differentiated, namely regulation oriented towards foreign arbitration, regulation of domestic arbitration, and regulation disregarding the nationality of arbitration. All three categories may encompass norms governing any stage of arbitration, but could be easiest differentiated with regard to the post-award phase.

[36] FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9, at 31.

[37] *Id.* at 97.

Most countries have specific rules determining the conditions under which foreign awards can be recognized, enforced or contested within their territory. In the states that ratified the New York Convention, the Convention itself became the law regulating recognition and enforcement of foreign arbitral awards; but in other countries that are not parties to the NY Convention, or which, although member states, made a reciprocity reservation[38], the rules governing recognition and enforcement of awards rendered in non-contracting states are usually incorporated in specific laws, or sometimes in the Code of Civil Procedure. For the present research, however, the place where the relevant arbitration regulations are located within the national legislation is less important; what concerns more is the content of these provisions, and especially the relationship they have with other sources of norms.

Countries having a territorial approach to regulating international arbitration put a great emphasis on the role of the seat, often claiming that arbitration is insufficiently or incorrectly regulated whenever the seat is undetermined[39]. At the other end of the spectrum, some countries consider it appropriate to regulate any international arbitration, irrespective of its seat. Even if theoretically there is no territorial limit to the scope of such rules, a minimum contact between the legislating country and the regulated international arbitration is usually required – a requirement easily satisfied by the choice of that state's law to govern any

[38] Out of the 145 parties to the Convention, 72 states made a reciprocity reservation, applying the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

[39] For discussion on this issue see FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9, at 98.

element of arbitration, or even by any application submitted to a local court. In any case, extraterritorial application of arbitral legislation often leads to conflict with other applicable laws; therefore this category represents a special interest for the present thesis.

A secondary feature allowing internal differentiation between the national sources of norms regulating international commercial arbitration is whether they originate from the legislator or from the state courts. Statutes generally provide for a flexible framework to be completed in practice by the parties' decisions, or – more rarely – strictly regulate the arbitration mechanism in great detail. In any case, case law completes statutes with a legislative force and effect in common law systems, and with a similarly – but not quite identically – important role in civil law countries. In the latter, previous decisions are taken into account by courts to some degree, guidelines and interpretations of a superior court are usually observed and followed by the inferior ones, which makes the entire process to be quite similar to the common law system; with the only difference that courts, although usually choose to follow 'precedents', they do not necessarily have to.

In civil law countries a court decision can not influence or supplement statutes with equal force, but rather applies and interprets them. Consequently, while both statutes and judgments are considered primary sources in common law systems, but only the first is a binding category in civil law countries, court decisions play a significant role in every system by offering interpretation of the legislators' intention, sometimes insufficiently or unclearly reflected by statutes. Accordingly, the present thesis will make use of an extensive case law

from both common law and civil law countries, as providing valuable interpretation and guideline in the application of the statutory provisions – potentially conflicting with other sources of norms regulating international commercial arbitration.

I.2.2. International sources of norms

Before entering into a brief presentation of the different categories of international sources of norms, it must be mentioned in advance that the norms initially originating from international sources eventually perform their actual effect as national norms. From the perspective of their applicability – since the international norms become part of state legislation – their international origin has little, if any, practical relevance; but due to the legislative harmonization effect, and for the purpose of an easier analysis of provisions reflected in almost identical way in many state laws, these norms will be separately analyzed as a category having international origin.

International sources of norms can regulate arbitration in many different ways; through model laws, conventions, or by creating arbitral institutions and establishing jurisdiction over certain disputes. The latter category – for which the Iran-United States Claims Tribunal is so representative by establishing mandatory jurisdiction over disputes between parties from Iran and America – puts the contractual basis of arbitration under serious question; a contradiction

that will be analyzed under the conflicts between party autonomy and international sources. After a short presentation of each category of international sources, they will be analyzed in the following chapters to the extent to which come in direct or indirect conflict with the other sources of norms regulating international commercial arbitration.

I.2.2.1. Uniform and model laws

A model law is an optional source of norms, but it is optional only for the states; a state can freely decide whether it enacts a model law or not, but as soon as it is incorporated in the state's legislation, its mandatory provisions become obligatorily applicable to those subject to that national jurisdiction; consequently, it is not an optional source for the individual parties to arbitration. Moreover, due to its nature, a uniform or model law is not in itself a direct source of norms regulating international commercial arbitration and as such it can not come in direct conflict with any other source of norms either. Rather, it can be involved in such relationships as the national law of an enacting state, falling under the category of state legislation. Nevertheless, considering that the limits of the present paper make it impossible to analyze every existing jurisdiction on Earth, uniform and model laws offer the ease of a group analysis of countries adopting them and of the more-or-less also identical problems within states having identical regulations. In addition, they play a significant role in legislative harmonization, indicating that there is also cohabitation, not only conflict on the arena of international commercial arbitration.

In 1985 the UNICTRAL adopted the Model Law on International Commercial Arbitration, "*designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration"*[40]. The Model Law covers every stage of arbitration, offering the potential of worldwide legislative harmonization of the entire arbitration process, as "[i]*t reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world"*[41]. Since its adoption, the Model Law has been enacted in 63 jurisdictions worldwide[42], having a

[40] As stated on the official website of UNCITRAL, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

[41] *Id.*

[42] Armenia (2006), Australia (1989, 2010*), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Bulgaria (2002), Cambodia (2006), Canada (1986), Chile (2004), China (the Hong Kong Special Administrative Region (1996) and the Macao Special Administrative Region (1998)), Croatia (2001), Cyprus, Denmark (2005), Dominican Republic (2008), Egypt (1994), Estonia (2006), Georgia (2009*), Germany (1998), Greece (1999), Guatemala (1995), Honduras (2000), Hungary (1994), India (1996), Iran (Islamic Republic of) (1997), Ireland (1998, 2010*), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008*), Mexico (1993), New Zealand (1996, 2007*), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay (2002), Peru (1996, 2008*), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Rwanda (2008*), Serbia (2006), Singapore (2001), Slovenia (2008*), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda, an overseas territory of the United Kingdom), the United States of America (the States of California (1996), Connecticut (2000), Florida (2010*), Illinois (1998), Louisiana (2006), Oregon and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000) and Zimbabwe (1996); * indicating those states that enacted the 2006 amendments of the Model Law.

serious contribution to the modernization and uniformization of the international arbitration legislation; and has been amended in 2006[43], offering an updated harmonization tool to model law countries.

Another uniform act is the one adopted by OHADA in 1999 as the governing law in any arbitration case in which the seat of arbitration is in one of the member states[44], creating uniformity with regard to international commercial arbitration within many African countries. Finally, the Uniform Law on Arbitration provided by the European Convention[45] should also be mentioned here as an interesting example. The law was prepared within the framework of the Council of Europe by a Committee of Experts on Arbitration set up for this purpose, and though signature was open from January 20, 1966, as of today it still has only one signature and one ratification[46].

[43] Amendments adopted by the UN General Assembly in its 64th plenary meeting of 4 December 2006.

[44] Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Bissao Guinea, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo.

[45] European Treaty Series No. 56 (1966), available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=056&CM=7&DF=4/3/2007&CL=ENG>.

[46] Austria and Belgium both signed in 1966, but only Belgium ratified in 1973.

I.2.2.2. Multilateral conventions

Treaties and conventions form the other most important category of international sources of norms regulating arbitration; the most famous source being the New York Convention. On June 10, 1958 the United Nations adopted the Convention on Recognition and Enforcement of Foreign Arbitral Awards, which – due to its worldwide application – is a major force in creating uniformity as reflected both in national legislation and in court practice. The Convention "*requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions"*[47]. Up to now, 145 states are parties to the Convention[48] in force since June 7,

[47] As stated on the official website of UNCITRAL, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

[48] Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Cook Islands, Costa Rica, Côte d' Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Rep. of), Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden,

1959, many of them making declarations and reservations. And although there are voices asking for a revision of the initial 1958 text[49], amending a Convention having 145 signatories seems to be, indeed an unrealistic ambition that would rather risk to undermine instead of further support effective legislative harmonization. Nevertheless, due to its long time application, the Convention benefits of extensive judicial interpretation – ensuring a large number of court decisions for analyzing its potential conflicts with other sources of norms regulating arbitration.

Another convention having major influence over international arbitration practice is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter 'ICSID Convention'). Submitted by the Executive Directors of the International Bank for Reconstruction and Development in 1965 (March 18), it entered into force from October 14, 1966, having by now 157 contracting states[50]. The ICSID Convention

Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Vietnam, Zambia and Zimbabwe.

[49] *See* Albert Jan Van den Berg, Preliminary Draft Convention on the International Enforcement of Arbitration Agreements and Awards; presented at the Convention's 50th anniversary in Dublin (2008) as the 'Dublin Draft', and only accepted as an interpretation tool under the name of the 'Miami Draft', available at <http://www.newyorkconvention.org/draft-convention>.

[50] Afghanistan, Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaiján, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech

affected the practice of states to settle their dispute; and bringing them to arbitrate created a worldwide preference towards avoiding state courts' bias and contributed to a more positive perception of arbitration in general. Although the ICSID Convention had an undisputedly positive effect, its existence raises the question of whether arbitration in this case is still a creation of the parties' will, as it may force individual investors to adhere to an arbitration agreement they have never signed – a potential theoretical conflict to be considered in the party autonomy v. international sources section of this thesis[51].

Besides the two most important conventions, there are also numerous regional multilateral agreements, of which the following should be mentioned: the European Convention on International Commercial Arbitration (Geneva Convention) of April 21,

Republic, Dominican Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Etiopía, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea, Kosovo, Kuwait, Kyrgyz, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Micronesia, Moldova, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Níger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Qatar, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovak Republic, Slovenia, Solomon Islands, Somalia, Spain, Sri Lanka, St. Kitts & Nevis, St. Lucia, Sudan, Swaziland, Sweden, Switzerland, Syria, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, Zambia and Zimbabwe.

[51] Chaper IV.

1961[52]; the Panama Convention of 1975, entered into force on June 16, 1976 between the member states of the Organization of American States (OAS)[53]; the Arab Convention on Commercial Arbitration[54]; and the MERCOSUR Agreement done in Buenos Aires in 1998. Two Geneva agreements must also be noted here – although because of the success of the New York Convention, they lost most of their practical relevance – the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. All these conventions, although not as well-known as the previously mentioned New York or ICSID Conventions, are still present in the world of international arbitration.

I.2.2.3. Bilateral agreements

In addition to the many national laws and international agreements, arbitration is often also regulated by bilateral state agreements – although their practical importance has considerably declined, due to the successful multilateral conventions dealing expressly with

[52] United Nations Treaty Series No. 7041 vol. 484, p. 364 (1963-1964).

[53] Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, Venezuela.

[54] Signed in 1987 in Amman by Jordan, Tunisia, Algeria, Djibuti, Sudan, Syria, Iraq, Palestinia, Lebanon, Lybia, Moroco, Mauretania, Arab Republic of Yemen and People's Democratic Republic of Yemen.

international arbitration, and also because many of the bilateral agreements address the dispute resolution mechanism only incidentally, having their main focus on other aspects of bilateral cooperation; usually on trade or investment issues. Bilateral treaties primarily dealing with arbitration are quite rare, and are either created for establishing an arbitral institution[55], or are mainly characteristic to certain developing countries.

The origin of these treaties often has a strong political underlying justification, and they may come in contradiction, for example, with an equally applicable multilateral convention. However, such conflicts are often foreseen and resolved through a so-called 'compatibility clauses' – treaty provisions regulating the dilemma of whether to apply the principle of the treaty (the more specific convention) or the rule of 'maximum effectiveness'[56].

I.3. Other sources of norms regulating arbitration

When participating in or conducting arbitration, one must consider not only the written legal provisions that may be involved in a given case, but should also respect the cultural differences of the participants and observe the influence that these differences may have over arbitration. Socio-cultural norms or religious practices may just as well influence the

[55] Like the Algiers Declarations of 1981 establishing the Iran-US Claims Tribunal.

[56] FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9, at 219, 268.

proceedings as any written rule; and although their mandatory nature can be invoked to a less extent than those of a legal provision, their effect may nevertheless have a serious impact on arbitration.

These norms, even if not directly regulating arbitration, can come in conflict with national, institutional, or even international regulations, when generating conditions and practices which are widely accepted among their followers; but which come in contradiction with the said laws or rules. For this reason, religious and socio-cultural norms will also be included in the analysis of the conflicting sources of norms, as they do affect arbitration in one way or other.

I.4. Mandatory and optional sources of norms

Within almost every category of sources of norms regulating international commercial arbitration – except for party autonomy – a further differentiation can be made, depending on the level of applicability of that regulation. While party autonomy is exclusively subject to the parties' subjective intention, both national and international norms – but even arbitration rules – contain regulations that are, or can become of mandatory application in a given case. On the other hand, all these categories contain provisions of a non-mandatory nature as well,

their applicability depending either on express party decision, or on the absence of any stipulation.

Arbitration rules, although applicable only if parties so decide, often appear as a given 'package'; as long as parties choose those rules, the parties cannot avoid the applicability of, nor can they amend the content of certain mandatory provisions incorporated in those rules. Similarly, although arbitration laws only become applicable by the parties' choice – either through an express choice of law governing the procedure or through the choice of the seat eventually determining the *lex arbitri* – as long as a law becomes applicable to a case, there is no more possibility to avoid or to amend the applicability of certain provisions incorporated in that law.

Mandatory provisions have a well determined purpose of protecting public interest, but also of ensuring stability and security for the private dispute resolution system of arbitration. Many regulations of a compulsory nature are similar in different jurisdictions, but many more are of specific and often local character, reflecting protected values and principles of that country only. Identifying the relevant mandatory regulations is a matter of a case-by-case research and analysis. Some statutes make it very clear which parts of their provisions are of mandatory application, and which are not. An excellent example of this kind is the English Arbitration Act, expressly stating that "[t]*he mandatory provisions of this Part are listed in Schedule I and have effect notwithstanding any agreement to the contrary*"[57]. The mandatory

[57] Part I section 4 (1) of the English Arbitration Act (1996).

norms are then enumerated in the indicated Schedule I, making it very easy to identify the hierarchy of applicable norms in a particular case. Naturally, mandatory provisions represent a significant source for potential conflicts, as it will be shown in the following chapters.

For any other law that does not make such an unambiguous differentiation between mandatory and non-mandatory provisions, the language of the text usually contains sufficient indication of whether that provision is of mandatory application or not. In this sense, expressions like '*shall be'* or '*will be'* indicate – as a general rule – mandatory nature, while provisions containing the expression '*unless otherwise agreed'* (or any word construction having the same or similar meaning, including the express provision saying that '*the parties are free to agree')* leave their applicability to the free will of the parties.

Non-mandatory provisions will also become applicable to fill the gaps left by the parties or the rules chosen by them; fortunate cases, in which national laws and party stipulations coexist without conflict. As defined by the English Arbitration Act, "*the 'non-mandatory' provisions allow the parties to make their own arrangement but provide rules which apply in the absence of such agreement*"[58]. In most cases, the 'non-mandatory' character is either not emphasized at all, but optional provisions give the parties great freedom in shaping their proceedings; freedom which can also bring in errors and uncertainty and generate confusions as to their applicability, as it will be seen in the following chapters.

[58] Part I section 4 (2) of the English Arbitration Act (1996).

All the above presented sources of norms regulating international commercial arbitration will be analyzed in the thesis from the perspective of their 'cohabitation and conflict' with each other; but most importantly, in relation to the primary source of arbitration: party autonomy.

CHAPTER II. COHABITATION AND CONFLICT BETWEEN PARTY STIPULATION AND ARBITRATION RULES

Before entering into a detailed discussion of the coexistence and possible conflicts between party stipulations and various rules of arbitration, the terminology needs to be clarified. Although the introductory and first chapter of the thesis referred to 'party autonomy', the following chapters will use both the term 'party autonomy', and that of 'party stipulation'; while the prior is referring to the principle itself, the latter refers to the physical manifestation of the principle, namely the contractual clauses, agreements and provisions reflecting the parties' intention to regulate arbitration – manifestation that can come in direct conflict with itself, or with other norms regulating arbitration. Accordingly, an analysis of party stipulation as potential source of problems – irrespective of any chosen rules – is needed first, in order later to better understand the relationship between these party stipulations and the rules which they supplement or contradict.

II.1. Self-contradictory and otherwise defective party stipulations

Party autonomy, the basic principle and one of the greatest advantages of arbitration, is not always used in the most efficient manner to serve the parties' interest. Human nature plays a significant role in building up complex procedures, and as such, it can involve mistakes – the seriousness and the nature of such mistakes will determine whether the arbitration can survive the deficiency of the party agreement or will fall victim of its own creators. In the following, several distinct but common problems are presented, with the aim of raising awareness of self-contradictory party stipulations and their potential consequences; while also reflecting the courts' approach towards such deficiencies.

II.1.1. Party stipulation providing for both state court and arbitral jurisdiction

One of the most common types of defective arbitration clauses are those that are self-contradicting by providing for the jurisdiction of state courts and at the same time for arbitration as a dispute resolution method. Variations are almost endless, from the clearly

pathological to the less obvious contradictions, but an example that could be labeled as classical, is a clause made available by an arbitrator from her own experience, providing that *"[i]f any dispute arises between the parties with respect to this Agreement, such dispute shall be settled by the proper court as provided above or by arbitration. In the event of arbitration, the procedure of Arbitration of the Arbitration Law of Indonesia shall apply and the venue of arbitration shall be Indonesia or any neutral country*"[59]. No additional comments are needed to see the dilemma created by the otherwise plain language of this clause.

The experience of the same arbitrator reflects that many insurance policies and construction contracts, just "*pieced together from other contracts*" contain both an arbitration clause and a clause providing for the exclusive jurisdiction of a state court. A typical 'gem' of this kind, provides that

> *"In the event of any dispute arising between the Insurer and the Insured in respect of the implementation and/or interpretation of this policy, the dispute shall be settled amicably within 60 (sixty) days since the dispute arises. […] If the dispute could not be settled, the insurer shall give the option to the Insured to elect either one of the following dispute clauses (sic) to settle the dispute and such choice could not be revoked. The Insured must notify his choice to the Insurer by registered letter, telegrams, telex, facsimile, E-mail or by courier*
>
> *Settlement of dispute (Arbitration) Clause*

[59] By email from Karen Mills, arbitrator, attorney at KarimSyah in Jakarta, on January 9, 2011.

It is hereby noted and agreed that the insured and the Insurer shall settle the dispute through arbitration Ad Hoc as follows

[…]

Settlement of Dispute (Court of Law) Clause

It is hereby noted and agreed that the insured and the Insurer shall settle the dispute through Court of Law where the defendant resides"[60].

While this latter clause offered a clear choice between two relatively well defined alternatives to one of the parties – thus being at least theoretically operable – the problem would probably arise if the empowered party would not want to choose but would remain completely passive; one can be forced to arbitrate, but cannot be forced to make a choice. In a strongly pro-arbitration environment there is a chance for state courts to still uphold the jurisdiction of an arbitral tribunal[61], but such formula can turn into a Russian roulette anytime, eventually killing whatever intention to arbitrate may have existed behind the clause.

To make things even more interesting (and jurisdictions less mutually exclusive), insurance companies apparently used to have the habit of dividing jurisdiction, opting for London courts for liability disputes and providing for arbitration somewhere else for disputes

[60] *Id.* on January 15, 2011.

[61] *Id.* on January 9, 2011, describing a case she arbitrated, in which the clause provided for both arbitration and the exclusive jurisdiction of UK courts; the tribunal decided to have jurisdiction, the decision was appealed, but the Singapore court confirmed the tribunal's jurisdiction.

on the quantum[62]. Even if such a provision is not deemed to be fatal for arbitration, it does cause serious complications – just as any other split method. In a Ukrainian case between a Russian seller and a Cypriot buyer, for example, the dispute resolution clause provided for the following construction:

> "*If the vendor is deemed to be the plaintiff, arbitration will take place at the location of the vendor. If the purchaser is deemed to be the plaintiff, arbitration will take place in the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry under Ukrainian arbitration rules*"[63].

Based on this agreement, the buyer submitted arbitration to the indicated International Commercial Arbitration Court at the Ukrainian Chamber of Commerce, but later withdrew it. In the meantime (before the arbitral procedure was terminated), the seller also initiated proceedings in front of the regional *arbitrazh* court[64] at its location, pursuant to the same agreement. Then again, after the arbitral procedure was terminated, the buyer submitted a

[62] *Id.*

[63] Clause reproduced in Yuliya S. Chernykh, *Alternative arbitration clauses: Tribunal blocks abuse of procedural rights*, International Law Office (ILO) Newsletter August 27, 2009, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=89e3b163-3458-49bb-8bef-54b46eaebd23>.

[64] *Arbitrazh* court in Russia is a commercial state court, not an arbitral institution, but the name often creates confusion among those not knowing the Russian court system – for more see Chapter I.A of the *Handbook on Commercial Dispute Resolution in the Russian Federation*, prepared by the U.S. Department of Commerce, International Trade Administration, Office of Eastern Europe, Russia and Independent States (2003), available at <http://www.trade.gov/goodgovernance/commercial_dispute_resolution/russianhandbook.asp>.

new claim to the same arbitral institution and asked the *arbitrazh* court to terminate its proceedings. While the *arbitrazh* state court refused to terminate the proceedings, the seller disputed the jurisdiction of the Ukrainian arbitral tribunal; objection that was accepted and jurisdiction refused. Besides noting the unclear language of the clause when providing for "*arbitration at the location of the seller*", the tribunal also "*made it clear that it will not allow parties to abuse their procedural rights by initiating unmerited claims solely in an attempt to deny jurisdiction to the competent forum – a position that will benefit good-faith parties to arbitration*"[65].

Unambiguous manifestation of intent to arbitrate containing an exclusion of state court jurisdiction and a clear arbitral mechanism was also expressly requested by both American and Swiss courts, which found a dispute resolution clause providing for a dispute to be "*submitted to binding arbitration through the American Arbitration Association or to any other U.S. court"*[66] so uncertain that it could not be enforced as an arbitration agreement[67]. After the District Court of the Southern District of New York refused to compel arbitration, the Second Circuit Court of Appeal also found the arbitration agreement ambiguous enough to remand the case for further proceedings – order that led to excessive discovery and witness testimonies before the case was eventually voluntarily dismissed.

[65] Chernykh, *supra* note 63.

[66] Section 22 of the Asset Management Facilitation Agreement concluded between ISC Holding AG and Nobel Biocare Investments on January 21, 2008.

[67] The AAA refused jurisdiction due to the provision requiring the application of the ICC Rules; incompatibility discussed under II.1.3. below.

In the meantime parallel court proceedings were commenced in Switzerland, where court jurisdiction was contested based on the arbitration agreement. The arbitration agreement, however, was again found to be a pathological clause that cannot be healed[68]. This decision was then confirmed by the Swiss Federal Supreme Court, holding that "*a sufficiently clear formulation of an unequivocal exclusion of the ordinary state jurisdiction is lacking in the case at hand and that the clause may be understood as an (insufficient) alternative agreement to an arbitral tribunal or to a state court. Indeed in the context outlined it is not thereby excluded that the arbitral proceedings are only one of the alternative possibilities agreed upon*"[69].

Conclusively, a choice of forum should not only be clearly established in advance, but it should not leave open alternatives either – especially not to be decided in a moment when the parties are less likely to reach any agreement. Uncertainty may prove to be fatal exactly when arbitration becomes mostly needed and ambiguous dispute resolution clauses are less likely to be upheld even by state courts otherwise having strong pro-arbitration practice.

[68] "*unheilbar pathologische Klausel*" meaning un-healable pathological clause in German; decision of April 8, 2010 of the Zug Court of Appeal.

[69] Swiss Supreme Court case No. 4A_279/2010, judgment of October 25, 2010, Section 3.2.

II.1.2. Party stipulation indicating more than one institution and/or set of rules

Reference in an arbitration clause to an institution generally also means the applicability of the rules of that institution; just as the choice made in favor of a set of pre-drafted institutional rules generally indicates administration vested with that court of arbitration. This rule, explicitly adopted by many institutions, aims to supplement vague arbitration agreements not clearly indicating both the institution and the applicable rules. Parties, however, can create strange combinations – some of them unable to be saved by the rules.

In cases where the contracting parties – either through ignorance or simply through an accidental oversight – indicate in their arbitral clause two different arbitral institutions to be equally and jointly competent, the clause is very likely to be diagnosed as pathological, even if the arbitration practice is in favor of confirming and saving defective clauses. A very arbitration-friendly interpretation could be observed, for example, in a case decided at the Hamburg Chamber of Commerce[70], where the parties had in their contract two separate arbitration clauses indicating two different arbitral institutions. The tribunal vested with the

[70] SchiedsVZ 2007, 55.

case followed an earlier decision of the German Federal Court of Justice[71] and held that the two arbitration clauses were valid and to be considered as alternatives – even if they were not linked by the word 'or' to expressly show their alternative nature.

However, in spite of any pro-arbitration approach, such self-contradictory clauses are very hazardous, the conflict between the two named institutions being difficult to solve. Even if the two institutions are indicated in a one-or-the-other manner, if the method of choice is not clearly set and the parties do not reach agreement at the moment of the dispute, the conflict between the two equally acceptable arbitral jurisdictions may eventually lead to no arbitration at all.

A similar 'double-trouble' was solved by the French Supreme Court through a workaround decision relying on the principle of *competence-competence*[72]. Following a contract that provided for both the rules of the Association Francaise d'Arbitrage and the rules of the ICC Paris, one of the parties brought suit in the Aix-en-Provance Commercial Court, whose jurisdiction was then expectedly challenged. The court refused the challenge on the ground that the arbitration agreement was "*manifestly inapplicable*", as it made equally mandatory reference to two different institutions having mutually incompatible rules, making

[71] BGH IHR 203, 90; Arbitration Court of the Japan Shipping Exchange of Sept. 1, 1981, Yearbk. Comm. Arb'n (1986) 194.

[72] UOP NV v. BP France et.al., French Supreme Court decision of February 20, 2007, related in Charles Kaplan, *Simultaneous Choice of Two Arbitration Intuitions Not (Immediately) Fatal*, ILO Newsletter July 27, 2007, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=3050b40b-490b-441c-bbb8-0de3abf647e5>.

both the institution and the applicable rule impossible to be determined. The decision was confirmed by the Court of Appeal, but was then overruled by the Supreme Court – according to which the internal inconsistency of the clause did not in itself render it inapplicable, and as long as the parties' intent seems to be to refer their dispute to arbitration, it is not the court who has to decide whether, and if so then which arbitral institution has jurisdiction and what rules should apply.

Pursuant to the *competence-competence* principle, it is the arbitral tribunal that has to deal with this issue in the first instance, just as in cases where the clause provides for both litigation and arbitration. It has to be noted, however, that – while in the latter case the arbitrator's jurisdiction to make the choice between arbitration and litigation is clear – in case the choice has to be made between two arbitral institutions, the automatic question arises: which institution has the priority to rule on its own jurisdiction and to make the choice between the two? If the clause, just as in the case presented above, makes a purely contradictory reference to two equally competent institutions without any hint to which one would prevail, the outcome is quite unclear – one could only speculate and assume that a 'first-came-first-served' priority would make one or other institution competent. In the case at hand, the Supreme Court did not find it necessary to address this issue directly, but it nevertheless did make a suggestion to help in similar future situations.

Accordingly, in the court's opinion, the choice between the two institutions would fall within the issues concerning the constitution of the tribunal; and since according to Art.1493

of the French Code of Civil Procedure[73] the president of the Tribunal de Grande Instance de Paris has the power to solve appointment-related problems – if the seat of arbitration is France and/or French law applies to the case – the problem of choosing between two institutions can be solved by the supporting judge. Since in the case at hand the president of the Tribunal de Grande Instance was not addressed with the issue of appointment – and consequently with the choice between institutions – the Supreme Court refused court jurisdiction. Accordingly, the court did not discuss what the outcome would be, should the supporting judge be unable to decide in favor of either of the two institutions – case in which the clause would eventually still prove to be inapplicable – but it most probably relied on the presidents' established practice of finding creative and flexible solutions in support of arbitration.

Less obvious (but even more problematic) is when interrelated business relationships involve different contradictory arbitration clauses included in different, but connected contracts, each providing for a different institution. As disputes are often based on a more complex relationship rather than on a single contract, the contradiction between apparently non-related arbitration agreements could prove to be fatal. Similarly, failure to rely on the clause relevant for that particular dispute may render a dispute non-arbitrable in spite of the existence of a parallel but un-invoked arbitration agreement – as apparently happened in a

[73] Applicable at the time of the case and amended since; the provision, after the 2011 amendments, is currently part of Art.1505.

2009 Canadian case[74]. There, the Supreme Court of British Columbia dismissed an application for stay in favor of arbitration for lack of evidence that the claimant consented to or even had knowledge of the arbitration agreement invoked by the defendant – providing for Stockholm arbitration[75]. The court however – while correctly observed that the agreement invoked was only connected to another contract (between the same parties) and mutual agreement was not proved even for that contract – failed to look into the other arbitration agreement (providing for arbitration in Washington) linked to the contract on which the dispute was in fact based[76].

Whether this omission was due to the fact that the defendant did not expressly rely on the right agreement is not clear from the decision, but the court could have verified the existence and validity of that agreement anyway, as the one obviously linked to the dispute. Rather, the court only held that "*it is striking […] that the defendants asserted the existence of a different arbitration agreement based on different conditions until after these proceedings were commenced*"[77] and instead of further analyzing whether that other agreement was accepted by the claimant or not, it deemed this inconsistency to be "*fatal*" to the application for a stay, and consequently decided to move on with the court proceedings.

[74] H & H Marine Engine Service Ltd. v. Volvo Penta of the Americas, Inc., 2009 BCSC 1389.

[75] *Id.* at paras 19, 22 and 57.

[76] *Id.* at paras 14, 15 and 24.

[77] *Id.* at para 57.

While the court's ignorance towards the existence of an arbitration agreement may be based on the absence of an *ex oficio* duty to look at grounds beyond those invoked by the applicant, for practical reasons of efficiency and also to ensure justice, the court could have easily looked at the arbitration clause referring to arbitration in Washington. Of course, in doing so the court would have probably 'cut the branch beneath its own feet' precisely for the reasons elaborated in its decision, namely that the court is entitled to verify the existence of an arbitration agreement only "*in the absence of an evidentiary or statutory basis for application of the competence/competence principle*"[78] – which is apparently missing from the Stockholm Rules[79] but is included in the AAA Rules[80]. This case is a representative example indicating that whenever arbitral agreements are unclear, a court will find the means to find to have jurisdiction, if it wants to. More often, the pro-arbitration approach will prevail, but contradictory party agreements can never guarantee that arbitration will be upheld by courts.

[78] *Id.* at para 55.

[79] The SCC Arbitration Rules do not contain any reference to the jurisdiction of the arbitrators' to decide over their own jurisdiction, but the Board of Directors of the Institute is expressly vested with the power to "*decide whether the SCC Institute manifestly lacks jurisdiction over the dispute*" (Art.9(1) of both the 2007 version, in force at the date of the dispute, and of the current, 2010 version), a provision which could have been understood as a reflection of the competence-competence principle.

[80] The Commercial Arbitration Rules of the AAA expressly chosen in the agreement to arbitrate in Washington (*Supra* note 74 at para 15), which provides:

"*R-7. Jurisdiction*

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

II.1.3. Party stipulation providing for the jurisdiction of one institution and the rules of another one

Yet another example of self-contradictory party agreements is when (for whatever reason) parties decide to use the administrative services of one institution, but nevertheless choose the applicability of the arbitration rules of a different institution; disregarding the fact that – as already emphasized – most rules are tailored to fit the organizational structure of a particular institution. If one wishes to use an institution – for example because it is at hand, or known as reliable in handling the administration – but without its own rules, then the parties should at least check whether that institution is willing and able to administer proceedings under the UNCITRAL Rules, which is capable of providing procedural safeguard within or outside any institutional setting; but combining elements from two institutions is never a safe endeavour.

Parties made such a combination in a case decided by the Court of Arbitration of the Hungarian Chamber of Commerce and Industry[81], choosing to submit their dispute to the Budapest Court of Arbitration, and at the same time opting for the arbitral rules of the ICC. The arbitrators in that case considered that "*this may be a complicated and less than practical solution, but not an impossible one. […][because] the two [rules] are*

[81] Vb 99130/2000, Court of Arbitration at the Hungarian Chamber of Commerce and Industry

reconcilable"[82]. Such positive approach may be based on the good relationship that the Hungarian Court of Arbitration has with the ICC, or just based on the flexibility of the institution and of the appointed arbitrators; but sometimes good intention may just not be enough to save a case. In a dispute based on the following clause, for example – otherwise very similar with the one just mentioned above – the conflict would most probably prove to be fatal:

> "*Any dispute which may arise out of this agreement will be resolved by arbitration before BANI*[83] *in accordance with the rules of procedure of the International Chamber of Commerce ("ICC") in such city as the parties may agree."* [84]

Besides the problematic seat provision of "*such city as the parties may agree*", the hidden conflict is again between two institutions. According to the BANI Rules of Arbitration, the institution will only administer a proceeding under its own rules[85]; moreover,

[82] *Id.*

[83] *i.e.* Indonesian National Board of Arbitration.

[84] By email from Mills, *supra* note 59 on June 15, 2010; no further information is available about the end result of this agreement.

[85] Rules Of Arbitral Procedure of The Indonesia National Board Of Arbitration Art.1.:

"If the parties to a commercial agreement or transaction have agreed in writing that disputes in relation to that agreement or transaction shall be referred to arbitration before the Indonesian National Board of Arbitration ("BANI"), or under the Rules of BANI, then such dispute shall be settled under the administration of BANI in accordance with these Rules, subject to such modifications as the parties may agree in writing, so long as such modifications do not contradict mandatory provisions of law nor the policies of BANI."

the ICC Rules are not designed to function elsewhere, as they provide for procedures inseparable from the internal organs of the ICC[86], tasks that probably couldn't be performed by BANI, due to its very different organizational structure.

Similarly, in a quite dramatic case comprising a sequence of court decisions rendered over a period of two years in two different countries, a contradiction between a choice of arbitral institution combined with the choice of a different institution's rules – and with an alternative court jurisdiction – proved to be fatal to arbitration. The dispute resolution clause incorporated in a contract between ISC Holding AG and Nobel Biocare Investments, contained the following:

> "*…the parties agree in advance to have the dispute submitted to binding arbitration through the American Arbitration Association or to any other U.S. court. […] The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500).*"[87]

Furthermore, Art.2 provides that "*These Procedural Rules shall apply to arbitrations conducted by BANI.*"

[86] *e.g.* the most important function of the Court at the ICC is to scrutinize the awards.

[87] Section 22 of the Asset Management Facilitation Agreement concluded on January 21, 2008.

Due to the incompatibility between the institution and the ICC Rules, the International Center for Dispute Resolution of the American Arbitration Association refused jurisdiction and the case was eventually deemed to be decided by state courts[88].

These decisions indicate that irrespective of the more-or-less obvious deficiencies reflected by unclear arbitration agreements and in spite of any pro-arbitration practice, cases combining jurisdiction and/or rules from more than one institution may very well end up being redirected to the national court system – the jurisdiction of which the parties presumably wanted to avoid in the first place. The decision of what is a pathological clause is (to some extent) a matter of subjective evaluation, but whenever clear intent to arbitrate – and to exclude court jurisdiction – cannot be proved, arbitration is at risk. Consequently, parties should avoid indicating more than one institution in their arbitration agreements or combining an institution with the rules of another one, as such mixtures may have disastrous consequences to their arbitration.

[88] *See* II.1.1. above for the other irregularity of the clause.

II.1.4. Party stipulations not clear enough to provide for any institution and/or rules

Arbitration agreements come in 'every size and shape', reflecting the indefinite creativity of the human mind; creativity which sometimes is not appreciated in a field in which clear and concise logic and precision rule. Consequently, in spite of the flexibility of arbitration in general, unless the dispute resolution clause clearly and unambiguously provides for arbitration to be conducted by a certain institution, the clause could be deemed to be insufficient to confer arbitral jurisdiction at all – or at least not within that institution.

For example, in a case between a Polish claimant and an English respondent, submitted to the Hungarian Court of Arbitration[89], the following clause was found to be unsatisfactory in light of the requirements of the institution's rules[90]:

> "*Arbitration, any disputes between the parties shall be settled by an independent international, European Court in any country as indicated by Buyer – excluding Poland and country of Manufacturer.*"[91] [i.e. England]

[89] *i.e.* Court of Arbitration Attached to the Hungarian Chamber of Commerce

[90] Art.1 of the Rules of Proceedings of the Arbitration Court Attached to the Hungarian Chamber of Commerce.

Although the tribunal found that the Hungarian Court of Arbitration is an independent, international and European court, and also that due to these characteristics the clause could only refer to arbitration and not to a state court, the tribunal nevertheless found to lack jurisdiction for the absence of any reference to this particular court. In the tribunal's view, since the clause did not reflect the parties' agreement to submit their case to this institution, and the respondent contested its jurisdiction, agreement in this regard cannot be inferred.

Moreover, even though the clause provided for the buyer's (*i.e.* claimant's) right to choose an institution, the rules of this particular institution do not accept such one-sided choice, but require the court to be stipulated in the agreement. Such express requirement is provided by Art.1(c) of the Rules, according to which "(1) [t]*he jurisdiction of the Arbitration Court encompasses the settlement of all disputes where […] (c) the jurisdiction of the Arbitration Court was stipulated in an arbitration agreement…*" – precisely the element missing in the case at hand. Strange enough, though, the tribunal only relied on Art.1(3) of the Rules, which defines 'arbitration agreement' as "*an agreement by the parties to submit to the Arbitration Court their disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*" – the tribunal interpreting this submission requirement to refer to the Hungarian Court of Arbitration; consequently, in the absence of such reference in the disputed clause, and in light of the express refusal from

[91] Polish claimant v English respondent, Court of Arbitration Attached to the Hungarian Chamber of Commerce, decision on jurisdiction of March 31, 2005.

one of the parties to confer jurisdiction upon the Hungarian Court, the tribunal decided not to have jurisdiction.

Although both the logic and the reasoning of the decision are debatable, the end result was in line with the applicable rules. Thus, in spite of the fact that the tribunal found to lack jurisdiction based – quite strangely – on a substantive and formal validity analysis of the arbitration agreement[92] but without actually declaring the agreement invalid (which would have been a far-fetched conclusion, considering that an arbitration agreement can still be valid if it does not refer to this particular institution), there was, indeed, a fatal conflict between the arbitration agreement and the requirements of the arbitration rules, as incorporated in Art.1(c) – even if this conflict was completely omitted by the tribunal.

This requirement of Art.1(c) (which is not a unique provision of the Hungarian Court of Arbitration) does render the agreement insufficient to confer jurisdiction, in spite of the exclusive right of one of the parties to choose an arbitral institution. Hence, broader formulations and one-sided rights may not necessarily be a better choice, if the targeted rules require express and unambiguous mutual agreement – as many rules usually do. The clause above may have satisfied the basic requirements for an *ad hoc* arbitration, with the buyer's right actually being the right to choose a seat and not an institution, but as the later fate of this case is not known, any further analysis about the possible extent to which the tribunal's

[92] The tribunal also went into analyzing Art.1(4) of the Rules of proceedings regulating the formal requirements of arbitral agreements.

analysis targeting the validity of the arbitration agreement did or did not affect later attempts to arbitrate, would be mere speculation.

More precise as a clause, but still insufficient to undoubtedly establish jurisdiction, is an agreement indicating an institution, but due to the defective identification, leaving it unclear what institution the parties actually intended to designate. Most often, such errors are caused by imperfect translations of institutions' names, and most often such errors do not end up being a problem – assuming that there is no other equally valid alternative interpretation; however, no positive outcome is ever guaranteed. For example, it may seem obvious to some that the 'Arbitration Court of Stockholm' can only mean the Arbitration Institute of the Stockholm Chamber of Commerce; however, to the Economic Court of Kyiv Region, it only meant that the parties named a non-existent institution – sufficient reason to solve the case itself, instead of sending it to arbitration.[93]

And since misinterpretations are apparently not characteristic to a particular region, two current Austrian examples reflect the same problem caused by imperfect references to arbitral institutions and/or rules. One, providing for "*arbitration to the Chamber of Commerce, Wien, Austria*"[94], and another one, providing for "*arbitration in accordance with the Rules of the*

[93] Economic Court of Kyiv Region case No. 129/3-06, decision of 14.07.2006, case reported by Konstantin Pilkov in the *International arbitration. News, analytics and practice* blog available at <http://arbitration-blog.eu/ukraine-arbitrationfriendly-jurisdiction-stockholm/>.

[94] "*any dispute arising between FP and TT which is not settled amicably within 60 days of notification, will be submitted for arbitration to the Chamber of Commerce, Wien, Austria, for final decision, which will be*

Austrian curt (sic!), settled in Vienna"[95] – arguably both referring to arbitration at the Vienna International Arbitral Centre. While the first only impaired the name of the institution, the second one causes bigger difficulties with its reference to an Austrian 'curt' (*i.e.* court), but one can easily imagine the difficulties and delays caused in solving disputes based on any of them.

Even when there is a clear arbitration agreement containing reference to only one institution, such reference may still be the source of errors. In some rare instances, reference to an institution, while theoretically sufficient, may still not automatically trigger the application of the expected rules – an expectation that could be based, for example, on the name of the targeted rules. The Korean Commercial Arbitration Board (KCAB) for example, has two sets of rules: the 'original' KCAB Rules[96] and the International Rules[97]. The latter, however, does not mean that it applies to all cases having an international element; rather, the KCAB Rules are applicable by default to both domestic and international cases, while the International Rules become applicable only if the parties expressly choose them.

binding on both parties." – by email from Hon.-Prof. Dr. Irene Welser, managing partner at CHSH Vienna, Austria, on January 13, 2011. Dispute still pending.

[95] "*Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules of the Austrian curt (sic!), settled in Vienna. The arbitration proceedings shall be held in Vienna and conducted in the German language*." – by email from Welser *supra* note 94. Dispute still pending.

[96] Arbitration Rules of the KCAB (2008).

[97] Rules of International Arbitration (2007).

The misleading labeling is even more unfortunate as the two sets of rules contain essential differences, for example with regard to the language of the proceedings and the appointment mechanism – the International Rules being modeled after the ICC Rules[98]. Therefore, it is not always and exclusively the deficiency or imperfection of the party stipulation that leads to the non-applicability of the rules intended by the parties. Nevertheless, even when external factors facilitate mistakes, carefully drafted party stipulation based on thorough research and understanding could avoid such pitfalls.

II.2. The relationship between party autonomy and arbitration rules

In the fortunate cases when parties do make a viable choice for an institution and a set of arbitration rules, the relationship between the party stipulation and the chosen rules raises new possibilities for deficiencies and conflicts. This is so in spite of the fact that arbitration rules become applicable only as a result of the parties' choice, and therefore they are based on party autonomy – and as such, theoretically there should be no conflict between the two.

[98] For more information *see* Benjamin Hughes, *The 'new' International rules of arbitration should encourage foreign parties to submit their disputes to the Korean Commercial Arbitration Board*, IBA Arbitration Newsletter of September 2010, 32-35.

But since there is a clearly identifiable relationship between express provisions originating from the parties and pre-established rules chosen by the parties, this relationship has to be considered as a possible source of conflicts. Thus, for the purpose of the present thesis, arbitration rules are considered as a distinct source of norms regulating international commercial arbitration, separate from party autonomy.

One of the most well-known arbitration rules are the UNCITRAL Rules; however, as none of its provisions is of mandatory nature – Art.1.1 expressly allowing the parties to depart from any of the Rules' provisions[99] – the UNCITRAL Rules are rarely subject to any conflict with any other source of norms. Nevertheless, differences may arise out of the differing interpretation of the same provisions by the arbitral tribunal and the parties. Any such difference may be a source of difficulty and tension, if there is uncertainty as to whether the parties have surrendered their right to modify the rules as soon as they have constituted the tribunal – as discussed below.

Arbitral institutions are able to adapt their regulations more rapidly and flexibly to the 'market requirements' than states can, and hence, the regularly updated rules are a good reflection of the universal tendencies and of the needs of the players in the international arbitration arena. The recent changes adopted by several large institutions reflect an increased need for efficiency in administration and case management, and are balancing on a thin line

[99] UNCITRAL Arbitration Rules 2010 Art.1.1:

"*... disputes shall be settled in accordance with these Rules subject to such modifications as the parties may agree*".

between party autonomy and over-regulating the proceedings that were initially supposed to be in the parties' hands. The dilemma is also reflected by the different hierarchies that are established by the different arbitration rules.

Most rules provide for the primacy of the rules themselves, with variations mostly limited between the hierarchic stand of the parties' will and the arbitrators' discretion. In this sense for example, the UNCITRAL Rules provide for the rules supplemented by the parties' agreement, and only after that followed by the tribunal's determination[100]. The new Milan Rules[101], however, already include a delimitation in time; the hierarchy beginning with the rules, followed by party stipulations made only before the constitution of the tribunal, the list being closed with the arbitrator's discretion[102].

[100] Art.15.1. of the ICC Rules of Arbitration:

"*The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on...*"

Art.12(1) of the 2010 Stockholm Rules:

"*Subject to these rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate*."

[101] *i.e.* International Arbitration Rules of the Chamber of Arbitration of Milan (2010).

[102] Art. 2.1. of the Milan Rules (2010):

"The arbitral proceedings shall be governed by the Rules, by the rules agreed upon by the parties up to the constitution of the Arbitral Tribunal if consistent with the Rules, or, in default, by the rules set by the Arbitral Tribunal."

On a slightly different note, the LCIA gives considerable preference to the parties' will to determine the procedural rules[103]; party autonomy nevertheless being subject to limitations - which are, again, very similarly presented in many rules. Accordingly, - as if it was any need for expressly regulating it – many rules insert in the hierarchy of the procedural rules requirements of fairness and equality[104], and some have relatively recently also added the requirement of efficiency[105]. While these later limitations at first sight may seem to only

[103] *See* Art. 14.1 of the LCIA Arbitration Rules:

"*The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so...*"

[104] *See* for example Art.17.1 of the UNCITRAL Rules (2010):

"... provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case";

Art.2.3. of the Milan Rules (2010):

"*In any case, the principles of due process and equal treatment of the parties shall apply*";

Art.15.2. of the ICC Rules:

"*In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case*";

Art.14.1(i) of the LCIA Rules:

"...consistent with the Arbitral Tribunal's general duties at all times:

(i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent;"

[105] *See* Art. 17.1. of the UNCITRAL Rules (2010):

"... The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute";

Art. 14.1(ii) of the LCIA Rules:

influence the tribunal's determination, as the one conducting the proceedings, the inclusion of fairness and efficiency requirements in the hierarchy of procedural rules is welcome, as it can also avoid dilatory tactics deriving from an abuse of the parties' rights.

At the other end of the spectrum, the Rules of the Japan Commercial Arbitration Association, for example, do not contain any provision with regard to the hierarchy of rules, or to what happens if the Rules are silent with regard to any procedural aspect. More esoteric, but probably equally useless, is Art. 65 of the Rules of Arbitration of the Netherlands Arbitration Institute (NAI), providing that "[i]*n all matters not provided for in these Rules, the spirit of these Rules shall be followed*" – whatever that spirit may be.

Last, but not least in this hierarchy, one should not forget about the continuous influence of the applicable law and the limitations imposed by its mandatory provisions. While many institutional rules fail to contain express reference to mandatory laws, the UNCITRAL Rules make their own application subject to "*provision of the law applicable to*

"*the Arbitral Tribunal's general duties at all times: [...]*

(ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute";

Art.19(2) of the Stockholm Rules:

"*In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case*"

Time and cost efficiency requirements are likely to be included in the planned amendments to the ICC Rules as well, currently being revised by a task Force committee – *see* note on the ICC official website at <http://www.iccwbo.org/policy/arbitration/index.html?id=28796>.

the arbitration from which the parties cannot derogate"[106]; and the Milan Rules could arguably also be interpreted as having such reference, when providing that "[i]*n any case, mandatory provisions that are applicable to the arbitral proceedings shall apply"*[107]. Apart from the problem that 'mandatory provisions' is a term that leaves room to interpretation as of the source of such mandatory provisions, at least an acknowledgment of the existence of such mandatory norms is appreciated as a good way of attracting parties' attention that there exist other relevant regulations above their rules, the rules of the institution and the discretion of the arbitrators.

Other institutional rules that mention procedural rules from the legislation – generally of the seat of arbitration, whether within the country of the institution or not – are the CIETAC Rules[108], the Madrid Rules[109], the DIS Rules[110], the NAI Rules,[111] the SIAC Rules[112], the Russian and the Romanian Rules – the latter even providing for the Geneva

[106] Art.1.3. of the UNCITRAL Arbitration Rules (2010).

[107] Art.2.2. of the Milan Rules (2010).

[108] Art.4.2. also allowing arbitration at CIETAC under different rules, as long as it is not "*in conflict with a mandatory provision of the law of the place of arbitration*".

[109] *i.e.* Rules of the Madrid Chamber of Commerce and Industry (2009).

[110] Section 24.1. of the Arbitration Rules of the German Institution of Arbitration (1998).

[111] Primacy f the Dutch Code of Civil Procedure is reflected throughout the entire NAI Rules (2010).

[112] Rule 1.1. of the Arbitration Rules of the Singapore International Arbitration Centre (2010).

Convention and the UNCITRAL Rules in its transitory provisions, creating thus a strange list of applicable regulations[113].

In spite of any such or similar hierarchy lists, conflicts between party stipulation and rules – and further with laws and other sources – are very common, and will remain a fact of life for as long as human nature plays a role in arbitration. (In line with the reverse application of the solipsism principle that "*I make mistakes, therefore I am*"[114].)

II.2.1. Party-stipulations supplementing institutional rules

The most common – and at the same time most fortunate – situation is when party provisions come to supplement gaps in the applicable set of rules to give specific sense to general or vague rules. Although this scenario could theoretically be the recipe of an ideal cohabitation between party autonomy and arbitration rules (as the possibility of a conflict is

[113] Art. 105. of the Procedural Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania:

"*The arbitral tribunal shall apply the civil procedural common law, as well as the provisions of the European Convention on international commercial arbitration signed at Geneva, on April 21st, 1961 and the provisions of the Arbitration Rules of the United Nations Commission on International Commercial Law, signed on December 15th, 1976 (UNCITRAL), unless contrary to the provisions hereof.*"

[114] "*fallor ergo sum*" in Latin (Augustine).

almost non-existent), the reality is that sometimes exactly the lack of a specific rule can render a party provision difficult to work.

II.2.1.1. Party stipulation regulating the composition of the tribunal

i) Appointment of arbitrators by parties or by institution

Due to the flexibility of most institutional rules, parties are generally free and able to adapt the procedure for the appointment of arbitrators to their individual needs and what they consider more efficient. The appointment of arbitrators is often perceived as the first and most significant manifestation of party autonomy, and hence, parties prefer to make the appointment themselves, instead of entrusting the administering institution with this task. However, while the freedom to choose the arbitrators is one of arbitration's biggest advantages, taking matters on one's own hands is not always the most efficient option.

As a survey conducted by the LCIA[115] shows, the cases in which the court chose the tribunal were solved within time, within budget, and were allegedly also solved better than those cases in which the parties nominated the arbitrator(s) themselves. The reason for this could be that parties are more tempted to select famous names inducing a higher level of certainty that their experience and knowledge will ensure a better outcome. Another reason

[115] Reference to the LCIA survey was made by Jan Paulsson at the HKIAC 25th Anniversary Conference in November 2010; no statistical data is available.

could be that the choice of arbitrators, if left for the parties, is in fact made by the parties' lawyers, who on their turn will appoint other well-known lawyers. The problem with popular arbitrators is that, due to their high demand, they are rarely available to conduct arbitration within a relatively short timeframe, thus increasing the costs not only through their personal high fees[116] but also through the delays caused by their busy schedule. If insisting on making the appointment themselves, parties should not be afraid to appoint younger arbitrators, who are often well educated, eager to invest their knowledge, and most importantly willing to work hard in order to 'make a name' in the profession[117] (so that eventually they would also become a popular arbitrator with a busy schedule unable to accept cases with tight deadlines); but until that dream is achieved, they are a choice just as good as any 'brand name' in the field, and often even serving the purpose better.

Some institutions already recognized this, and under the recent trend focused towards time and cost efficiency, whenever the court of arbitration appoints the arbitrator(s), the court would consider less experienced, and accordingly less busy younger arbitrators for less complicated cases[118]; another reason (from behind the scenes) of this institutional practice is

[116] Except when the rules provide for fees calculated on other grounds – *e.g.* work hours spent on the case or value of the claim.

[117] *See* Lisa Bench Nieuwveld, *Choosing the Weathered Veteran or the Young Buck?*, Kluwer Arbitration Blog (January 8, 2011), available at <http://kluwerarbitrationblog.com/blog/2011/01/08/choosing-the-weathered-veteran-or-the-young-buck/>.

[118] Practice revealed by representatives of the ACICA, ICC and LCIA at the HKIAC Conference (2010). Also *see* Rinaldo Sali, *How to choose the ideal arbitrator: the institutional point of view*, available at

that "*an experienced arbitrator is rarely happy to be appointed in a low cost dispute*"[119] – a consideration that indirectly reflects the relationship between the experience of an arbitrator and the costs of a case. Thus, some institutions seem to have found the solution to the possible difficulty arising from the freedom of the parties in selecting their arbitrators – this solution, however, can only be out in practice if party autonomy is not executed, allowing the institution to step in the appointment procedure.

Similarly, appointing arbitrators from a particular jurisdiction, even if unrelated to the case itself, is another bad practice of the parties, made possible by most rules. The so-called 'reactive appointment', when appointment is made "*as a reaction to a single circumstance, for example because they share the same law of the disputed contract or the place of arbitration, are the same as the counsel and/or arbitrator appointed by the claimant, or, in the case of appointing counsel, are the same law firm that assisted the party in drafting the contested contract (the "lawyer down the hallway" method of appointment)"*[120] is a practice that may lead to the 'domestication' of international cases. For example, appointing arbitrators from the seat of arbitration may lead to either a local battle of forces or to the

<http://www.european-arbitrators.org/EUROPEANARBITRATORS_FILES/CONTENT/Papers/RS%20How%20to%20choose%20the%20ideal%20arbitrator.pdf>.

[119] *Id.* Sali at 3.

[120] Michael McIlwrath, *Anti-Arbitration: A New Year's Resolution to Leave Worst Practices Behind,* Kluwer Arbitration Blog (January 1, 2011), available at <http://kluwerarbitrationblog.com/blog/2011/01/01/anti-arbitration-a-new-year%e2%80%99s-resolution-to-leave-worst-practices-behind/>.

undesired infiltration of local litigation practices in the arbitration that will remain international only by its name, but not by its true characteristics. As a direct consequence, "[r]*ather than experiencing the vaunted flexibility of international arbitration, parties in such cases are likely to find themselves immersed in the idiosyncrasies of local pleading practice"*, as recently noted in a professional's *'new year's resolution to leave worst practices behind'*[121].

While such unfortunate consequences derive indirectly from the party autonomy principle, arbitration rules can do little to counteract them, and most of them leave the appointment right primarily vested to the parties. Just as in the previous scenario, institutions are generally only entitled to step in if the parties do not exercise their right in choosing arbitrators, and rules that reserve a higher degree of discretion to the institution in the tribunal's constitution process tend to be perceived with criticism, as unnecessarily and unreasonably limiting party autonomy.

ii) Party requirements on the arbitrators' qualification

Another tribunal-related party right that is usually not prohibited or limited by the procedural rules regards the requirement of special qualifications for arbitrators. The expectation of special qualifications may be well justified in some cases, when the dispute

[121] *Id.*

itself requires special knowledge, but it may also be a source of difficulties and complications. Expertise from a special field – other than law and arbitration – that parties often expect from their appointed arbitrators can be easily substituted by technical knowledge of an expert or expert witness; but the reverse is not necessarily true. The special legal knowledge needed to efficiently conduct arbitral proceedings can be provided by a qualified arbitrator, but not necessarily by a technical expert.

Moreover, standard contract forms providing for arbitrators' special qualification in too vague terms may only create difficulties[122]. Logically thus, although arbitration rules do not restrict the freedom to appoint experts as arbitrators, if special technical knowledge is needed to solve a case, that should not be ensured by substituting arbitrators with experts. A compromise solution could be the rare occurrence of an arbitrator proficient in both law and the special area of dispute, or a 'mixed tribunal' composed of both lawyers and experts – a solution favored by the Milan Arbitration Chamber[123], but less ideal when the case could be easily solved by a sole arbitrator. Appointing a panel of three just to ensure the presence of both lawyers and technical experts is again, a less fortunate choice, compared to a sole arbitrator appointing expert witnesses to provide the technical opinion. Therefore, party autonomy filling the gap intentionally left in arbitration rules with regard to the qualification

[122] *See* for example the requirement of arbitrators to be '*commercial men'* that was found to have "*eight possible alternative meanings*" - Rahcassi Shipping Co SA v Blue Star Line (The Bede) Queen's Bench Division (Commercial Court), 27 June 1967, [1969] 1 Q.B. 173, at 183.

[123] *See* Sali *supra* note 118 at 2.

of arbitrators can (but does not necessarily have to) end up in a deficient arbitration; the quality of one's case will be just as god as the quality of one's choice made under the party autonomy principle.

iii) Parties regulating the challenge of arbitrators

Last, but not least within the procedure to constitute the tribunal, party stipulations regulating the challenge of arbitrators are less likely to supplement institutional rules, since most rules provide for a well elaborated challenge procedure. For this reason, there is a high risk of conflict between party terms providing for a different procedure, especially regulating the decision on the challenge – in case the parties do not agree on the challenge, and/or the challenged arbitrator does not withdraw following the challenge. The only rules that do not pose such risk of contradiction are the UNCITRAL Rules, which are not only quite vague on this matter, but are not of mandatory application anyway. In any case, the UNCITRAL rules provide for the appointing authority to render a decision within 30 days[124] – meaning that, if the parties have not commonly designated an appointing authority, then the challenging party may request the Secretary-General of the Permanent Court of Arbitration (PCA) to designate such appointing authority[125].

[124] Art.13.4 of the UNCITRAL Arbitration Rules.

[125] Art.6.2 of the UNCITRAL Arbitration Rules.

Institutions, however, will usually provide for an internal organ of the court of arbitration to decide on the challenge, only a few allowing any derogation from this rule – usually limited to common agreement of the parties on the challenge. In this sense, the court is the one to decide on a challenge at the ICC[126] and at the LCIA[127], the Board at the Stockholm Arbitration Institute[128], the administrator at the AAA[129], the Arbitral Council at the Milan Arbitration Chamber[130] and the Special Committee at any of the chambers of commerce adhering to the Swiss Rules[131]. Any different construction on deciding on the challenge of an appointed arbitrator will most likely generate a conflict between the party stipulation and the rule.

Strict institutional rules also regulate the time limit within which a challenge has to be submitted – 30 days at the ICC, 15 days at the LCIA, the AAA and the Stockholm Arbitration Institute, and 10 days at the Milan Arbitration Chamber; there is no time limit provided by the Swiss Rules, even though they are based on the UNICTRAL Rules, which on their turn provide for a 15 days term to submit a challenge to all parties and arbitrators involved[132].

[126] Art.11.3 of the ICC Rules.

[127] Art.10.4 of the LCIA Rules.

[128] Art. 15(4) of the Stockholm Rules.

[129] Art.9 of the ICDR International Arbitration Rules.

[130] Art.19.4 of the Milan Rules.

[131] Art.11.2 of the Swiss Rules.

[132] Art. 13.1 and 13.2. of the UNCITRAL Rules.

Thus, apart from arbitrations conducted under the Swiss or under the UNCITRAL Rules, any party stipulation providing for a different timeframe may be a source of procedural conflict – to be solved eventually by a state court – or may even to lead to the inoperability of the arbitration agreement.

II.2.1.2. Party request regarding other 'participants' to the arbitration

One would easily think that party provisions, even when supplementing rules, can only regulate issues at least already identified by the rules as being part of the arbitral procedure. Reality, however, proves the opposite; forcing tribunals and institutions to handle party requests that do not fill in a gap, but supplement the rules in an atypical manner[133]. In an ICSID case[134] the claimant submitted an unusual request to the tribunal, not expressly supported by any of the applicable rules, and the tribunal faced the situation of deciding not over its own composition or jurisdiction, but over the persons representing the parties. Concretely, respondent submitted a list of its counsels shortly before the hearings, list which contained the name of a counsel who was a member of the same barristers' chamber as the tribunal's president – a connection which was worrisome for claimant, especially in light of

[133] In this section, in the absence of a mutual party agreement, a one-sided party request is analyzed, the purpose of maintaining cohabitation between party expectation and arbitration rules leading to an unusual compromise and legal analysis.

[134] Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, Case No.ARB/05/24; Tribunal's Ruling of May 6, 2008.

the late disclosure and considering the provisions of the IBA Guidelines on Conflicts of Interest in International Arbitration[135]. Since none of the parties wanted the president to resign, and the change of the panel would not have been a solution at that point of the proceedings anyway, claimant requested an order that respondent refrain from using the services of that particular counsel[136].

However, nothing in the ICSID Rules or the Convention empowered the tribunal to make such an order, and the problem was two-folded. On one hand, for both options of rendering or refusing the order requested, there was a risk of infringing fundamental rules of procedure: if granted, respondent may contend that its right to representation[137] and the right to be given full opportunity to present a case was infringed; while if denied, claimant may contend that there was an appearance of partiality raising doubts as to the case being judged fairly[138]. With regard to this issue, the panel found that "*even fundamental principles must […] give way to overriding exceptions. In this case, the overriding principle is that of the*

[135] General Standard 2(b) on the justifiable doubts as to the arbitrator's impartiality or independence; and point 3.3.2 on the Orange list, on the membership to the same barristers' chambers of an arbitrator and the counsel for one of the parties.

[136] As indicated in the introductory parts of the thesis, unilateral party requests are not excluded from the analysis, as long as they reflect a possible conflict with other sources of norms regulating arbitration.

[137] Provided for by ICSID Arbitration Rule 19, and expressly acknowledged by the Tribunal in para. 24 of the Ruling.

[138] As required by ICSID Arbitration Rule 6.

immutability of properly constituted tribunals (Article 56(1) of the ICSID Convention)"[139]; more precisely that "*the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any Tribunal member*"[140].

On the other hand, however, as the request was neither based on party agreement, nor expressly supported by the applicable rules, the issue seemed to exist in a legislative vacuum. The solution (and the ground to order the relief requested by claimant) was eventually found in the tribunals' "*inherent power to preserve the integrity of its proceedings*"[141]. Accordingly, the tribunal found that it does have power primarily based on Art.44 of the ICSID Convention[142], but also added that "[m]*ore broadly, there is an 'inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction'; that power 'exists independently of any statutory reference'*"[143].

While the inherent power is a useful principle when it comes to party stipulations that do not fit within the framework of the applicable rules, in this particular case it is interesting to consider why the tribunal felt the need to rely on this general inherent power, when Art.44

[139] Para. 25 of the Ruling.

[140] Para. 30 of the Ruling.

[141] Para. 33 of the Ruling, with reference to SCHEURER, THE ICSID CONVENTION: A COMMENTARY (2001).

[142] Art. 44. "[…] *If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.*"

[143] Para. 33. of the Ruling, quoting Prosecutor v. Beqa Beqaj, Case No. IT-03-66-T-R77, Judgment on Contempt Alegations of May 27, 2005.

of the Convention could have served as sufficient ground – just as it did in previous cases[144]. A rationale may have been that a tribunal is reluctant to issue orders – even procedural ones – which may be twisted and interpreted as falling outside of the scope of its mandate. Another motivation may have been also that the relief requested was not as clearly limited to a question of procedure as to undoubtedly fall under the provisions of Art.44. The tribunal's reasoning remains uncovered for now; however taking the safe way may open broad possibilities to future tribunals, as well as to parties to issue and request orders that were never before heard of. In any case, this precedent shows that party requests may find their place even if there is no rule or law governing such issue in arbitration; and that the inherent power of a tribunal, as defined above, may in itself serve as a bridge between party autonomy and arbitration rules, filling gaps and solving tensions.

II.2.1.3. Party stipulation regulating the taking of evidence

Another area in which parties often supplement rules is the taking of evidence – a 'hot potato' in arbitration, subject to many debates especially between common law and civil law practitioners. With the popularity of arbitration in international business relationships and the increase in value and in complexity of cases, the initial advantage of time and cost saving did slowly, but certainly, disappear from the arbitration arena. While the appearance of alternative 'fast-track' arbitration is a suitable solution for some cases, the vast majority of

[144] Cases even invoked by the Tribunal in fn.16 of the Ruling.

larger cases still face lengthy proceedings, mostly (but not exclusively) due to production of evidence through excessive discovery and extensive examination and cross-examination of witnesses and expert witnesses.

Due to the international nature of disputes involving parties, counsels and arbitrators coming from different legal systems and accustomed to different evidentiary procedures, large international arbitrations sometimes tend to drown in disagreements with regard to how to prove the case. And because arbitration is a creation of the parties, many tribunals do not have other choice than to watch over the parties' (or rather their counsels') fight, without being clearly entitled to draw the line and to limit the production of evidence to what is reasonably sufficient to prove the case. This can happen due to the deficiency of clear institutional regulation leaving a large door open to excessive party-created evidencing procedures, not limited in any way by powers entrusted to the tribunal to establish and keep these procedures within reasonable boundaries. The complete lack of such regulation is subject of a separate Chapter V analysis below[145], but there are also cases when the institutions, recognizing the problem, do try to solve them by implementing rules – which, on their turn, are then contradicted by party stipulations.

The arbitration world seems to recognize lately the need towards simplifying procedures, especially with regard to taking of evidence. With the risk of attracting the resentment of common law professionals, I dare to say that this phenomenon is a late

[145] *See* V.4. below.

'discovery' mainly caused by British ignorance combined with American arrogance towards the practical aspects of civil law systems[146]. Tribunals from civil law countries were practicing for many years the way that English and American arbitrators and counsel just recently started to identify as an efficient and proactive approach; involving early identification of common grounds and issues to be decided, as well as of the procedural steps including a feasible timetable, and most importantly, the list and nature of evidence required and accepted. Having issues determined early may serve to identify the issues to which witness statements should be limited, or may even determine witness evidence completely unnecessary; just as an early procedural plan created by the tribunal – with the consultation of the parties, of course – may find an expert conference being just as useful, but a lot more time efficient than examining and cross-examining in turn each expert witness separately.

These practices, if not expressly supported by the applicable law and definitely not agreed upon by the parties, require a more authoritarian tribunal, firmly conducting the proceedings instead of only surviving it at the mercy of the parties' counsels – perhaps this is why these proactive practices are more common in the inquisitorial civil law system. But even 'reinventing the wheel' is better late than never, and the current trend of 'rethinking international commercial arbitration'[147] in the sense of finding the balance between the parties' freedom in being the 'masters' of their case, and imposing upon them (if necessary) a

[146] With no offence to those common law arbitrators who already adopted this pragmatic approach.

[147] This was the theme of the HKIAC Anniversary Conference in 2010, recognizing the need towards more simplified procedures and evidence taking.

more efficient procedure, appears to be also a rapprochement between the common law and civil law approach to arbitration.

The 2010 amendments to the UNCITRAL Arbitration Rules nicely reflect the overall development of international practice in this sense, as a reaction to the common problems of disagreement and delay in evidentiary processes in arbitration. The tendency to limit party autonomy to some practical extent is also reflected in the 2010 amendments of the Milan Rules, Art.25.1. expressly providing that "[t]*he Arbitral Tribunal leads the case by taking all the relevant and admissible evidence adduced* ***in the manner it deems appropriate***" [emphasis added]; however, it still doesn't resemble the authoritarian style reflected by the DIS Rules, which expressly state that "[t]*he arbitral tribunal is not bound by the parties' applications for the admission of evidence*"[148]. Another, more detailed regulation on evidencing is included in the CIETAC Rules, which, backed up by an active involvement of the institution, have a much longer and detailed set of provisions governing the production of evidence, creating strict time limits and offering extensive powers to the tribunal; being justifiably known as not only 'different' than other institutional rules, but apparently also more efficient[149].

As practice proves it, balanced regulation – even if imposes certain limits to party autonomy – may be more efficient than a complete lack of reasonable boundaries. While

[148] Art.17.1. of the DIS Rules (1998).

[149] See Art. 36 – 39 of the CIETAC Arbitration Rules (2005).

party autonomy can still supplement and alter – to some reasonable extent – institutional rules regulating the taking of evidence, the increasing restrictions imposed by arbitration rules are meant to increase certainty; to serve an ultimate purpose of efficiency; and aim to provide for a solution against contradictory party provisions. And while balanced regulation would be an ideal solution, whenever there is no such regulation of evidencing in the chosen rules, the parties should carefully consider whether specific party stipulations are really needed in light of the arbitrators' general obligation to conduct the proceedings in the most efficient manner possible.

II.2.2. Party stipulations conflicting with arbitration rules

Apart from supplementing arbitration rules, parties may sometimes decide to create rules that are in contradiction with the rules of the institution they have chosen to administer their case. Although the expressed ground for this is usually the aim towards more efficiency than what the institution is assumed to be able to ensure, the real reason behind such act is often the lack of trust in the institution, lack of transparency of the institutional supervision, and last but not least, lack of proper arbitration knowledge. Apparently, there are still too many 'unserious' institutions, small 'boutique shops' masquerading as international arbitration fora, eventually determining arbitrating parties to manifest excessive caution, even

when they would not need it. In order to prevent deadlocks or costly delays, parties should consider that institutional rules do contain mandatory provisions, which cannot be altered. The justification of each mandatory rule can be different, but the mandatory nature itself will render any party stipulation to the contrary inefficient – eventually risking the entire fate of arbitration.

II.2.2.1. The development of mandatory institutional rules

Institutional rules are generated and shaped by the needs of arbitration practice; many rules, especially those of smaller institutions are very similar, not offering any real variety, but the rules of major, more experienced institutions are rich in special provisions, trying to ensure better and more efficient services to their clients. Competitive institutions also update their rules regularly, to keep the pace with the continuously changing business reality. The ICC, for example, is currently revising its rules again, updating the provisions under the theme of efficiency[150] – a spirit also leading the recent amendment of the Milan Rules, of the Stockholm Rules, and of the UNCITRAL Arbitration Rules as well.

[150] A Task Force on the Revision of the ICC Rules of Arbitration, created in October 2008 and composed of over 175 members from 41 countries, is mandated to study all suggestions received from National Committees, members of the ICC, users of the ICC rules of arbitration, Court members and members of the Secretariat; to determine if amendments to the ICC rules of arbitration are useful or necessary; to make any recommendations for the amendment of the ICC rules of arbitration that the Task Force deems to be useful or necessary. (*see* <http://www.iccwbo.org/policy/arbitration/id28796/index.html>.).

Some of the rules to be revised by the ICC are those on case management, the planned amendments aiming to provide better time and cost efficiency. In light of the fact that many tribunals, when drafting terms of references or procedural orders, fail to consult in advance with the parties and disregard their particular needs, the new rules are planned to provide for new principles and responsibilities for arbitrators and parties – imposing, for example, compulsory case management conferences; failure to fulfill these obligations in a time and cost-efficient manner are to be reflected in the allocation of costs. Although this seems to be a well-intended approach, and it is undisputable that both time and cost-efficiency are in the parties' best interest, another compulsory procedure imposed upon those opting for ICC arbitration does raise some concerns with regard to party autonomy.

Another area where the ICC experienced difficulties and is revising its rules is multi-party arbitration. It is true that having more parties involved implicitly means having bigger chances for conflicts reflected in the proceedings as well. Nevertheless, limiting the parties' rights by imposing more and more compulsory rules do not seem to serve the interest of arbitration overall, as those restrictions – even if introduced for the benefit of the parties – may not necessarily be desired by them. In any case, whether the ICC orientation towards a more restrictive system in the name of efficiency will prove to be indeed efficient or not, is yet to be seen, after the new rules will come into effect[151].

[151] The new rules are planned to be launched in September 2011.

Irrespective of the increasing rigidity of the ICC rules, one should bear in mind that rules of any institution may limit choices which would regularly fall within the confines of party autonomy. Some institutional rules from the Eastern Block, for example, still delimit the seat of arbitration to the registered office of the institution itself, leaving no room for potentially combining the rules of the institution with the law of a different country[152]. Institutional rules occasionally also impose limits with regard to the characteristics of the arbitrators; while imposing nationality restrictions by a state law may seem more natural, one has to keep in mind that institutions may also impose various restrictions. The Abu Dhabi Commercial Conciliation and Arbitration Centre, for example, provides that arbitrators may not be less than 35 years old, have a minimum 15 years of professional experience, not have any conviction affecting the honor, honesty or public trust, have the approval of the employer, if any, and not be subject to any legal limitations in performing as an arbitrator[153].

Although the applicability of arbitration rules is based on the parties' express choice, as soon as such choice is made, the chosen rules can impose restrictions upon party autonomy by rendering some of their provisions to be of mandatory application. In spite of this, practice often faces mutations of procedural rules invented by parties, leading to results stretching from discrete amusement to unsolvable deadlocks and undesired litigation in state courts.

[152] *See* Section 22.1. of the Rules of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry; Art.10 of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry; and Art.55(1) of the rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

[153] *See* Art. 14 of the Abu Dhabi Commercial Conciliation and Arbitration Center Charter.

Ideally, the parties should be very careful when amending procedures provided by institutional rules, as party stipulations altering compulsory provisions may create more difficulties and conflicts than serve any particular need. Nevertheless, even in the presence of party stipulations going beyond the limits of permissible regulation, arbitral tribunals – and to increasing extent state courts as well – will attempt to find a solution and save even apparently hopeless arbitral agreements, as seen from the case below.

II.2.2.2. Party stipulation contradicting institutional rules regulating the appointment of arbitrators

Whenever parties choose a set of institutional rules to govern their case, but at the same time decide to limit the applicability of those rules by replacing parts of the provisions, it is for the tribunal to find a solution. In a classical example of party stipulation intervening in the efficient functioning of an institutional rule, the contract provided for the ICC Rules of Arbitration, but also included an appointment procedure different from that of the said rules, the entire arbitration starting off with a severe conflict between party provision and the applicable rules. The party stipulation proved to be ineffective, as the appointing authority designated by the parties refused to make appointment. Consequently, the ICC stepped in to make appointment[154], partially disregarding and implicitly saving the dysfunctional arbitration agreement. The arbitrator appointed by the ICC, when considering whether his

[154]Preliminary Award in ICC Case No. 2321/1974, 1 Yearbk. Comm. Arb'n (1976) 133-135.

appointment was validly made, considered the following: *"[...] when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause"*[155]. This pro-arbitration perception is very often met, saving arbitration in spite of a defective party agreement contradicting compulsory provisions of the chosen rules.

Another case had to take a by-pass road due to the deficiency of the following arbitration agreement containing a conflict with the chosen rules:

> *"Any dispute ... which may arise in the ... performance of this Contract shall be resolved by arbitral award (decision of arbitrators) chosen by mutual agreement. This can be in Nicaragua or the Rice Millers' Association [RMA] of the United States."*[156]

A claim was filed to the RMA, except that its rules of arbitration provide for the arbitration committee to appoint the arbitrators[157] and not for the parties. The tribunal so appointed by the RMA rendered an award in spite of the respondent's warnings regarding the irregularity of the appointment, and the award was confirmed by the Eastern District Court of Virginia. The same court later dismissed the action to compel arbitration before arbitrators chosen by mutual agreement of the parties.

[155] *Id.*

[156] As reproduced in Cargill Rice v. Empresa Nicaraguense Dealimentos Basicos; Empresa Nicaraguense Dealimentos Basicos v. Cargill Rice, 25 F.3d 223.

[157] RMA Arbitration Rule 8(a) providing that *"...The arbitrators in each case shall be appointed by the Arbitration Committee ..."*

The Fourth Circuit Court of Appeal faced with the appeals against these two District Court decisions managed to solve the arbitral agreement's conflict with the chosen rules by cutting through the Gordian knot: not only it vacated the first award and ordered the District Court to compel arbitration before arbitrators chosen by mutual agreement, but it also anticipated the next problem and supplemented the missing appointment mechanism, by ordering "*the standard method, where both parties choose an arbitrator and these arbitrators select a third arbitrator. If these arbitrators cannot agree on this selection, the district court, under section 5 of the FAA, shall appoint the third arbitrator*"[158]. Moreover, the Court of Appeal also ordered the District Court to "*conduct any fact-finding necessary to determine where the arbitration should proceed*"[159], and justified its decision arguing that the governing Federal Arbitration Act "*provides absolutely no authority for disregarding the parties' choice that the arbitrators be appointed by their mutual agreement, and instead allowing the arbitrators to be appointed by the arbitration committee of an organization that appears in the parties' contract only because they designated it as a possible arbitral forum*"[160].

The decision seems to be a positive solution respecting party autonomy and saving arbitration from a clash with its own apparently incompatible rules, but the dissenting opinion of Judge Hall indicates the opposite. While all judges agreed that arbitration is a creation of

[158] 25 F.3d 223 at para 12.

[159] *Id.*

[160] *Id* at fn.6, referring to 9 U.S.C. Sec. 5.

contract[161], Judge Hall interpreted the arbitral agreement as being in perfect harmony with the RMA Rules; the RMA being a "*standing arbitral body with complete rules and procedures to handle disputes submitted to it*"[162] and the parties having actually agreed that "*the RMA is an acceptable forum*"[163], in the sense that it would logically not approve an arbitration conducted under its aegis "*by utter strangers, or even by persons of whom it disapproves*"[164]. In Hall's opinion, the choice of forum automatically implies the choice of its professionals, and consequently the clause can have only one interpretation – the one made by the RMA.

While this interpretation is strongly debatable, the following practicality arguments worth more consideration. According to Judge Hall, even if he would be mistaken in interpreting the clause as just presented, the majority decision was still wrong for several reasons. Firstly, the solution of arbitrating in front of a tribunal appointed by the 'standard method' is just as far from the parties' agreement, as the RMA's own appointment procedure, since the parties never opted for this method; even more, the 'standard method' of each party choosing one, who then will choose a third arbitrator, would actually be contrary to the arbitral agreement, as "*ironically, under this [standard] method, not a single one of the arbitrators will have been chosen by 'mutual agreement'*"[165] as required by the parties'

[161] *See supra* note 158 at paras 16 and 29.

[162] *See supra* note 158 at para 30.

[163] *Id.*

[164] *See supra* note 158 at para 31.

[165] *See supra* note 158 at para 32.

clause. Secondly, even if the arbitrators will be appointed by the court[166], the court may have no other choice than to appoint the same people as initially sitting in the panel – being limited to its own district by section 4 of the FAA, and if the possible translation of the original Spanish arbitration agreement is that "[t]*his can be in Nicaragua or the Rice Millers' Association of the United States*"[167], then the only available solution may be that in the US the parties can only be compelled to arbitrate at the RMA[168].

These alternative interpretations of a not-so-obviously defective clause are a good exemplification that even the smallest provisions, if not properly coordinated with the chosen rules, may lead to difficulties in executing the arbitral agreement. And while eventual solutions imposed by state court may save the arbitration itself, time and money spent to reach a solution are an investment made in arguments just for the arguments' own sake.

II.2.2.3. Party stipulation excluding mandatory institutional rules regulating scrutiny of awards

After seeing that party stipulations may contradict and generate conflict with institutional rules, one may rather think of expressly excluding the undesired rules. But

[166] According to 9 U.S.C. Sec. 5 *"[I]f for any ... reason there shall be a lapse in the naming of an arbitrator ..., then ... the court shall designate and appoint an arbitrator*."

[167] *Supra* note 158 at para 33 and fn.1.

[168] *See supra* note 158 at para 33.

eliminating institutional provisions may render the arbitral agreement just as inoperable, if the rules excluded are mandatory or vital for conducting arbitration. Many institutional rules are similar to some extent, reflecting the same steps and principles, but some institutions have specific rules from which they would not depart; would rather refuse the administration of a case even if the institution is clearly and expressly chosen by the parties, than to accept the exclusion of such rules.

The scrutiny of arbitral awards performed by the ICC Court of Arbitration, as regulated by Art.27 of its rules[169], is such a notorious provision. Apart from the strict language reflecting mandatory application (*i.e.* "[n]*o Award shall be rendered*"), practice and the literature also acknowledged that "[t]*he ICC Court will refuse to administer an arbitration with party agreed modifications to the Rules [...] when a fundamental characteristic of ICC arbitration (such as Court scrutiny of the award) is omitted*"[170], rendering such arbitration clause pathological. And although a pathological clause may lead to the inability to arbitrate,

[169] Art.27 of the ICC Rules of Arbitration:

"*Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.*"

[170] W. LAURENCE CRAIG, WILLIAM W. PARK AND JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, 295 (3rd ed. 2000).

in a recent French case[171] the court upheld an agreement excluding mandatory provisions of the chosen rules, in order to enforce the parties' clear intent to arbitrate.

In a contract between a Korean and a German company, the dispute resolution clause provided for arbitration according to "*the rules of conciliation and arbitration of the International Chamber of Commerce, Paris*", also stipulating that unless the arbitrators agreed otherwise, the seat of arbitration will be Paris. At the same time, however, the same dispute resolution clause excluded the provision of the ICC Rules regarding confirmation of the appointment of arbitrators[172] and approval of the award[173]. Consequently, when a dispute was submitted to the ICC, the institution notified the parties that it will not administer the proceedings, unless the arbitral agreement is amended to be in line with all the mandatory rules of the institution. While the claimant agreed to waive the contractual provisions at issue, the respondent refused, also refusing the make appointment.

In order to constitute the arbitral tribunal, the claimant submitted a request to the Tribunal de Grande Instance of Paris to order the respondent to appoint its arbitrator, and then to assist the parties in appointing the chairman as well. In spite of the respondent's objection, the court found to have jurisdiction according to Art. 1493 of the French Code of Civil

[171] Samsung Electronics Co Ltd v. Michael Jaffe, administrator/liquidator of Qimonada AG, case No. 10-50604 Tribunal de Grande Instance Paris, decision of January 22, 2010.

[172] Art.9 of the ICC Rules of Arbitration (1998).

[173] Art.27 of the ICC Rules of Arbitration (1998).

Procedure[174], as the parties did indicate Paris as the seat of arbitration and did indicate the ICC, these two representing sufficient link to France to fulfill the conditions of Art. 1493. Since in the meantime the respondent voluntarily appointed its arbitrator, the court invited the two co-arbitrators to nominate the third, presiding arbitrator within 30 days and provided for a safety mechanism for the case of failure, in order to enforce the parties' agreement to arbitrate.

It has to be noted, however, that the court's reasoning on Art. 1493 behind the jurisdictional issue may be problematic, if one observed the conditional language of the arbitral clause providing for Paris as the seat only unless the arbitrators agreed otherwise. Does such a provision mean that the seat is subject to change as soon as the tribunal will be able to decide on it? – and consequently the law of the seat, governing the procedure, is also subject to change during different phases of the procedure, possibly creating further difficulties? Or does it mean that the seat is simply not established at all until the tribunal can confirm the parties' conditional agreement? In any case, finding that the seat is clearly Paris before the constitution of the tribunal is an interpretation that may have gone beyond the parties' agreement.

[174] Art. 1493 paragraph 2 of the Code of Civil Procedure at the time of the case read:

"If, for arbitration proceedings held in France or those to which the parties have chosen to apply the French law of procedure, the convening of the arbitration tribunal encounters difficulties, the first mover may, unless otherwise agreed, bring his case to the president of the High Court of Paris …."

With the 2011 amendment, the former Art.1493 has become Art.1505, with a slightly different formulation, but unchanged meaning.

Still, such interpretation can be accepted as necessary in order to sustain the parties' opt for arbitration, since otherwise the entire arbitration would have been doomed to failure – with the ICC's refusal to administer the case and the seat undetermined, there would have been no connection to France for the French court to have jurisdiction to help the parties in creating a functional tribunal. The intention to arbitrate was, however, confirmed by the parties' subsequent conduct of not invoking the invalidity or inapplicability of the arbitration agreement, as well as by their subsequent agreement (in light of the ICC's refusal) to submit the dispute to an *ad hoc* tribunal, allocating to the ICC only the role of an appointing authority. Irrespective of the parties' such agreement, however, the court – by accepting to uphold a badly drafted and otherwise inoperable clause – confirmed the policy of French courts "*to enforce arbitration agreements which raise difficulties concerning the constitution of the arbitral tribunal*"[175]. In the court's view, the ICC's refusal to administer the case constituted such a difficulty, justifying court intervention in favor of arbitration; and found that arbitration was not impossible to be held, in spite of the clause containing provisions which were conflicting with mandatory provisions of the chosen arbitration rules.

Similar rules providing for institutional review of various extents of the arbitral awards are also used by the Milan Chamber of Arbitration[176], the CIETAC[177], the Madrid Court of

[175] Elie Kleiman, *Paris First instance court president upholds 'pathological' ICC arbitration clause*, ILO Newsletter of April 22, 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=144f1e59-463d-4989-9920-a7be2feb3f4a>.

[176] Art.30.4 of the Milan Rules.

Arbitration[178], the Russian Court of Arbitration[179], the SIAC[180] and the Swiss Chambers[181]. While the number of institutions just enumerated may create the false impression that providing by default for scrutiny of the award by the administering institution would be a safe solution, this is far from being true – considering the different internal organs that could perform such review, as well as the varied degree and nature of the scrutiny that could be performed. In any case, excluding any such pre-established rule is also undesirable, as it may determine the institution to refuse the case; which, in the absence of pro-arbitration court assistance, may render the case non-arbitrable.

II.2.2.4. Party stipulation leading to a conflict with rules of ethics

Party stipulation may occasionally override not only the directly applicable rules of the administering institution, but also rules that are (or should be) of general application; due to the values they represent and try to ensure. To exemplify: one of the parties to a 2009 Hungarian case[182] forced the proceedings into a non-agreed international channel when – in

[177] Art. 45 of the CIETAC Rules.

[178] Art. 41.1 of the Madrid Rules.

[179] Section 42.1. of the Russian Rules.

[180] Art. 27.1. of the SIAC Rules.

[181] Art.40.4. of the Swiss Rules.

[182] Case submitted to the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry - no citation is available for confidentiality reasons.

spite of the applicable law and the language being agreed to be Hungarian – claimant appointed a foreign arbitrator not familiar with the national legislation, but more importantly having no command of the language of the proceedings. Irrespective, however, of the negative practical effects created by this appointment (*e.g.* time and money spent on translating all written submission; hearings held with the assistance of an interpreter, depriving the foreign arbitrator of the possibility to hear the arguments directly), the applicable rules[183] permitted such choice, only providing in Art.9(6) for the use of an interpreter. Consequently, the opposing party's challenge against the foreign arbitrator was dismissed by both the Presidium of the Arbitration Court[184] and the Metropolitan State Court of Budapest[185].

Though on its face there seems to be no conflict in this case, one should also consider the 'unofficial' conflicts that were not considered by any of the involved parties and/or fora. Accordingly, the appointing party, as well as the foreign arbitrator, could have considered the IBA Rules of Ethics[186]; Art.2.2. of which stipulates that "[a] *prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of the arbitration*". Although the

[183] Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (2008).

[184] Decision of September 8, 2009.

[185] Decision of November 27, 2009.

[186] IBA Rules of Ethics for International Arbitrators.

IBA itself admits that "[t]*he rules cannot be directly binding* […] *unless they are adopted by agreement*"[187], these rules generally function as guiding principles, as they "*reflect internationally acceptable guidelines developed by practicing lawyers from all countries*"[188] and should always be observed, especially when ethical issues are of concern.

Thus, in spite of the fact that the conflict between the appointing party's stipulation – and accordingly, the arbitrator's acceptance of appointment – and the IBA Rules of Ethics did not raise any technical legal issues due to the absence of the IBA Rules' express applicability; it definitely raises issues of good faith and moral concerns. Should the IBA Rules have been directly applicable, the conflict would have been more obvious and would have lead to a probably very different outcome, by establishing a clearer hierarchy between the rules and the party stipulation.

The beauty and benefit of arbitration is in the flexibility of the proceedings, the almost unlimited combinations permitted and possible to shape a dispute resolution mechanism to the individual interest of the parties and their case. This freedom and flexibility, however, does not mean that arbitration can handle severe contradictions in its regulation; or can survive in spite of vague or unclear provisions. Party autonomy in itself is rarely sufficient to govern arbitration, and making use of pre-established rules should be perceived to benefit and not impede arbitration. Rules aim to provide procedural certainty and safety, and parties

[187] Introductory Note to the IBA Rules of Ethics for International Arbitrators.

[188] *Id*.

should carefully consider the possible conflicts between their stipulations and the mandatory provisions of the chosen rules before deciding to restrict or to alter arbitration rules to better serve their needs.

CHAPTER III. COHABITATION AND CONFLICT BETWEEN PARTY STIPULATIONS AND NATIONAL LEGISLATION

In the present chapter (just as in the previous and the following ones) the point of reference will be party autonomy, as the first and most important source of norms regulating international commercial arbitration; the will that chooses arbitration instead of classical court litigation, creating or choosing the procedure, determining the laws to be applied; a will without which there would be no arbitration at all[189].

As already mentioned before, party autonomy is subject to the limitations imposed by mandatory provisions of state legislation during all phases of arbitration – *i.e.* prior to the commencement and during the arbitral proceedings, as well as in the post-award phase. The arbitral agreement has to satisfy the mandatory requirements of the law applicable to it; the procedural determinations included in the agreement have to be in line with the mandatory provisions of the law governing the procedure (regularly the law of the seat of arbitration, but not necessarily) and the rules chosen by the parties also have to respect such mandatory laws[190].

[189] A nevertheless disputable position, considering the existence of mandatory arbitration in certain jurisdictions with regard to claims within certain areas of law.

[190] The relationship between the rules and laws will be analyzed separately in Chapter V.

Compulsory legislative provisions may impose restrictions to various elements of the proceedings, from the appointment of arbitrators to the language of the proceedings. In addition, municipal rules may allow national courts to intervene in the proceedings or to reopen the merits in an appeal procedure, jeopardizing the advantage of speed combined with finality that arbitration generally has against litigation. Even more, the nationality of the award - also determined by the seat - is an important characteristic observed in the recognition and enforcement procedure (for example in countries that apply the condition of reciprocity, but also to determine whether an award is foreign or domestic). Therefore, by choosing the seat, one implicitly chooses mandatory laws that impact on different phases of arbitration.

Besides the law of the seat, the legislation from the place of recognition and enforcement is also of great relevance – and equally, an additional source of norms, with which party stipulation may come in contradiction. Apart from the fact that the parties should not attempt to modify court control – either by restricting or by expanding the limits of judicial review through contractual provisions – for the challenge of the award at the seat, party stipulations should also be in line with the laws from the potential place of enforcement, as those are the ones regulating the last check on the validity and procedural fairness of arbitration. But any variation added to these laws by way of party autonomy may generate conflicts; the outcome depending on the nature and flexibility of the applicable law. There is no universally valid solution, the only advice to follow being to observe the mandatory nature of the applicable legal provisions.

The first step in avoiding conflicts with mandatory legislative provisions is to identify those mandatory provisions – a task which should not be very complicated, assuming that one knows where to look and also takes a careful look at the language of each provision. Some laws expressly indicate which of their provisions are of mandatory application – like the English Arbitration Act already mentioned above[191] – but most of them leave it to the reader to figure out whether a particular provision is compulsory or not. In any case, the language of the provision is always a good indication of its mandatory or optional nature, and one should always keep in mind that mandatory laws can not be eluded, but non-mandatory laws are usually there to help, and not to hinder arbitration.

III.1. Party autonomy supplemented by national laws

Even though arbitration today is governed by the rules of a free market in which (besides the competition between arbitrators and arbitral institutions) cities also fight an intense battle to be chosen as seats[192], parties nevertheless frequently remain unaware of the legal implications of their choice. What is more present in the public awareness is that until recently the world of international arbitration has been mainly and more-or-less equally split

[191] *Supra* note 57.

[192] *See* Jalal El Ahdab, *Introductory note*, Journal of Arab Arbitration No. 4 (2009).

between New York, London and Paris, but in recent years other cities (like Vienna, Stockholm, Madrid, Hong Kong, Singapore or Dubai[193]) also made their presence known in the ever-growing field of arbitration, forcing the 'veterans' out of their safe leading role and into a fierce competition with emerging new arbitration centers. Still, while marketing materials and activities launched by the arbitral institutions, city officials or legal organizations[194] do attract arbitration (just as logistics developments, political security and attractive venues do), for professionals aware of the legal settings, it is the national legislation that will have the ultimate say in opting for one seat or another.

Partly for this reason, arbitration laws are amended at a speed that is not characteristic to legislation in general, following the needs of a demanding and fast developing field. Many laws are now following the 2006 amendments of the UNCITRAL Model Law[195] or are just trying to create and ensure a more flexible, arbitration-friendly environment. And while most arbitration laws contain several mandatory provisions, the UNCITRAL Model Law stands as an example of a very flexible approach; giving the parties maximum freedom to determine

[193] *Id*.

[194] *See* 'England and Wales: The jurisdiction of choice', dispute resolution brochure of the Law Society of England and Wales (2007); or the Paris, Place internationale de l'arbitrage conference organized by the Paris Bar; or the creation of an Association under the same name, in 2008.

[195] Like Australia, Georgia, Ireland, Mauritius, New Zealand, Peru, Rwanda, Slovenia – see status of the Model Law at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

the procedure to be followed[196], with gaps to be supplemented by the tribunal[197]. Moreover, even though the party autonomy provided by its Art.19 is understood to prevail over the arbitrators' power to establish the procedural rules[198], Art.19 itself is not of mandatory application[199]. In line with this trend, an example of maximum legislative flexibility is also reflected by a very recent amendment of the Australian International Arbitration Act[200], providing for a complete opt-out possibility from the provisions of the Model Law (adopted through the Act)[201].

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[196] Art.19(1) of the Model Law:

"*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings*."

[197] Art.19(2) of the Model Law:

"*Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence*."

[198] According to the drafting history of the Model Law, the Working Group intended to maintain the parties' right to shape the procedure even after the constitution of the tribunal. *See* HOLTZMANN, HOWARD M AND NEUHAUS, JOSEPH E, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 556-567 (Kluwer Law and Taxation Publishers 1989).

[199] *Id.* at 583

[200] International Arbitration Act 1974, as amended in 2010.

[201] Section 21 of the International Arbitration Act (1974):

"*If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute*."

Although many arbitration law provisions serve indeed as safeguards, providing for solutions to the parties' incomplete or deficient agreements, it may also happen that the parties, for whatever reason, intentionally and expressly exclude these assisting, non-mandatory provisions, that could ultimately save their arbitration agreement. A representative example of such clause analyzed by the Delhi High Court[202], even though not international, attracted significant worldwide attention. The agreement in dispute contained two specific provisions, one of them being the obligation on the party invoking the arbitration agreement to provide in its letter a list of the disputes and the amounts claimed; while the other one being a strict appointment procedure, providing that "*no person other than the person appointed by the commissioner of the [Respondent] could act as arbitrator, and that if for any reason such appointment was not possible, the matter would not be referred to arbitration at all*"[203].

Both these provisions proved to be fatal to arbitrating the dispute, as the claimant failed to indicate the dispute in its letter invoking the arbitration clause, and the respondent failed to make any appointment. While for the first condition there would be no legal provision or rule to assist the parties in overcoming this omission and the arbitration could only be saved by a strong pro-arbitration approach of the court filed with the petition, the second issue could

[202] Case related by Manoj Kumar Singh, *If arbitrator appointment procedure is not followed, civil court has jurisdiction*, ILO Newsletter of December 17, 2009, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=4f02f1f7-14d7-4b5a-a9dc-88938130662f>.

[203] *Id.*

have been solved by the applicable law providing for backup appointment procedures. However, the arbitration agreement at issue expressly excluded any such gap-filling provisions, preferring rather to litigate, than to have an arbitrator appointed through any other means. While this raises the question of why opting for arbitration at all, and the unilateral appointment may also raise concerns of due process, as long as arbitration is a creation of the parties, the parties are free to agree even on procedures that will eventually not lead to arbitration. Accordingly, the Indian court dismissed the petition for appointment of arbitrator, relying on the principle of party autonomy[204].

Whether party stipulation is only supplemented – and not restricted – by state law also depends on the flexibility and pro-arbitration approach of courts interpreting the applicable legislation. A Norwegian Court of Appeal, for example, found that arbitration does not even have to be based on an agreement expressly entitled 'arbitration agreement', as long as it satisfies basic legal requirements. As a result, the court qualified a decision rendered by a lawyer[205] an arbitral award, because there was a written agreement asking for a decision that was expected to be final and not issued only for the purpose of guidance[206]. Although this

[204] Arvind Construction Company ltd v. Union of India, and Indian Oil Corporation Ltd v. Raja Transport Private Ltd.

[205] The parties asked the lawyer to resolve (or as one of the parties later claimed, to consider) a real estate ownership dispute.

[206] Gulating Court of Appeal Case LG-2007-28609, decision of October 22, 2007, referred in Per Magne Ristvedt, *Court of Appeal Upholds Arbitration Agreement and Clarifies Legislation*, ILO Newsletter of

agreement could have been considered insufficient, the court supplemented the party agreement by adopting an obviously pro-arbitration approach. Hence, even judicial interpretation can complete party stipulations satisfying basic legislative conditions, so that the initially deficient agreement would achieve its purpose and lead to arbitration.

III.2. Party autonomy restricted by mandatory national laws

It is not uncommon that contracting parties would choose the place of their arbitration considering how to avoid the applicability of certain municipal rules, but not necessarily paying sufficient attention to what they opt for in exchange. The forum shopping notion borrowed from the American legal practice has become of common use in international arbitration too, parties to cross-border business relationships making the maximum out of the differences between legislative provisions of different states. However, there are specific provisions and basic legal principles common to almost every jurisdiction and which are, thus, inevitable, no matter what forum one may choose.

Many national laws contain the same or similar mandatory norms reflecting universal legal principles. Due process in one such principle, providing for fairness and justice in the

December 13 2007, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=14ec7d41-cc56-46ec-8482-0cf747f8ac1d>.

conduct of legal proceedings "*including proper notice and the right to a fair hearing before a tribunal with the power to decide the case*"[207]. Arbitrating parties, however, may try to elude this basic legal principle, creating unusual and unacceptable procedures – like a requirement for non-neutral arbitrators, or the arbitral tribunal to only accept written evidence or to hear witnesses proposed by just one of the parties. An arbitral clause containing such provisions – even if reflecting mutual party agreement – would never be implemented; in fact, an agreement containing such unilateral rights and preferences was voided in *Hooters of America, Inc. V. Phillips* [208], the court finding that the agreement contained so many deficient and biased provisions, that it created *"a sham system unworthy even of the name of arbitration*"[209]. Alternatively, if *ad absurdum* an award would be rendered according to such provisions, that award would probably – and hopefully – never be recognized. Such contractual clauses not only contradict mandatory national legal provisions, but an award based on such clause would also come in conflict with international norms regulating recognition and enforcement.

Besides the common compulsory limits, mandatory regulations may also contain more special restrictions, specific to that jurisdiction only – of which one would only become aware if researching the arbitration law of each state whose legislation may affect a given case. One of the probably most striking limitations to arbitration imposed by national laws is

[207] Black's Law Dictionary 516 (7th ed. 1999).

[208] 173 F3d 933 (4th Cir. 1999).

[209] *Id*. at 940

the non-recognition of certain types of arbitration. China, for example, used to accept only institutional awards and to refuse to recognize their *ad hoc* counterparts; it was only very recently that the Supreme People's Court issued a notice stating that *ad hoc* awards are enforceable[210].

Although state laws regulating arbitration generally offer great autonomy to the parties with regard to the other procedural elements, some of them may still impose restrictions even to the free appointment of arbitrators and/or to the legal representation of the parties. For example, in Cambodia only members of the National Arbitration Center may act as arbitrators; arbitrators in Indonesia must be over 35 years old and have at least 15 years of experience in the field; Saudi legislation prohibits the appointment of foreign arbitrators and of foreign counsel, the later regulation being the same in Egypt and Morocco[211] as well. Other limitations may affect the place, the language or the law governing the dispute, all posing serious concerns for the party autonomy principle; or may just create borders aimed to ensure certainty in proceedings – borders then attempted to be crossed by creative party stipulations.

[210] *See Recent Developments in Arbitration Law and Practice: PR China*, 35 Yearbk. Comm. Arb'n (2010) 24 – 24.

[211] *See* surveys conducted by the World Bank within the Investing Across Borders project 2010; summary report available at <http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf> with individual country data available at <http://iab.worldbank.org/>.

III.2.1. Party stipulations challenging the boundaries of arbitration

One border attempted to be crossed is the notion of arbitration itself. One would easily consider that arbitration is as clearly defined as possible, leaving no room to variations; and according to the Black's Law Dictionary, arbitration is "*a method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding. — Also termed (redundantly) binding arbitration*"[212]. Therefore, the binding character of the arbitrators' decision is a key element, a basic feature of arbitration, self-understood and unquestioned. Still, parties are able to construct dispute resolution mechanisms avoiding this essential feature and quite confusingly, still call it arbitration. In this sense, a dispute resolution clause that ended up in front of the Greek Supreme Court provided for institutional arbitration before the Technical Chamber of Greece, but also provided that "*the institution's arbitral award would bind both parties to re-examine their dispute in search of a resolution; however, in the event that the two parties could not reach an agreed settlement, the state courts […] would have jurisdictio*n"[213].

[212] Black's Law Dictionary (8th ed. 2004).

[213] Case and clause related by Antonios D. Tsavdaridis, *Non-binding invalid arbitration clause can be valid contractual provision*, ILO Newsletter of April 22, 2010, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=3eac12a1-187c-432f-a019-d0b30ea11c12>.

Based on this unusual agreement, the Greek courts found that the award rendered in the case is not binding, and as such, cannot constitute an executor title – thus, it cannot be enforced – but it nevertheless constituts an award. The Supreme Court noted that "*the parties' agreement on the non-binding nature of an award was valid and was not meant to circumvent the legal provisions on arbitration*"[214]. As the author commenting this decision noted, "*if arbitration is deprived of its binding force, the relevant clause is invalid*"[215]; but the same agreement – invalid as an arbitration clause – can still be a valid contractual provision having a different scope. Although this case is again more about contract interpretation than about a conflict between different sources of norms – although there is an apparent conflict between the legal and the party definition of arbitration, even if the difference was not found critical by the court – it nicely reflects the parties' contradictory understanding of what arbitration is. Subject to a more rigid legislative definition or court interpretation, an agreement providing for a procedure that does not fit within that definition may be easily found inoperative.

Party stipulation may also contradict state laws regulating time limits – an essential feature of civil procedure provisions, which may also find their application over arbitration. Quite unusually, in a Malaysian case[216] the court held that the parties are free to establish

[214] *Id.*

[215] *Id.*

[216] Dancom Telecommunication v. Uniasia General Insurance Berhad [2008] MLJU 0387, Court of Appeal (Putrajaya), Aug.1, 2008, related in Shanti Mogan, *Are Clauses that Limit Timeframes for Referring*

time limits to refer a claim to arbitration, as such timeframes are not contrary to the Arbitration Act. The court found that Section 29 of the Contract Act – provision which rendered void "*any agreement by which a party is restricted absolutely from enforcing its rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunal*" – only refers to ordinary courts of law, thereby not affecting arbitration. Moreover, the court also found that party agreements on timeframes are implicitly supported by the provision of the Arbitration Act that allows the extension of time for commencing arbitration proceedings[217]**.** Other laws and courts, however, are usually not so relaxed with regard to time limits, and it is more likely that any such provisions will be strictly applied, irrespective of any agreement to the contrary.

III.2.2. Party stipulations affecting the judicial review of arbitral awards

Before dwelling in the detailed analysis of how party autonomy may affect the limits of judicial review, since this is an issue that is subject to more than just one possible conflict of sources of norms, the framework and place of each such conflict must be set upfront. Thus,

Claims to Arbitration Valid?, ILO Newsletter of October 09 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=d522bc2e-f958-4d17-8d17-d9780ef6e06b>.

[217] Section 28 of the 1952, and Section 45 of the new Arbitration Act (2005).

the present section is focused on the conflict between party stipulation and state legislation with regard to the possibility – or the lack thereof – of a right to appeal, and with regard to annulment of awards. Chapter VI will also address judicial review in order to present the differences between how different states regulate this issue[218] – analysis that will again target the setting aside of awards. Finally, court review of awards will also form part of a Chapter VII analysis[219], with focus exclusively on scrutiny performed within recognition and enforcement proceedings, with different judicial interpretations not always reflecting the aims of the NY Convention.

Arbitration is generally known as a single-step adjudicating method, the award rendered by the tribunal being final and binding. The finality of an arbitral award is, however, debatable. On one hand, the enforcement procedure itself is asking for some degree of court scrutiny in a more-or-less identical manner worldwide[220]; while on the other hand, there are state laws that expressly create the possibility for an appeal in the national courts, thus allowing for a revision of the merits before declaring the award final and binding – in spite of the fact that, according to the UNCITRAL Model Law, in the country of origin the setting aside procedure is the "*exclusive recourse against arbitral award[s]*"[221]. More importantly

[218] *See* VI.2.1 below

[219] *See* VII.2.2 below

[220] Or at least in a similar way within the member states to the New York Convention.

[221] *See* the title of Art.34: "*Application for setting aside as exclusive recourse against arbitral award*".

for the present section, however, parties themselves may also create rules with regard to the review of an arbitral award.

In order to have a clear understanding of the party autonomy affecting judicial review, we must first make a difference between procedural and substantive review. And while procedural review is generally accepted as a check on the fairness of the proceedings, any review of the substance of an award is perceived with skepticism, as an unnecessary intrusion into the 'perfection' of an arbitration outcome – no matter how unrealistic this perception may sometimes be. A widely spread pro-arbitration approach generally upholds the strict determination of the limits of court scrutiny – as anticipated by Lord Wilberforce during the second reading of the English Arbitration Bill in the House of Lords (and later cited by the House of Lords in *Lesotho Highlands v Impregilo*[222]), the Bill "*has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors"*[223]; noting more; nothing less.

Judicial scrutiny is accepted and even expected from the enforcing courts, insofar as it is limited to the legal elements and grounds, as provided for example by the UNCITRAL Model Law or by the NY Convention. Nobody will dispute a court's right to overview the

[222] Lesotho Highlands Development Authority v Impregilo SpA and Others, [2005] UKHL 43 (U.K.)

[223] *Id*. at para 18.

procedural fairness of the proceedings and public policy implications of the possible enforcement of an award[224]. When it comes to the scrutiny of the substantive decision, however, the debate becomes fierce and opinions distanced into the extremes. The truth – as usual – is probably somewhere half way between the advocates of the principle that arbitral awards should be final in every sense (and as such free of any judicial scrutiny) and those advocating in favor of judicial review as being necessary to serve the purpose of fairness. Even though there is an assumption that "*the integrity of arbitral proceedings, just as finality of the arbitral award, is the shared pre-contractual expectation of the parties*"[225], at the end of arbitration the prospect of finality will become predominant for the winner, while the expectation for fairness and review will become more important for the losing party. And while a state's interest in becoming a preferred seat for arbitration may lean regulations towards finality, complete exclusion of judicial scrutiny could affect the trust in arbitration overall[226].

The jurisdiction of state courts to review an arbitral award, as well as the right to an appeal, is generally regulated by state legislation, but may also be regulated to some extent by institutional rules – hence, implicitly, by party autonomy. Some laws are flexible enough and

[224] Although review in light of public policy can represent a problem in itself, due to the different interpretation of public policy in various jurisdictions – *see* VII.2.3.3. below

[225] Hossein Abedian, *Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review*, conference paper presented at the HKIAC 25th Anniversary Conference (2010).

[226] *See Id*.

allow the parties to completely waive their right to appeal – as the English law does, when allowing the provision that "*a party to arbitral proceedings may […] appeal to the court on a question of law arising out of an award made in the proceedings*"[227] to be excluded by party agreement. However, in order for this provision to be excluded, the parties have to express their decision in a very clear manner – as found in *Shell v. Dana Gas Egypt*[228]. In this case, the Commercial Court considered that the language of the arbitration clause providing that the award "*shall be final, conclusive and binding on the parties*"[229] only referred to an old established principle on *res judicata* and estoppel, but was insufficient to exclude the right for appeal otherwise guaranteed by Section 69.

This can be an issue, of course, only if the chosen institutional rules do not exclude the appeal automatically – as the LCIA Rules and the ICC Rules do[230]. In such cases, although the exclusion is not made by the parties' express agreement, but by incorporation of the rules

[227] Section 69.(1) of the English Arbitration Act (1996).

[228] Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd, Queen's Bench Division (Commercial Court), judgment of 7 August 2009, [2009] EWHC 2097 (Comm).

[229] Clause reproduced by Matthew Weiniger and Ruth Byrne, *Excluding Appeal of Arbitral Awards on Point of Law*, ILO Newsletter of September 24, 2004, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=20f1eedc-2933-46dd-8f18-9dd38335f7bf>.

[230] Art.26.9 of the LCIA Arbitration Rules (1998) and Art.28(6) of the ICC Rules of Arbitration (1998) having the exact same wording:

"*by agreeing to arbitration under these Rules, the parties […] waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made*"

excluding any appeal, the reference still seems to qualify as a valid mutual agreement. Such agreement by reference was accepted in the *Sumukan Ltd v. Commonwealth Secretariat*[231] case, where a UK Court of Appeal found that a clause excluding an appeal on point of law that was not even included in the arbitration agreement, but only by reference to a statute available on request, is nevertheless a valid agreement. Although the language of the referred provision was clear enough (as requested in the *Shell* case above), providing that the award will be "*final and binding on the parties and […] not subject to appeal*"[232], an express choice made by both parties is questionable; nevertheless, the court found that this exclusion of the courts' right to review the case was voluntarily and validly agreed upon. A similarly flexible interpretation of Section 69 was reflected in the *Lesotho* case[233], in which the House of Lords held that choosing the ICC Rules to govern arbitration, which provides for the parties "*to forego any right of appeal to the courts […] is an effective exclusion agreement of the right of appeal on a point of law under section 69*"[234].

The Belgian Judicial Code and the Swedish Arbitration Act also allow the exclusion or the restriction of a setting aside procedure[235], while a much wider opt-out possibility exists in

[231] [2007] EWCA Civ 243.

[232] As reproduced in Audley Sheppard, *Arbitration Not Contrary to European Convention on Human Rights*, ILO Newsletter of April 26, 2007, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=15f73c4c-8286-46f9-893f-5d75a0f19dc2>.

[233] Lesotho Highlands Development Authority v. Impreglio S.p.A. et al., [2005] UKHL 43 (U.K.).

[234] *Id.* at para 5.

[235] Art.1717(4) of the Judicial Code provides:

Panama, where the parties can exclude the annulment procedure through an agreement or even reference to arbitration rules without any further condition[236]. Similar approach was just recently adopted by France as well, with the 2011 amendments to the French Code of Civil Procedure on arbitration including a provision that "*the parties may, by specific agreement, waive at any time their right to challenge the award [by way of annulment*]"[237].

Even if not completely eluded, the scope of judicial scrutiny of arbitral awards may be subject to both restriction and expansion by the parties. While most laws are not explicit in saying whether the legislative grounds for court scrutiny are exhaustive or are subject to any amendment from the parties[238], the Swiss Federal Statute on Private International Law, for example, is expressly allowing the parties not only to opt out, but also to limit the judicial

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"*The parties may, by an express statement in the arbitration agreement or by a subsequent agreement, exclude any application for the set aside the arbitral award, where none of the parties is either an individual of Belgian nationality or an individual residing in Belgium, or a legal person having its head office or a branch office in Belgium*."

Section 51 of the Swedish Arbitration Act provides:

"*Where none of the parties is domiciled or has its place of business in Sweden, such parties may in a commercial relationship through an express written agreement exclude or limit the application of the grounds for setting aside an award as are set forth in section 34. An award which is subject to such an agreement shall be recognised and enforced in Sweden in accordance with the rules applicable to a foreign award*."

[236] Art.36 of the Legislative Decree No.5 of 8 July 1999.

[237] Art.1522 French Code of Civil Procedure, as amended by the Decree No.2011-48.

[238] See Tibor Varady, *The Elusive Pro-Arbitration Priority in Contemporary Court Scrutiny of Arbitral Awards*, Collected Courses of the Xiamen Academy of International Law, Vol. 2 (2009) (Martinus Nijhoff Publisher) at 13.

review by courts where none of the parties is of Swiss residence[239]. The provision has not been tested in practice for a long time after its adoption, the cases dealing with alleged waiver stipulations being held "*either missing or imperfect*"[240]; it was only in 2005 that Art.192 eventually received a few positive applications[241], confirming to some extent the intended flexibility of the law. However, the Swiss court adopted a narrow interpretation of the provision – similar to that of the English court in *Shell v. Dana Gas*[242] –, holding that the parties' agreement for the award to be "*final and binding upon the parties to the dispute*" is insufficient for the application of the Art.192 waiver of the right to appeal[243].

The scope of court scrutiny can not only be restricted, but expanded as well – a party stipulation that again causes problems, especially in jurisdictions where the law does not

[239] Art.192(1) of the Private International Law provides:

"*If neither party has a domicile, a place of habitual residence, or a place of business in Switzerland, they may, by an express declaration in the arbitration agreement or in a subsequent written agreement, exclude all appeals against the award of the arbitral tribunal. They may also exclude an appeal only on one or several of the grounds enumerated in Article 190, paragraph 2*."

[240] Varady, *supra* note 238, at 15.

[241] Swiss Federal Tribunal, First Civil Court, Case 4P.236/2004, Judgment of 4 February 2005, ASA Bulletin, (Kluwer Law International 2005 Volume 23 Issue 3) 508 – 519; and Case 4P 198/2005, Decision of October 31, 2005, ASA Bulletin, (Kluwer Law International 2006 Volume 24 Issue 2) 339 – 347 – English reference in Varady, *supra* note 238 at 16.

[242] Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd, Queen's Bench Division (Commercial Court), judgment of 7 August 2009, [2009] EWHC 2097 (Comm).

[243] Swiss Federal Tribunal, First Civil Court **,** Case 4P.114/2006, ASA Bulletin, (Kluwer Law International 2007 Volume 25 Issue 1) 123 – 154 – English reference and translation of the clause in Varady, *supra* note 238 at 16.

expressly empower private parties to amend the judiciary-created boundaries of a court' right to exercise judicial review; because more often than they do, arbitration laws do not provide for the possibility of amending the scope and/or extent of judicial review of arbitral awards, courts faced with such agreements having no legislation to rely on. But as observed by a New Zealand court, the UNCITRAL Model Law was not created with "*the view that contractual exclusion of curial review was contemplated*"[244], and therefore no such derogation from a law based on the Model Law can be accepted.

And since the UNCITRAL Model Law does not address this issue, courts try to clarify and fill the gap in their national legislation as they can best, just as the US Supreme Court did in *Hall Street Associates LLC v. Mattel Inc.*[245] – the latest and highest-level development in US case law in this matter, putting an end to a series of contradictory lower court decisions. Namely, in the famous *Lapine v. Kyocera*[246], in which the parties attempted to add two additional grounds of review to those provided by the Federal Arbitration Act[247], the US

[244] Methanex Motunui Ltd v Spellman, High Court of New Zealand, judgment of 18 August 2003, [2004] 1 NZLR 95 (HC), at para. 116, relying on *travaux préparatoires* of the UNCITRAL Model Law.

[245] 128 S. Ct. 1396 (2008).

[246] Lapine Technology Corp. v. Kyocera Corp

[247] The arbitration agreement provided for vacatur of the award inclusively *"(ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous"*, while the section 10 of the FAA provides for vacatur only for *"(1) where the award was procured by corruption, fraud, or undue means;(2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other*

District Court of the Northern District of California found that "*the parties may not by agreement alter by expansion the provisions for judicial review contained in the Federal Arbitration Act*"[248]; upon appeal, the Court of Appeal of the Ninth Circuit, however, held that it "*must honor*" the agreement expanding the grounds of judicial review and "*must not disregard it by limiting our review to the FAA grounds*"[249] – consequently upholding the party agreement; by a strange turn of events, the same Court of Appeal of the Ninth Circuit revisited the issue in a rehearing *en banc*, this time reaching an exact opposite conclusion; namely that "[b]*ecause the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may not contractually impose their own standard on the courts*"[250].

Other US courts also faced the dilemma of court review of arbitral awards extended by party agreement[251], a dilemma finally solved by the Supreme Court by holding that "[t]*he FAA's grounds for prompt vacatur and modification of awards are exclusive for parties*

misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[248] Lapine Technology Corp. v. Kyocera Corp, Decision of December 11, 1995, 909 F.Supp. 697, at 705.

[249] Lapine Technology Corp. v. Kyocera Corp, Decision of December 9, 1997, 130 F.3d 884, at 887.

[250] Lapine Technology Corp. v. Kyocera Corp, Decision of August 29, 2003, 341 F.3d 987, at 994.

[251] For a detailed description of cases and for an in-depth analysis of the topic *see* Varady, *supra* note 238.

seeking expedited review under the FAA"[252]. Although the Supreme Court also expressly stated that "*manifest disregard of the law*"[253] does not represent an additional ground for review besides those provided by the Federal Arbitration Act, there are still federal courts that consider 'manifest disregard' a non-statutory ground for judicial review of arbitral awards on their merits – and consequently for annulment[254].

In any case, imposing limitations to the judicial review provided by the law or expanding the scope of court scrutiny through additional grounds than those listed in the applicable law can be a risky endeavor, especially if such initiatives are not expressly supported by legislation. Silence of the law in this regard does not automatically mean permission, and courts will always find a way to interpret the existing legal provisions in a narrow way – *i.e.* that of prohibiting party stipulations influencing court review – irrespective of any pro-arbitration approach, mostly because "*the dilemmas regarding further contractual restriction (or even exclusion) of judicial control show, […] that we have approached the rational limits of restriction*"[255]. Due to this 'rational limit' (or due to limits of rationality, perhaps..?), courts can even reach contradictory decisions under the same principles of pro-arbitration – as it did in *Kyocera*, where both the District Court and the Court of Appeal

[252] Lapine Technology Corp. v. Kyocera Corp, Decision of March 25, 2008, 128 S.Ct. 1396, at 577.

[253] Idea first raised in 1953 in *Wilko* v. *Swan*, 346 U. S. 427.

[254] For a comprehensive case review on this issue, *see* Stephen Schwarz, *'Manifest Disregard of the Law': Does It Provide Courts a Reason to Vacate Arbitration Awards?*, WLF Legal Backgrounder, Vol.24 No.33, October 9, 2009, available at <http://www.wlf.org/publishing/publication_detail.asp?id=2112>.

[255] Varady, *supra* note 238 at 21.

qualified its decision as favoring arbitration (one as supporting the finality of arbitration, and the other as supporting party autonomy). And while the US seems to have a uniform regulation now through the Supreme Court decision in *Hall Street*, one should not interpret and rely on the absence of such decision in any other jurisdiction as permission for derogations from the legal limits of judicial review.

If to all these above we add – just for the sake of argument – the possibility offered by some laws to have an appeal performed not by courts, but by a second arbitral tribunal, mimicking the steps of litigation (but before the award can even get to a state court for a set-aside procedure)[256], one can easily imagine how the expectation of parties coming from all these different systems can clash and create conflicting decisions. It is sufficient for a party to be inspired by his home legislation and to insert an option like this in an arbitration agreement to be executed under a different legislation (not providing for any such appeal, but rather providing that the award is final and binding, subject only to annulment by the court) to end up with a problematic clause. In case a court faced with such dilemma would find that this level of review in contradiction with the applicable law was conditional to arbitration, the entire clause may be deemed pathological and un-enforceable.

Even if not directly affecting post-award procedures, party agreements contradicting any mandatory legal provisions may risk consequences in the post-award phase, since

[256] *See* for example Section 27 of the Czech Arbitration Act No. 216/1996, allowing parties to expressly opt for a review of the award by a second tier tribunal composed of different arbitrators, appeal which is still part of the arbitration, and follows the same arbitral procedure.

whenever a mandatory provision is attempted to be avoided, the desired outcome – *i.e.* enforcement of an award not complying with mandatory law – cannot be guaranteed. Rather, such party stipulations may generate several alternative negative effects, the parties facing – in the words of Van Den Berg – a Scylla-Charybdis-like situation[257]. Although the dilemma of choosing between two different, but equally hazardous solutions[258] was often reiterated in the arbitration literature by using the Scylla-Charybdis metaphor[259], the case for which it was originally used by Van Den Berg is probably the most representative for the purpose of the present chapter.

As apparent from case law[260], charter parties based on the standard form known as 'Exxonvoy 1969' commonly contained a dispute resolution clause providing for alternative

[257] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 328 (Wolters Kluwer 1981).

[258] The idiom of '*being between Scylla and Charybdis'* originates from Greek mythology, according to which Scylla and Charybdis were two sea monsters located on opposite sides of the Strait of Messina, representing a great hazard for passing sailors; they were close enough to each other to pose an inescapable threat, as avoiding one meant passing too close to the other.

[259] *See* especially writings from William W. Park – e.g. *Arbitral jurisdiction in the United States: who decides what?* [2008] Int. A.L.R.; *Eason-Weinmann Center for comparative law colloquium: The internationalization of law and legal practice: National law and commercial justice: Safeguarding procedural integrity in international arbitration* [1989] 63 Tul. L. Rev. 647; *The Lex Loci Arbitri and International Commercial Arbitration*, [1983] The International and Comparative law Quarterly Vol.32 No.1.

[260] *See Rederi Aktiebolaget Sally v. Termarea*, Court of Appeal of Florence, 4 Yearbk. Comm. Arb'n 294 (1979) and *Termarea v. Rederiaktiebolaget Sally*, Court of England Queen's Bench Division, Wkly.L.Rep., Nov.16, 1979, as both reprinted in VARADY, BARCELO AND VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION. A TRANSNATIONAL PERSPECTIVE 82-88 (West, 4th ed. 2009).

options of arbitration in New York or London "*before a board of three persons*"[261]; each party appointing one arbitrator and the two so chosen arbitrators then appointing the third one. The problems with such arbitration agreements arose whenever London arbitration was to occur, with the applicability of the 1950 version of the English Arbitration Act – which provided for tribunals composed of two arbitrators and an umpire[262], in contradiction with the parties' express agreement in favor of a panel of three arbitrators having equal rights.

Consequently, in case arbitration was to take place in London, the parties' derogation from the mandatory provisions of the English Arbitration Act caused a serious dilemma: should the arbitrators apply English law, the award risks to be refused recognition and enforcement in any other country under Art.V(1)(d) of the New York Convention, since the composition of the tribunal would not be in accordance with the parties' agreement; on the other hand, should the tribunal give preference to the party agreement over the English Arbitration Act, the award resulted could be set aside in England for violation of mandatory law. In the latter case, the final outcome could again be the refusal of recognition and

[261] *Id*.

[262] Sec.9(1) of the 1950 English Arbitration act provided that "*[w]here an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties*." This provision has since been radically amended, the 1996 English Arbitration act giving preference (in its sections 15 and 16) to tribunals composed of two party-appointed arbitrators and a chairman.

enforcement in other countries as well, as a result of Art.V(1)(e) of the Convention[263]. Even if the Florence Court of Appeal decided[264] that from the language of Art.V(1)(d) one can clearly see that party agreement prevails over the law of the seat – the law having relevance only if the parties have not provided for a different composition of the tribunal – one should rather avoid deviations from mandatory provisions of the law.

But all these evaluations of mandatory and non-mandatory provisions can have their place only if there is an arbitration law at all. Sometimes, however, there are fundamental gaps in the national legislation where party autonomy, unregulated and un-provided for, may not even be recognized as a source of norms regulating international commercial arbitration (or of arbitration in general). There are also still countries which not only do not take part of the legislative harmonization efforts, but which completely lack special arbitration laws[265] – a reality hopefully counter-balanced in the future by a World Bank project initiated in 2010 to incline such countries to ensure more party autonomy and by this to get in line with the global trend of legislative harmonization in international commercial arbitration; ultimately serving the purpose of opening and ensuring cross-border investment opportunities[266]. Until

[263] Art.V(1)(e) of the New York Convention permits refusal of recognition and enforcement if "*the award ... has been set aside ... by a competent authority of the country in which ... that award was made*".

[264] *Rederi Aktiebolaget Sally v. Termarea*, Court of Appeal of Florence, 4 Yearbk. Comm. Arb'n 294 (1979).

[265] Such countries are, for example, Albania, Argentina, Liberia – *see* World Bank statistics from the Investing Across Borders project 2010, data available at <http://iab.worldbank.org/>.

[266] *See* the World Bank Investing Across Borders initiative 2010.

such harmonization is achieved, however, party stipulations, mandatory state laws and the gaps left open in between the two represent a potential source of conflict.

III.2.3. Party autonomy restricted by legislation not directly regulating arbitration

The risk of any restriction to party autonomy having severe consequences is even greater if it is not imposed by the arbitration act, but is rather part of a different regulation (albeit having the same procedural impact). For example, according to Art.87 of the Egyptian Commercial Law regulating technology transfer, "*the parties may agree to resolve any dispute amicably or by resorting to arbitration, which shall take place in Egypt according to Egyptian law*"[267]. Due to this restriction to the freedom of contract, arbitrating disputes on technology transfer (from a foreign country to Egypt) is only allowed if the arbitration is conducted in Egypt and under Egyptian law; otherwise the clause is deemed to be void. However, Art.25 of the Egyptian Arbitration Law[268] leaves open the possibility to choose whichever institutional rules the parties may choose to govern their proceedings - and by this, eventually to escape from the provisions of the Arbitration Law itself. Therefore, the

[267] Art. 87 of the Egyptian Commercial Law No. 17/1999.

[268] Arbitration Law of Egypt No. 27/1994 as amended.

dilemma in technology transfer disputes would be whether such choice of an institutional arbitration would be accepted or the Arbitration Act would prevail irrespective of the parties' choice.

Although it could be argued that the Arbitration Act itself safeguards the application of any institutional rule – therefore, choosing any such rule instead of the law is in fact in line with the application of the law – this circular dilemma is eventually solved by the first part of the same Art.87; since Egyptian law would be applicable anyway, as the law of the seat of arbitration. Moreover, the limitation is unlikely to provoke objections by Egyptians, as it is motivated by a national public interest aiming to protect the weaker part (which is usually the Egyptian technology importer). Objections were, however, raised in the form of a plea for unconstitutionality[269], rejected on the ground that on one hand, the legislator can impose limitations to party autonomy for considerations of public policy, and on the other hand, that the disputed Art.87 has the purpose of protecting national interest – thus being an issue of public policy. In line with this approach, a recent request of a Belgian company for exequatur of an ICC award rendered against an Egyptian investment company was initially refused because the case seemed to be one on technology transfer matters; however, as soon as the

[269] Decision of the Supreme Constitutional Court of April 15, 2007 in case No.253.

contract proved to be one of agency and the claim only on due payment, the Cairo Court of Appeal granted exequatur without further ado[270].

A similar limitation can be observed in the Brazilian Public-Private Partnership Law[271] and the Concessions Law[272], which both permit arbitration of disputes arising from transactions with the federal government, but which both require the arbitration to take place in Brazil and to be conducted in Portuguese. Considering the involvement in such cases of public entities, it is understandable why the place of arbitration has to be in Brazil. The law of the seat – as the law governing the procedure and eventual court interventions – are all familiar to the state entities that may be involved, making the entire procedure easier for them to handle. Even more, the financial aspects of a complex arbitral proceeding conducted abroad and requiring foreign counsels may also represent a problem, therefore the government allegedly had all the reasons – but in any case, it did have all the interest – to impose such a limitation protecting national interests. It is, of course, a different question how these protectionist measures affect the rights and interests of others.

Party autonomy can also be limited by various legislations due to certain change in circumstances. One such change in circumstances is when bankruptcy proceedings are initiated against one of the parties to an arbitral agreement/procedure. Besides identifying the

[270] Case shortly reported by the Al-Ahram Egyptian daily newspaper Issue No.45273 of 19 November 2010, at 6.

[271] Federal Law Nr. 11.079/04.

[272] Federal Law Nr.8.987/95 as amended in 2005 by the Law 11.196/05.

basic conflict between the national law and the parties' agreement opting for arbitration (limited by that national law), the two major questions are: which national law and limiting what exactly. In this sense, in order to be able to ascertain whether arbitration is affected by the existence of a bankruptcy proceeding, one first has to determine which of the many involved legislations can have this effect – the law of the seat of arbitration; the home law of the bankrupt party; the law of the country where enforcement may be sought; or even some other law that is connected to the contract or the parties by some other means? And secondly, even if the law that is found applicable to this issue is prohibiting arbitration in case of bankruptcy, the question remains how exactly this limitations occurs – i.e. affecting the capacity of the bankrupt party, the validity of the arbitration agreement or the jurisdiction of the tribunal; by restricting arbitrability or by imposing compulsory court jurisdiction? The answers to all these dilemmas lie in the state law that is found to be applicable; but its interpretation will very much depend on the arbitral tribunal and ultimately on the court vested with the issue.

The Swiss Federal Supreme Court, for example, agreed with the tribunal which discontinued the arbitral proceedings against an insolvent company for the reason of losing its capacity[273]; while in the US, it is the special jurisdiction of federal bankruptcy courts that determines court primacy over arbitral tribunals – yet, arbitration may still be allowed to

[273] Case No. 4A_428/2008, related in Martin Aebi and Harold Frey, *Impact of Bankruptcy on International Arbitration Proceedings - A Special Case Does not Make a General Rule: Note - 31 March 2009 - Swiss Supreme Court*, Volume 28 Issue 1 ASA Bulletin (2010) 113 – 123.

continue with limited purpose[274]. The jurisdictional restrictions are similar in France, but the ICC practice is clearly favoring arbitration; ICC tribunals regularly denying requests to suspend arbitration for parallel insolvency proceedings[275]. Therefore, due to the many possible variations, one cannot really anticipate whether and to what extent would bankruptcy proceedings affect arbitration.

Moreover, since insolvency is not something that one would normally consider when contracting, any speculation in advance would reflect an uncommon degree of precaution. If one would still want to take that extra care, however, the only attempt to safeguard arbitration is to choose such legislations to govern the arbitral agreement and the proceedings that would not prohibit arbitration in case of parallel insolvency proceedings. One has to remember, though, that even then, it is practically impossible to avoid every law that may contain more restrictive provisions – since the home law of the contracting partner or of the place of enforcement are determined by other aspects, not primarily by the parties' free choice. In addition, court practice may also cause surprises by either an excessively narrow or an unexpectedly broad interpretation of any legislation.

[274] *See* the practice of US courts detailed in José Rosell and Harvey Prager, *International Arbitration and Bankruptcy: United States, France and the ICC*, Volume 18 Issue 4 Journal of International Arbitration (2001) 417 – 434.

[275] *See Id.*

III.3. Party agreements prejudiced by judicial interpretation supplementing incomplete applicable law

Besides the obvious party stipulation-state law relationship, party autonomy may also be affected by judicial interpretation – a distinct category analyzed separately not because of the common law courts' power to create law, but precisely because of those civil law courts that are not meant to create law, but that often have to fill in legislative gaps without even having a law to interpret. Although this category legally qualifies as a matter of contract or legislative interpretation (as such not clearly fitting in the conflict categories subject of the present thesis), it is still worth to be mentioned, as courts may sometimes limit party autonomy even in the absence of a legislative provision supporting such limitation and in the presence of any mutual agreement of the parties. Even more, courts may give party agreements an interpretation that would expand that agreement beyond what has probably been intended by the parties when concluding their contract.

III.3.1. Restricted party agreements

Sometimes, even when parties expressly agree to arbitrate and no pathology or legislation annuls their agreement, a court may nevertheless consider that arbitration is not appropriate and prohibit the enforcement of the dispute resolution clause. A protective court may restrict the parties' arbitration agreement even in the absence of clear legislative support, if it considers necessary. This is how a court in Argentina could find that a dispute – that was otherwise arbitrable by law – fell outside of the scope of an otherwise valid arbitration agreement.

The Commercial Court of Appeals decided that the changes intervened in the country's economy after entering into the arbitration agreement represent sufficient ground to doubt that "*the parties had freely subjected an absolutely new matter to arbitral jurisdiction that had significantly shaken up the economic scheme of the contract*"[276]. Apparently, this is not the only decision in Argentina restricting arbitral jurisdiction in spite of existing arbitration agreements[277]. According to the local literature, "[t]*he varied criteria considered in case law inevitably create doubts regarding: the validity of arbitral clauses agreed upon; matters*

[276] *Rivadeneira Hugo German v. ABN Amro Bank NA*, Division D of the Commercial Court of Appeals, February 28, 2008.

[277] *Peyras, Hernán Matías v Nordelta Constructora SA*, Division II of the Civil and Commercial Court of Appeals of San Isidro, December 21, 2004.

which may be subject to arbitration; the degree of parties' autonomy; [and] what may be interpreted by arbitral tribunals with equivalent jurisdiction to judicial courts"[278], the decisions representing "*a step backwards in terms of correct case law*"[279]. It is disputable whether the limitation invoked by the court was indeed created by the parties themselves or was imposed by the court; and the court decisions also raise pro-arbitration concerns in Argentina.

Although not in an international setting, but a decision of the Porto Court of Appeal[280] is also a good example of court intervention limiting party autonomy, based on change in circumstances. Accordingly, the Porto court found that the financial difficulties of a party represent a sufficiently serious change in circumstances to exonerate that party from the arbitration agreement[281]. In the absence of specific legislation, the court's reasoning was based on the principle of access to justice – arguing that the insolvent party could not defend

[278] Manuel J Marino, Maria Laura Velacuz et.al, *A Step Backwards in Terms of Correct Case Law?*, ILO Newsletter, July 31, 2008, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=fe641d6a-e278-4cea-ada8-3440174d25d4>.

[279] *Id.*

[280] Case related in Jose Miguel Judice and Antonio P. Pinto Monteiro, *Access to Justice and Financial Hardship*, ILO Newsletter of September 24, 2009, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=8f3417b3-b609-4f17-b0cc-acd941ef7c4b>.

[281] Art. 437(1) of the Portuguese Civil Code provides that "*if the circumstances which influenced the parties decision to contract have been unusually changed, the injured party has the right to terminate the contract or to amend the latter in accordance with the principle of equity, provided that the obligations implied by the said contract gravely affect the principles of good faith and are not covered by the own risks of the contract*."

its legitimate interests in an arbitration procedure, as it has no financial resources to support the costs of arbitration, while legal aid is not available for such proceedings. This approach is since then reflected by the new Insolvency and Corporate Rescue Code, the legislation thus filling the gap previously covered by the court.

Finally, a very recent US decision is likely to cause concerns in the arbitration arena, as it limited party autonomy by denying to enforce the choice of seat agreement of the parties. The Federal District court in Mississippi enforced the choice of forum part of the agreement (providing for ICC arbitration), but directed the parties to choose a seat other than the contracted Caracas on the ground that since concluding the contract the Venezuelan legal system evidences a strong pro-Government bias, making arbitration there an unreasonable choice[282]. An appeal against the decision is yet to be decided by the Fifth Circuit Court of Appeal, but using a change in circumstances as ground for imposing such amendments to the parties' agreement (without any legal support) was, in any case, a severe and unjustified intrusion by the district court in the party autonomy principle.

An agreement to arbitrate can also be restricted in the sense that – although the agreement is apparently valid, the designated arbitral institution accepted the case and the tribunal accepted jurisdiction – a court faced with the enforcement of the award may nevertheless subsequently decide that the agreement is not clear enough to be valid. Apart

[282] *Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of the Republic of Venezuela*, 2010 U.S. Dist. LEXIS 134830 (S.D. Miss. Dec. 4, 2010).

from possibly pathological clauses, this analysis only refers to cases when the arbitral agreement would normally be upheld, but due to a court's strict and narrow interpretation, it is eventually not. As an example of such strict requirements, according to the Supreme Economic Court of Ukraine, the parties' agreement to arbitrate "*should clearly define the body chosen by the parties*"[283] – an expectation that may seem logical and reasonable, but which (if interpreted strictly) may mean that reference to the rules of an institution would not be sufficient; even if such reference would be accepted as conferring jurisdiction by the arbitral institution whose rules are indicated.

Erroneous or incomplete indication of an institution will also be unaccepted by Ukrainian courts, as shown by several decisions refusing enforcement of awards. In this sense, especially awards rendered under clauses providing for arbitration in Switzerland were severely scrutinized, even if clear reference to the Swiss Rules was included in each agreement. Justifications included, among others, that the 'Arbitration Court of the Swiss Chamber of Commerce' is non-existent[284], or that a provision for hearings to take place in Geneva does not indicate clear enough the canton of Geneva for an arbitration under the

[283] Statement from the Supreme Economic Court of Ukraine, as related by Konstantin Pilkov, *Swiss Rules Play a trick, of why Ukrainian state courts do not recognize "arbitration in Geneva"?*, International Arbitration. News, Analytics and Practice online blog at <http://arbitration-blog.eu/swiss-rules-ukrainian-courts-recognize-arbitration-geneva/?goback=%2Egde_129101_member_35786679>.

[284] *ZTMK v. BEARCO S.A.* (case No. 24/81/10) related by Pilkov *Id.*

There is a "Swiss Chambers' Court of Arbitration and Mediation" formed by the Chambers of Commerce of Basel, Berne, Geneva , Lausanne , Lugano, Neuchâtel and Zurich.

Swiss Rules[285] – in spite of the fact that the Chambers adopting the Swiss Rules only require that an arbitration agreement "*refers to the Swiss Rules and to the Canton in which the Chamber is located*"[286]. Strange enough, and reflecting the inconsistency of Ukrainian courts, an agreement providing for the jurisdiction of the "*arbitration court in Nyon, Switzerland*" was accepted even in the absence of any reference to the Swiss Rules[287] – and even though Nyon is not a residence for any of the chambers adopting the Swiss Rules. Hence, it only takes a restrictive judicial interpretation to deprive the parties of the autonomy to choose arbitration, even if there was an intention to arbitrate.

III.3.2. Expanded party agreements

Party autonomy, as limited as it would be, nevertheless is the cornerstone of arbitration; the parties' agreement to submit their dispute to arbitration is the one – and in most cases the only one – that establishes a tribunal's jurisdiction and all the ancillary aspects of the

[285] Atem LLC v. S.A.S (case No. 17/355), decision of October 12, 2010, related by Pilkov, *supra* note 283

[286] Administration of the Rules by the Swiss Chambers of Commerce and Industry Memorandum, available at <https://www.sccam.org/sa/download/Internal_Rules.pdf>.

[287] Poverkhnost TV v. National TV Company of Ukraine (case No. 12/335), ruling of December 25, 2007, related by Pilkov, *supra* note 283.

proceeding. Nevertheless, there are cases when this basic principle is extended by national courts to impose arbitration agreement even where there was none. Whether this is done in a pro-arbitration spirit or not is another question, but the problem remains.

In a broad sense, every extension of an arbitration agreement over a non-signatory third party can be perceived as a violation of the party autonomy principle and a contradiction of the contractual nature of arbitration. It is widely accepted that certain relationships between a signatory and a non-signatory (relationships qualified under various theories of piercing the corporate veil, group of companies, assignment or agency relationships[288]) can justify the extension of an arbitration agreement. However, there are cases when there is no relationship between the signatory and non-signatory company at all (or at least apart from the contract which does not contain an arbitration agreement), but the court nevertheless interprets the existence of an arbitration agreement.

Such extension of an arbitration agreement to third parties connected only through a chain of contracts was made by the French Supreme Court, based on a cause of action in contract – which is not recognized in most legal systems. According to the French rule, however - as expressed by the Supreme Court[289] - a sub-purchaser can present a claim in contract against the manufacturer or the initial seller, even if there is no direct contractual relationship between them. This rule has been then transferred into the field of arbitration, the

[288] *See* REDFERN AND HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 175-181 (Thomson, 4th ed. 2004).

[289] Plenary Section, February 7, 1986, at 293.

Supreme Court deciding that "*in a chain of agreements that achieve a succession of transfer of title to certain goods, the arbitration agreement is automatically transferred as an ancillary element to the right to sue, which is itself ancillary to the substantive rights transferred pursuant to the agreements*"[290].

One could say that such extensions look more acceptable if an arbitral tribunal, once invested with a case, finds from the factual circumstances of the case that a non-signatory is justified to be involved in the resolution of that particular dispute through arbitration. But from more-or-less obvious connections between companies to the extension of an arbitration clause contained in a contract setting up a pension fund to a beneficiary of that fund even without proven knowledge of the existence of the clause[291], courts have proven to be very creative in finding justification in favor of arbitration. Whether this can be qualified as pro-arbitration or ultimately affecting the trust in arbitration, is a yet unanswered question.

Luckily though, not quite any connection between a signatory and a non-signatory is acceptable as ground for arbitral jurisdiction. And while the nature of the connection and the level of acceptance of this relationship will depend on the law applicable to the case, a recent

[290] Alcatel v. Amkor (ABS case), French Supreme Court First Civil Chamber, March 27, 2007, in Revue de l'Arbitrage Volume 2007 Issue 2, 347 - 348; completing the decision in Peavey v. Organisme général pour les fourrages, French Supreme Court First Civil Chamber, February 6, 2001, in Revue de l'Arbitrage Volume 2001 Issue 1, 229 – 238; confirmed by the decision in HGL v. Spanghero, French Supreme Court First Civil Chamber, 9 January 2008, in Revue de l'Arbitrage, Volume 2008 Issue 1, 160 – 161.

[291] Court of Appeal of Lisbon, Portugal, Case no: 373/09.0TTLSB.L1-4, decision of 13 January 2010, reported by José Miguel Júdice from the ITA Board of Reporters, Kluwer Law International.

landmark case of the UK Supreme Court[292] clarified that – at least under French law – the common intention to arbitrate (express or implied) is what will ultimately determine whether the non-signatory is a party to arbitration or not; thus reflecting that the only conflict that can exist is between the party stipulation – but not the party's real intention – and the court's decision. And while the judgment created ambiguity and raised concerns with regard to other elements (to be analyzed in other chapters of the present paper[293]), the decision at least clarified this issue with a positive effect.

A different problem was caused by another controversial judicial interpretation in Ukraine[294], when in a contractual relationship including an arbitration agreement a court ordered an interim measure not in support of arbitration, but for arresting the goods not paid for by the Austrian buyer. The buyer, instead of challenging the measure in the competent higher Ukrainian court, later claimed damages for this measure in front of an arbitral tribunal, which – although not explicitly – also addressed the issue whether the Ukrainian court was entitled to grant the measure at all. This case raises two concerns: on one hand, it is alarming that court intervention in arbitration could be extended by the court itself without any justification or legal basis, jeopardizing the delimitations between court and arbitration

[292] Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.

[293] *See* VII.2.2.1 below for an analysis on the court review entering the merits of the case.

[294] Case related in Yuliya S. Chernykh, *Arbitration Agreements versus Interim Measures*, ILO Newsletter of April 3, 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=1c4ecfd4-ee70-4a27-a586-83baf3ae8211>.

jurisdiction; on the other hand, however, it is even more alarming that a tribunal could interpret the arbitration agreement on which it based its jurisdiction so broadly, that it considered itself empowered to decide on the legality of a court decision, and to declare that the interim measure granted by a state court was "*unsubstantiated and unlawful*"[295]. Both aspects represent concerns for the relationship and delimitation between party autonomy on one hand, and legislation – as understood and reflected by a state court's judicial interpretation – on the other hand.

The nature and extent – or even the lack - of pro-arbitration approach from a country's courts is of major relevance. The fact that court practice is only what it is – court practice – and as such, it only interprets statutes (but decisions are not always reflected or backed up by statutory sources of norms regulating international commercial arbitration) makes this influence more difficult to identify. And while – again – there is no universal recipe to avoid a courts' potentially unfavorable intervention, one can fairly anticipate it by researching the court practice of a targeted jurisdiction before deciding to chose that jurisdiction as a seat for a future arbitration.

The hierarchy between party autonomy and state law does not necessarily ensure supremacy of any of the two, the relationship between party stipulation and law being a rather circular one; party autonomy is theoretically the primary source of norms regulating arbitration, but as soon as this party autonomy chooses an applicable law (directly or through

[295] *Id.*

choosing a seat), the mandatory provisions of that chosen law will have priority and will overrule any party stipulation to the contrary. As we have seen, party stipulations may replace or supplement parts of legislation, and whenever specifically allowed, may limit the applicability of statutory provisions. But how far can party stipulations stretch the flexibility of state laws is again a question that will differ from jurisdiction to jurisdiction – just as the possible consequences may differ[296].

In any event, such stipulations may range from altering the definition of basic arbitration terms to influencing the powers of the court vested with jurisdiction to review the award, depending on the limits imposed by mandatory provisions of each relevant law. But there is no universal pattern based on which one could easily know what legislative restrictions exist in every jurisdiction. Consequently, the only solution is to invest the effort and to verify on a case-by-case basis in advance primarily the arbitration laws, and secondarily any other procedural and substantive regulation that may, by some means, have an impact over arbitrating the dispute. And while verifying the laws of a potential place of enforcement is certainly useful, verifying the laws of a potential seat of arbitration before incorporating it in the arbitral agreement is a definite must.

[296] There is no universal practice as to whether illegal provisions from an arbitral agreements should be separated from the rest of the agreement or the entire agreement should be voided automatically. For a full analysis of this dilemma in the UC court practice *see* Adam Borstein, *Arbitrability enforcement: when arbitration agreements contain unlawful provisions* (39 Loy.L.A.L.Rev.1259) (2006).

CHAPTER IV. COHABITATION AND CONFLICT BETWEEN PARTY STIPULATIONS AND INTERNATIONAL SOURCES OF NORMS

International conventions, multilateral and bilateral treaties and international public policy fall under the analysis of the present chapter – all being subject to possible conflicts with the principle of party autonomy. In addition, international regulations whose primary object is not arbitration may also come in conflict with other arbitration regulations, as well as with party autonomy.

The most significant and most widely adopted international source of norms regulating international commercial arbitration is probably the New York Convention, ensuring the recognition and enforcement of foreign arbitral awards within its member states in accordance with identical standards. The Convention, however, influences the entire arbitration, given that the conditions imposed to recognition and enforcement must be observed already in the pre-award phase.

Treaties, especially bilateral trade and investment agreements form a second main category of international sources of norms, many of them being a direct source of arbitration by providing for this dispute resolution method. Apart from the classical conflict types, this category of sources of norms raises a specific issue as well, namely the role of party autonomy as generating arbitration.

All these international sources of norms regulate arbitration in combination with the complex net of other regulations and party stipulations – and consequently, are subject to various interactions, mutual completion and possible conflicts. The central element of arbitration being party autonomy, international sources of norms will primarily be analyzed in this chapter in relation to party stipulations, interacting in various phases of arbitration and affecting various elements of the proceedings.

IV.1. Party stipulations in conflict with international conventions

A potential conflict may seem impossible – or at least improbable – already from the heading reflecting an uneven balance of powers; party stipulations are not likely to contradict international conventions in the proper sense; at least not with any success. Nevertheless, since party stipulations – as an expression of party autonomy generating arbitration – have a special power recognized by other sources of norms regulating arbitration, they can also interact and have a viable (or sometimes conflicting) relationship with international sources of norms as well.

IV.1.1. International convention invalidating insufficiently explicit party agreement

Although theoretically party autonomy is the cornerstone of arbitration – meaning that whenever the parties so agree their dispute has to be decided by arbitration[297] – and in spite of a widespread pro-arbitration approach allowing flexible interpretations to support vague arbitration agreements, there are still international sources of norms applying a strict and narrow reading over the choice to arbitrate, invalidating the parties' stipulation for arbitration. In an Austrian case on road carriage[298], for example, the mere fact that the parties have not explicitly indicated the applicability of the Carriage by Road Convention[299] rendered their arbitration agreement invalid.

The case involved a Spanish carrier and a German insurer and three legal documents, all containing an arbitration clause conferring jurisdiction to the Spanish Arbitration Court for Transportation. While neither of the documents contained a choice-of-law provision, one of them (the general terms of the bill of lading) provided in Art.1 for the land transport to be governed by the Carriage by Road Convention, with Art.18 providing for the application of Spanish substantive law. The Spanish carrier sued the German insurer in Austrian courts, and

[297] Within the limits of arbitrability and other limitations imposed by national legislation, of course.

[298] 10 Ob 20/07z Austrian Supreme Court, decision of March 20, 2007.

[299] Convention on the Contract for the International Carriage of Goods by Road (1956).

while the Vienna Commercial Court refused jurisdiction based on the existence of the arbitration agreement, its decision was overruled in appeal by the Vienna Higher Regional Court – decision which on its turn was then upheld by the Supreme Court.

The reasoning of the two higher courts was identical, relying on a strict interpretation of Art.33 of the Road Convention – which provides that "*the contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention*" – in combination with Art.41 – which provides that "*any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void*". The courts found that the reference to the Convention made in Art.1 of the general terms of the bill of lading was insufficient to make the Convention applicable, and consequently, to fulfill the condition of Art.33.

Although the courts failed to verify whether the indication of the Spanish substantive law might have automatically involved the application of the Convention, they found the strict interpretation of Art.33 (and consequently the denial of arbitration) necessary precisely to guarantee the application of the Convention(!?). In the Supreme Court's reasoning, a simple reference to the Convention would not ensure its application in all member states; and the potential non-application by arbitral tribunals is sufficient ground for the invalidation of the arbitration agreement. Thus, the purpose of having the Convention's application

guaranteed eventually rendered an arbitration agreement bearing only the potential of the Convention's application null and void.

While one may say that the end justifies the means, from the perspective of arbitration principles, this decision seems to unnecessarily restrict party autonomy – if not even annihilates its main effect, of creating arbitration – generating an unnecessary conflict between party stipulation and an international source of norms otherwise not regulating arbitration.

IV.1.2. Party stipulations in conflict with the New York Convention provisions on court scrutiny of arbitral awards

Another area in which party autonomy may come in conflict with international sources of norms is the judicial review of arbitral awards. Since the review at the seat of arbitration – as regulated by state law (potentially based on the Model Law) – has already been analyzed in the previous chapter[300], in the present chapter only the review performed under recognition and enforcement procedures will be targeted. Nevertheless, the analysis of the case law

[300] *See* III.2.2

facing party stipulations aimed to amend in any way the grounds for review in setting aside procedures is applicable by analogy to recognition and enforcement as well[301].

The grounds and the extent of judicial review of arbitral awards by courts in the country of enforcement are regulated in most countries by the New York Convention, as developed through a laborious process of consultations, and as adopted by each member state. And although the Convention does not come in direct conflict with party autonomy (since it becomes applicable in the form of the contracting states' national law), it is nevertheless considered as a self-standing source of norms subject to conflict for the same reason for which the Convention (just as the Model Law) is discussed in general, and not in its adopted form as state law, throughout the entire thesis – to ease the analysis of very often similar or even identical regulations.

There are two issues with regard to party stipulations potentially altering the provisions of the Convention. On one hand, the recognition and enforcement procedure provides for a 'negative' review – *i.e.* with the purpose of refusing a petition (for recognition and enforcement). Thus, even though the grounds for review are identical with those applicable in a challenge procedure (a 'positive' review, to admit a petition), due to the different perspective, but also due to the uncertainty of the future place of such recognition and enforcement – making the judicial review subject to a yet unknown legislation –, amending the grounds would simply not make sense. In any case, it is hardly imaginable for a party

[301] *Id.*

agreement to provide for something like '*recognition and enforcement of the award can be refused only under the grounds provided by the present agreement, irrespective of the law applicable in the country of enforcement*'.

On the other hand – should the parties nevertheless wish to contract for such amended grounds for revision –, the Convention is strict in not allowing derogations from the grounds of judicial review for good reason: while exceptions may help one case, they would eventually undermine the entire system. Human nature, however, is unable to resist the temptation of restraining or complementing the grounds listed in Art.V of the Convention – disregarding the fact that those grounds are of mandatory nature, and no party agreement is allowed to limit or extend that exhaustive list; not even in the name of pro-arbitration practices.

Art.V. provides for only procedural and no substantive scrutiny, ensuring the confidence vested in arbitral tribunals of rendering proper, fair and legally well grounded decisions that do not need to be reviewed by state courts. And even procedural check is restricted to firmly limited elements, considering that some procedural mistakes may not influence the outcome on the merits of the case. Recognition and enforcement thus may primarily (but not exclusively) be refused for lack or excess of arbitral jurisdiction[302], for breach of due process principles[303] or for breach of party autonomy[304]. In addition,

[302] Art.V.1(a) and V.1(c) of the New York Convention.

[303] Art.V.1(b) of the New York Convention.

recognition and enforcement may also be refused if the award has been set aside or suspended in its country of origin[305] – presuming a review on the same or similar grounds (as reflected by the Model Law). These procedural grounds cannot be altered by party stipulation not because they represent an exhaustive list in a convention, but because they reflect general legal principles. Because there is always the possibility that the arbitration would have gone a different way even if the final award would have been the same, other elements of the arbitral proceedings are irrelevant for the ultimate purpose of recognition and enforcement of the award. The only two additional relevant aspects are substantive non-arbitrability[306] and breach of public policy[307]. But just as the others, these grounds cannot be altered by party agreement either, as they originate from compulsory state regulation representing higher values and public interest.

There could be one – not really strong – argument against the mandatory and limited nature of the grounds for refusing recognition and enforcement under the New York Convention, namely the provision of Art.VII.1 of the same Convention. Only created to ensure the applicability of a more favorable law available if the Convention and another state

[304] Art.V.1(d) of the New York Convention.

[305] Art.V.1(e) of the New York Convention

[306] Art.V.2(a) of the New York Convention.

[307] Art.V.2(b) of the New York Convention.

law contain slightly different provisions[308], the second part of the text could also be interpreted as permitting party derogations from the Convention. More precisely, the stipulation that "[t]*he provisions of the present Convention shall not […] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon*"[309] could also be interpreted as allowing the limitation and/or extensions of the Art.V grounds by the parties – as long as such restrictions and/or extensions are not prohibited by state law. This – slightly twisted – interpretation, however, has no clear ground in either the legislative history of the Convention or the case law and literature interpreting it[310]; remaining nothing more than a far-fetched theoretical analysis. But because parties may have far-fetched stipulations attempting to alter the provisions regulating recognition and enforcement – e.g. by excluding due process grounds from review just as excluding due process from the proceedings[311] – even this slightest possibility must be recognized, to make it avoidable.

[308] Being relevant only for the relationship and hierarchy between national and international sources of norms – *see* Chapter VII.

[309] Art.VII.1. of the New York Convention.

[310] At least not to the knowledge of the author.

[311] *See* III.2. above

IV.2. Treaties affecting party autonomy

Whereas the New York Convention assumes party autonomy generating voluntary arbitration – all provisions of the Convention reflecting party intention to arbitrate, to be reflected by an arbitration agreement – there are other international sources of norms that step in and create arbitral jurisdiction for and on behalf of the parties. Such treaties raise concerns with regard to the role and value of party stipulations by replacing the party autonomy principle with compulsory arbitration.

Although there is an increasing tendency to separate investment arbitration from the collective term of international commercial arbitration, for the purpose of the present thesis the effect of bilateral investment treaties will nevertheless be considered in order to analyze the cross-influences between party autonomy and international sources of norms regulating international arbitration – whether considered of investment or of commercial character in general. BITs raise concerns with regard to the relationship between party autonomy and international sources of norms regulating arbitration through their third party effect: the issue being whether and to what extent is a BIT-based arbitration still the creation of the arbitrating parties themselves. Even though today the vast majority of treaty-based investment-related disputes are resolved by arbitration, "[t]*his phenomenon does not, however, take away the*

basic prerequisite for arbitration: an agreement between parties to arbitrate"[312]. In the field of foreign investment this agreement is allegedly reached by the consent given by the state in advance through the dispute resolution provision of a BIT and the subsequent acceptance of that provision by an investor.

A classical formulation of a BIT dispute resolution clause used to provide for compulsory ICSID arbitration – binding not only the agreeing states, but having its ultimate effect also over investors who never signed the BIT. In light of the ICSID Convention requiring consent to arbitrate at ICSID[313], this construction is problematic. It is true that – as very concisely summarized in a recent ICSID decision – "[u]*nder ICSID case law, consent may also result from a unilateral offer by the host State, expressed in its legislation or in a treaty, which is subsequently accepted by the investor"*[314]*;* but in the absence of an express manifestation any alleged subsequent acceptance of the investor remains an open question.

One argument in favor of this construction could be that a BIT incorporated in the signatory state's home legislation becomes mandatory legal provision, and as such has

[312] ALEXANDRE VAGENHEIM, *"Consent" and the Jurisdiction of Investment Arbitrations: Are the Traditional Rules of Interpretation Still Relevant Today?,* Chapter 2 in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW Volume 3, Ian A. Laird and Todd J. Weiler Editors (2010).

[313] Art 25§1 of the ICSID Convention provides that "[t]*he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre*".

[314] Mobil Corporation and Others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27, June 10, 2010) at para 64.

supremacy over party agreement, eventually even replacing it; this reasoning, however, goes against the principle of arbitration being by principle "*a creature of contract*"[315]. Another justification could theoretically lie in the theories based on which arbitral agreements are often extended to non-signatory third parties[316]; however, stretching any of these corporation-specific principles to a state-investor relationship would be a rather difficult and artificial maneuver. Perhaps due to this debatable nature of investment arbitration it is rather qualified as an independent type of treaty-based arbitration, completely separate from institutional and *ad hoc* arbitration (even though based on the criteria differentiating institutional from *ad hoc*, treaty arbitration is not a third category).

Apart from the 'take-it-or-leave-it' aspect of foreign investment dispute resolution clauses in which the investor has no other choice than to accept the arbitration agreement 'as is', the various expressions of consent within the BIT also leave room for extensive and differing interpretation. In this respect – although a matter of interpretation and not of a real conflict between different sources of norms in itself – it is worth mentioning that the provisions of the Vienna Convention on the Law of Treaties (also reflecting customary

[315] A maxim apparently repeated 349 times by 30 May 2005 only in U.S. judicial precedents – *see* DONALD FRANCIS DONOVAN AND ALEXANDER K.A. GREENAWALT, *Mitsubishi after twenty years: Mandatory rules before courts and international arbitrators*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION fn.1 p.11 (Loukas A. Mistelis and Julian D.M. Lew eds., Kluwer Law International (2006).

[316] *e.g. alter ego*, agency, group of companies theories.

international law) "*are not wholly useful in resolving questions of BIT interpretation, as the guidance they provide is insufficiently concrete*"[317].

In any case, the third party effect of BIT arbitration clauses is a rather theoretical issue, since it rarely happens for a host state to commence arbitration under a BIT[318] and it is unlikely that a foreign investor would prefer the jurisdiction of a court in the state against which it has a claim – as opposed to the jurisdiction of a neutral arbitral tribunal (whether ICSID or any other). Moreover, even this theoretical issue seems to slowly disappear, as the practice of BIT arbitration clauses appears to change; with more recent provisions allowing the investor's free choice in favor of, rather than imposing a compulsory arbitration. In this sense, the international investment field is currently witnessing an 'awakening' of the so-called 'fork-in-the-road' clauses, providing for a choice offered to investors between investment arbitration and litigation in the host state's domestic court[319].

These clauses have their own weaknesses (just as anything in life), especially due to the limited choices they allow to the investor – usually between state court litigation, ICSID arbitration and *ad hoc* arbitration in accordance with the UNCITRAL Rules. Compared to a compulsory arbitration, these alternatives certainly offer a larger pool of options, but they still

[317] VAGENHEIM , *supra* note 312.

[318] Out of the 124 cases pending, and 219 cases concluded by ICSID as of April 2011, only two were commenced by a state or state entity against a foreign investor.

[319] For a detailed discussion *see* Gerhard Wegen and Lars Markert, *Food for Thought on Fork-in-the-Road – a clause awakens from its hibernation,* Austrian Yearbook on International Arbitration 2010, 269-292.

don't satisfy the requirements of unrestricted party autonomy. The issue becomes apparent when parties – irrespective of the provisions of the BIT – provide in their contract for a fourth alternative; usually institutional arbitration, other than ICSID. Irrespective of whether the case is then submitted to ICSID or to the contracted arbitral institution, the issue of jurisdiction is a difficult one, depending on the nature of the claim. Theoretically, should the claim be purely contractual, the contracted arbitral institution should have jurisdiction, while for a treaty-based claim the jurisdiction established by the BIT should prevail. But in practice disputes are usually complex enough to make a clear-cut distinction between BIT-based and contract-based claims hardly possible.

Moreover, even if such separation would be possible, case law is not easy to follow, making every new jurisdictional decision difficult. In the *Joy Mining* case, for example, an ICSID tribunal decided that *"the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction"*[320]*;* on the contrary, in the *SGS Surveillance* case, another ICSID tribunal reached the conclusion that "*the Tribunal has jurisdiction with respect to a claim arising under the […] Agreement, even though it may not involve any breach of the substantive standards of the BIT*"[321]. The difference, of course, is not caused by simple inconsistency in

[320] Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on jurisdiction of August 6, 2004, para.82.

[321] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case N° ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, of January 29, 2004, para 169(3).

decisions, but is determined by the language of the dispute resolution clause in the BIT, the factual circumstances of the case, but most importantly on "*the legal basis of the claims, or the cause of action asserted in the claims*"[322].

In any case, even though new-style BIT dispute resolution clauses offer only a limited number of choices, if applied and interpreted properly, they do seem to solve – to some extent – the contradiction between the form and nature of an international treaty and the principle of consent-based arbitration at least with regard to the investor's express agreement to arbitrate. The questions of 'what kind of arbitration' and 'where' are then secondary (but not at all easier) issues to be decided on a case-by-case basis by the institution first notified with the claim.

The other problematic side of the same BIT-based arbitration theory is when an individual originally not falling under the provisions of a BIT tries to benefit from its protection provided by the arbitration clause contained therein. An ICSID tribunal has recently found to have jurisdiction over a case involving such manipulation, qualifying it as 'BIT planning'[323]. A group of US, German and Bahamas corporations managed to obtain ICSID jurisdiction over a claim filed against Venezuela in the absence of any contractual or legal ground, simply by introducing a Dutch entity in their corporate structure – and

[322] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan CASE No. ARB/01/13, Decision on Objection to Jurisdiction of August 06, 2003, para 161.

[323] Mobil Corporation and Others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27, June 10, 2010).

consequently falling under the application of a Venezuela-Netherland BIT providing for ICSID arbitration. While Venezuela qualified this legal artifice an "*abuse of right*"[324], the ICSID tribunal found that "*the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes*"[325] and consequently found to have jurisdiction over any disputes that arose after the restructuring (but not over any pre-existing disputes). In the absence of an initial mutual consent with regard to arbitration, however, such 'perfectly legitimate' BIT planning seems to stretch the notion of arbitration beyond the limits of the party autonomy principle, rather being a source of conflict than a source of arbitration.

Following the ICSID's flexible approach, BIT planning may nevertheless appear as a viable alternative for investors wishing to protect their interest whenever their country (and the country of investment) does not have an investor-state-dispute-settlement clause in their relevant BIT. In this sense, a very recent policy shift in Australia refusing to incorporate arbitration provisions in its future investor trade agreements with developing countries[326] is likely to cause an increase in such 'planning' maneuvers. And while contracting through

[324] *Id.* at paras 47 and 58.

[325] *Id.* at para 204.

[326] *See* the Gillard Government Policy Statement "*Trading our way to more jobs and prosperity*", Australian Government Department of Foreign Affairs and Trade, April 2011, available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf.L>

foreign countries that provide for arbitration in their BITs may not always raise concerns of mutual agreement – if done at the stage of concluding an investment – forcing investors in offshore arrangements with intermediary countries ensuring better foreign investor protection does raise concerns on other levels[327].

A similar party autonomy-international norms conflict is the one connected to the Iran-US Claims Tribunal, the jurisdiction of which is also based on an agreement between states[328], raising the same question: is arbitration in this case still based on party autonomy? Even though the Iran-US Claims Tribunal was established for the benefit of those nationals of one state who had a claim against the other state[329] – as they would have probably been worse off in any other jurisdiction – arbitration is not a product of charity, but is (or should be) a product of free will. But in establishing the compulsory jurisdiction of this special institution we can only talk about free will with regard to claims between the states (who did sign the agreement), while with regard to the claims of US or Iranian nationals, the Tribunal's jurisdiction is simply imposed. The provision *"… excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts…"*[330] is not justifying the

[327] Especially in taxation and investment costs.

[328] General Declaration and Claims Settlement Declaration, both of 19 January 1981, available at <http://www.iusct.org/english/page3/page3.html>.

[329] Related to the 1979 crisis between the Islamic Republic of Iran and the United States of America.

[330] Article 1 of the Claims Settlement Declaration (1981).

Tribunal's forced jurisdiction, since at the time of entering into such (or any) contracts, the parties could not have been aware of the future establishment of the Tribunal and its compulsory and exclusive jurisdiction, in order to exclude it – should they wished to.

Consequently, treaties come in conflict with party autonomy not at the level of procedural details regulating the proceedings, but at the core level of generating arbitration. Separated from the other types of arbitration for good reason, investment arbitration appears as a blatant contradiction to the principle of party autonomy being the cornerstone of arbitration – at least with regard to arbitral jurisdictions imposed upon investors with no or limited alternative choices available; a contradiction that can hardly be solved by individual actions, but which may ultimately work in favor of investors (considering the protection offered by arbitration as opposed to litigation in the host country's courts). Created with the same protective purpose, the Iran-US Claims Tribunal also contradicts party autonomy, being part of the mandatory international arbitration category – in which both the cause and the solution to this basic conflict are out of the parties' hands.

IV.3. Cohabitation between party autonomy and international norms not directly regulating arbitration

Although regularly placed upfront in a chapter, cohabitation is now left for the end, because it involves international sources of norms regulating other issues than arbitration. Arbitration is a complex mechanism, and as such is often influenced by legal resources that do not directly regulate arbitration, but have a different – but broad or tangential – scope of application. In fortunate situations their interaction with the party-autonomy-driven arbitration does not amount to conflict, but may create interesting legal issues. In this sense, a UK court had to decide whether arbitration agreements were in breach of the Human Rights Convention[331]; in *Paul Stretford v. Football Association Ltd*[332] an arbitration clause included in the license rules of a football agent, while in *Sumukan Ltd v. Commonwealth Secretariat*[333] a clause excluding an appeal on point of law, were both claimed to be contrary to Article 6 of the Convention – and were heard by the Court of Appeal together.

Art. 6.1 of the Human Right Convention provides that "*in the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a*

[331] European Convention on Human Rights, Rome (1950).

[332] [2007] EWCA Civ 238.

[333] [2007] EWCA Civ 243.

reasonable time by an independent and impartial tribunal established by law". In the first case the claimant contended that the arbitration clause – being in conflict with Art. 6 and the principles of natural justice – is null and void or inoperable; nevertheless, the court found that, pursuant to the jurisprudence of the European Court of Human Rights (ECHR), "*where the parties have voluntarily entered into an arbitration agreement, they are to be treated as having waived their rights under Article 6*"[334]. In addition, arbitration satisfies the requirement of Art.6 of "*a fair and public hearing within a reasonable time by an independent and impartial tribunal*", whereas the condition of this tribunal being "*established by law*" is waivable according to English law.

In the second case the claim referred to an arbitration agreement making reference to a statute available upon request, which provided for the award to be "*final and binding on the parties and […] not subject to appeal*"[335] – a stipulation meant to expressly limit state courts' right to review, but claimed to infringe the Human Rights Convention as not concluded voluntarily and in full awareness. The court, when finding that the exclusion of the right to appeal (allowed by Sec.69 of the UK Arbitration Act[336]) was validly incorporated into the contract, also observed that the contractual provision was not onerous, but was to the advantage of both parties. It is not obvious whether this characteristic of the clause was of

[334] As related in Sheppard, *supra* note 232.

[335] *Id.*

[336] Section 69 (1) provides that "*unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings*."

any relevance in reaching the decision or the most essential element was that the contesting party could have read the statute containing the clause, should it wish to – so that "*it would not have been surprised to find an exclusion of the right to appeal an award*"[337] – but in any case, the court found that such an exclusion clause was not contradicting the provision of Art.6 of the Human Rights Convention. These decisions – being in line with the practice of the ECHR[338] – confirmed that arbitration as such is not inconsistent with the Human Rights Convention, and its Article 6, and that courts will give effect to voluntarily agreed arbitration agreements. Accordingly, while party autonomy seems to have difficulties coexisting with international sources of norms regulating arbitration, it can get in contact without conflicts with international norms not aimed to regulate arbitration.

[337] As reproduced in Sheppard, *supra* note 232.

[338] E.g. Dewer v. Belgium [1980] 2 EHRR 439.

CHAPTER V. COHABITATION AND CONFLICT BETWEEN ARBITRATION RULES AND LAWS

Apart from party autonomy, arbitration rules and state laws are the two major sets of norms regulating arbitration. And although both become applicable only as a result of the parties' choice – or failing to make such choice by the decision of the arbitral tribunal supplementing the parties' will – both rules and laws can then override the parties' stipulations to some extent. In order to avoid any confusion, it needs to be clarified that – although both rules and laws regulate arbitral procedure – the difference between the two lies not only in their source of origin, but also in their scope. Accordingly, as a general rule, one can say that rules (institutional or *ad hoc*) provide for the procedure to be followed by the arbitral tribunal, but do not regulate the validity of the arbitral agreement, the tribunal's relationship with state courts, or the post-award procedures; as opposed to this, arbitration laws (the *lex arbitri* in a case) usually cover for all the elements of arbitration in a broad sense, having a much wider scope of application[339].

Ideally the role of both rules and laws is to ensure a secure legal framework in which arbitration can exist free of uncertainties and procedural deadlocks. Also ideally, the two (*i.e.* rules and laws) supplement each other and provide a collaborative-like procedural

[339] *See* JEAN-FRANCOIS POUDRET & SEBARTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION458 (Thomson Sweet & Maxwell, 2nd ed. 2007).

environment for arbitration. In this sense, the arbitral proceedings are primarily regulated by the parties' will, followed and supplemented by the arbitration rules[340], and in case of need supplemented by general principles and optional rules provided by the *lex arbitri*. In an imperfect world, however, the provisions of rules and laws may sometimes contradict each other; the conflicts created raising policy questions and dilemmas of hierarchy in application.

V.1. Co-existence of arbitration rules and laws

The procedural rules of major arbitral institutions and the arbitration law of the country where these institutions are located usually tend to be in unison. Naturally, as legislation cannot be changed so easily, it will be for the institutions to adapt their rules to any legislative amendment in order to avoid contradictions and conflicts between the potentially applicable rules and the law of the seat.

The Rules of the Vienna International Arbitral Centre (VIAC) were updated in this sense in 2006, in order to be immediately in line with the 2006 amendments of the Austrian arbitration legislation[341] affecting - among others[342] - the procedures of challenge of

[340] Or sometimes restricted by such rules, as analyzed in II.2.2. above.

[341] Sections 577-618 of the Austrian Code of Civil Procedure.

arbitrators[343], jurisdiction pleas[344], counterclaims[345], interim measures of protection[346], applicable law on the merits[347] and the amendment of awards[348]. Similarly, the ICC is currently revising its Rules of Arbitration[349], not only to reflect the changing needs of arbitration practice, but also to stay in line with the French arbitration legislation amended in 2011[350].

Of course, the parties' choice of an institution to administer their case does not always go hand-in-hand with the choice of the country (where that institution is located) as the seat of arbitration, or that country's law to serve as *lex arbitri*. And because in arbitration the parties have practically unlimited freedom to combine these elements upon their own wish

[342] For a full, detailed discussion of the changes, *see* Gerold Zeiler and Barbara Steindl, *New act leads to revision of Vienna Rules*, ILO Newsletter of May 17, 2007, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=27f06b55-341d-4641-80ca-c6f39ba24f75>.

[343] New section 588(2) of the Code of Civil Procedure; Art. 16(1) of the 2006 Vienna Rules.

[344] New section 592 of the Code of Civil Procedure; Art. 19 of the 2006 Vienna Rules.

[345] Art. 11 of the 2006 Vienna Rules.

[346] Section 593 of the Code of Civil Procedure; Art. 22 of the 2006 Vienna Rules.

[347] Section 603 of the Code of Civil Procedure; Art. 24 of the 2006 Vienna Rules.

[348] Section 610 of the Code of Civil Procedure; Art. 29 of the 2006 Vienna Rules.

[349] The new rules are planned to be released in September 2011.

[350] Decree No 2011-48 of 13 January 2011, entered into force on May 1, 2011, amending Book IV on Arbitration of the French Code of Civil Procedure.

and also because state laws do vary, no institution[351] can realistically exclude all possible conflicts with any state law that may become applicable in a case submitted to it. For this reason, several institutional rules contain a provision expressly subjecting themselves to the mandatory laws of the applicable law[352], while many others leave it to the state legislation to provide whether there are any limitations to their applicability.

In addition to indicating a more-or-less clear hierarchy, institutional rules also try to fit their provisions within the permissions contained by national legislation. In such attempt to smooth the cohabitation of rules with laws – but also to avoid uncertainties created by eventual ambiguous party stipulations – institutional rules sometimes contain an automatic use of the opt-out opportunities offered by state law. In this sense, rules often expressly rule out the applicability of statutory provisions that can be excluded by the parties – so that the

[351] At least no institutions allowing arbitration having a different seat than the country where the institution is located.

[352] *See* for example Art.1.3. of the UNCITRAL Arbitration Rules:

"*These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail*";

Art.1.b. of the ICDR International Arbitration Rules of the AAA:

"*These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail*";

or Art.2.2 of the new Milan Rules (2010):

"*In any case, mandatory provisions that are applicable to the arbitral proceedings shall apply*."

opt-out is made through the application of the institutional rules, even without an explicit party stipulation.

Such provisions appear, for example, in the LCIA Rules and the ICC Rules, both of them providing for a waiver of the "*right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made*"[353]. Consequently, parties opting for the application of these rules automatically waive their right to appeal or review – subject to such waiver being permitted by the applicable law, depending on the chosen seat of arbitration. Logically, any applicable legal provision to the contrary will automatically make these waiver rules ineffective – a flexible construction that is very efficient in avoiding conflicting applicable provisions. The only obvious problem that these automatic waivers may cause is that parties – if not fully aware of the rules they choose – may waive a right they may otherwise not wish to give up.

The other – not so obvious – problem is that state courts may be reluctant to accept waivers by reference; hence rendering the entire construction ineffective. US courts, for example, expressed on repeated occasions that "*the right to recourse is not waived by adoption of these [*i.e. ICC*] rules"*[354]. Similarly – although avoiding to address the issue directly – an Indian court rather declared an ICC award rendered abroad (but under Indian

[353] Art.26.9 of the LCIA Rules (1998) and Art.28(6) of the ICC Rules (1998).

[354] The Shaw Group, Inc. et.al. v. Triplefine International Corporation (Taiwan), US District Court, Southern District of New York, No. 01 CIV. 4273 (LMM), judgment of 8 September 2003 (29 Yearbk. Comm. Arb'n 2004) 1055, with reference to M&C Corp. v. Behr & Co., 87 F.3d 844, 847 (6th Cir. 1996).

law) domestic, than to accept the applicability of the Art.28(6) waiver provision by reference[355]. Consequently, even though rules become applicable based on party autonomy and reflect the parties' will, when it comes to important aspects of arbitration – such as recourse against awards – they cannot replace express party provisions. Accordingly, in this relationship between rules and laws, it is the third source – party autonomy – that appears to prevail; as it is quite uncertain that automatic waiver provisions – even if created with the aim of ensuring shorter, one-step proceedings and fill in gaps in party stipulations – will indeed achieve their purpose, if no express waiver is incorporated in the parties' agreement.

The relationship between rules and laws is, therefore, not so straightforward and free of hardship. Moreover, while in most cases the relationship that has to be considered is only between the applicable rules and one national legislation, the Stockholm Rules, for example, broaden the possibilities by providing that in case the parties fail to agree on the applicable law, "*the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate*"[356] [emphasis added]. The provision, being an elegant deviation from the classical terms – reflected, for example, by the Model Law[357] – makes an entire body of law available, opening the door to more regulations to which arbitration may be subjected to. Besides the slight inconsistency between the Model Law and the Stockholm Rules, this

[355] Nirma Ltd. v. Lurgi Energie und Entsorgung GmbH et al., High Court, Gujarat, judgment of 19 December 2002 (28 Yearbk. Comm. Arb'n 2003) 790 – 809.

[356] Art. 22(1) of the Stockholm Rules.

[357] Art. 28(2) of the Model Law, providing that "*the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*".

provision also means a more complex net of regulations for the applicable rules and the parties' will to coexist with – or, according to the law of large numbers[358], to generate more conflicts.

V.2. Arbitration rules contradicting legal provisions regulating arbitration

Although arbitration rules are designed to work together with national arbitration laws, complementing each other and forming one procedural framework, this cohabitation may sometimes be misunderstood and coexistence replaced by mutual exclusion – for example due to unfortunate legal language or unfortunate court interpretation; as it happened to Section 15 of the Singapore Procedural Arbitration Law. The 2001 version of this legal provision had an unclear language stating that the law is not applicable if the parties agree that their dispute is to be settled *otherwise* than in accordance with the said law. This

[358] The law of large numbers is a probability theory theorem, according to which the probability of an expected outcome increases with the increase of the number of trials – in this case, the theory is applied by analogy (i.e. the chance for a conflict increases with the increase in the number of regulations to consider).

language was interpreted by the court[359] in the sense that an express choice for the ICC Rules also implied the exclusion of the Arbitration Model Law (incorporated in the Procedural Arbitration Law). The Singapore Parliament stepped in to protect the arbitration reputation of the country and urgently passed an amendment to the Act, specifying *"for the avoidance of doubt, [that] a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned"*[360].

In spite of this clarification, the Singapore courts managed to come up with yet another twisted interpretation. In *Dermajaya Properties*[361] the court held that by choosing the UNCITRAL rules the parties did not intend to exclude the Procedural Arbitration Law; however, the court also noted that when the Model Law applies, any other incompatible sets of rules (in this case, the UNCITRAL Rules) would be completely excluded. The Parliament stepped in once again to clarify this issue, and introduced Section 15A to "*declare for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be*

[359] John Holland Property Limited (Australia) v. Toyo Engineering Corporation (Japan) [2001] 2 SLR 262.

[360] New paragraph (2) to Section 15 of the Singapore Procedural Arbitration Law.

[361] Dermajaya Properties Sdn Bhd (Brunei) v. Premium Properties Sdn Bhd (Malaysia) and CFE Holdings (Malaysia) Sdn Bhd (Malaysia) [2002] 2 SLR 164.

given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate"[362].

A very similar situation generated heavy criticism in Australia as well, where the Queensland Court of Appeal held that an express choice of a particular set of arbitration rules automatically implies the intention to opt out from the Model Law[363]. The decision was since legislatively reversed by the 2010 amendments to the Australian International Arbitration Act, but those amendments only apply to arbitration agreements entered into after July 2010, leaving earlier agreements at risk under the controversial Queensland decision.

If legislative intervention is needed to settle apparent conflicts between law and rules in countries that host respected and high-profile arbitral institutions[364], then one can easily imagine the frequency and level of possible conflicts between laws and rules in other jurisdictions having less significant arbitration practice. The areas in which such conflicts may arise are various, and the theoretical analysis of each and every possibility would be practically impossible. As a starting point, the provisions of the Model Law can be compared with various institutional rules; reflecting only a small fraction of the possible divergences, but to offer a basis for a case-by-case analysis that one should make – preferably before choosing the applicable rules and laws.

[362] New Section 15A of the Singapore Procedural Arbitration Law.

[363] Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing GmbH (2001) 1 QdR 461.

[364] Both SIAC (Singapore) and ACICA (Australia) are premier international arbitral institutions.

In any case, in order to establish which rules and laws can cause conflicts, one has to establish the mandatory or non-mandatory nature of the rules and laws involved. Mandatory legal provisions – although potentially conflicting with rules or party stipulation – do not cause much dilemma, nevertheless, since their mandatory nature ensures their supremacy entrusted by the legislator; hence if there is any rule contradicting a mandatory applicable law, the law will prevail. On the other hand, with regard to non-mandatory legal provisions, there is a dilemma as to whether the rules or the law should have preference in regulating a procedural aspect.

The constitution of the arbitral tribunal – as one of the most important building blocks of arbitration – is one of the aspects that is subject to different regulations; the possibility for conflicting rules and laws being considerably higher than with regard to other, less significant procedural elements. Variations usually appear in the number of arbitrators, in the method of appointment and the procedure of challenge. As a default, the Model Law determined in Art. 10 that in the absence of party agreement "*the number of arbitrators shall be three*". As opposed to this, the SCC Rules, for example, also provides for a panel of three "*unless the Board, taking into account the complexity of the case, the amount in dispute or other circumstances, decides that the dispute is to be decided by a sole arbitrator*"[365] – ultimately leaving it to the Board of directors to decide, depending on the circumstances of the case. The

[365] Art.12 of the Stockholm Rules.

ICC, on the other hand, provides for a sole arbitrator as the default option[366] – similarly to the AAA[367] and the Milan Rules[368]. Thus, whenever any of these rules (or other rules containing similar provisions) applies in a case to be decided in a Model Law jurisdiction, there will be a conflict between the applicable rules and law – subject to the parties' failure to determine the number of arbitrators, of course. As an elegant solution, the ACICA and the Swiss rules do not provide for a default number of arbitrators, but leave it to the institution to decide "*taking into account all relevant circumstances*"[369] – if a default number provided by the applicable law is considered to be a 'relevant circumstance', then the conflict is presumably solved.

The Model Law is the source of another possible conflict when it comes to the challenge of an arbitrator. Art.13(3) provides for court proceedings in case the challenge is not accepted[370]. As opposed to this, most institutional rules provide for a final decision to be

[366] Art.8.2. of the ICC Rules:

"*Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators*".

[367] Art.5 of the International Arbitration Rules of the ICDR.

[368] Art.13.2 of the Milan Rules.

[369] Art. 6.1 of the Swiss Rules; Art.8 of the ACICA Rules.

[370] Art.13(3) of the Model Law:

"*If a challenge under any procedure [...] is not successful, the challenging party may request [...] the court or other authority specified in article 6 to decide on the challenge, which decisions hall be subject to no appeal.*"

taken within the arbitral institution[371] – a contradiction in provisions that may generate difficulties in cases conducted in a model law country under such rules.

For both the above-presented conflicts – and for any similar ones regulating other aspects of arbitration to be identified upon a case-by-case analysis comparing the rules and laws applicable for a given case – the solution lies in the hierarchy between the arbitration rules and laws. For all aspects not regulated by a mandatory legal provision, both rules and laws usually expressly state that party autonomy prevails; but in case there is no party agreement with regard to these aspects, the hierarchy between the remaining non-mandatory alternatives has to be established.

Logic would dictate that the arbitration rules – as expressly chosen and applicable in accordance with the parties' will – are a result of party autonomy and as such, have priority over the optional legal provision. However, if one considers that a state law also becomes applicable in arbitration only because of the parties' choice – directly or through the choice of seat – then the same logic would lead to the primacy of the legal provisions against the rules. This dilemma, however, is generally solved by the hierarchy expressly stated within most rules[372], according to which the applicable rules will only be replaced by those legislative provisions from which the parties cannot derogate; for all other matters the rules, and not the non-mandatory legal provisions, will be applicable.

[371] *e.g.* Art.15(4) of the SCC Rules, Art.11(3) of the ICC Rules, Art.19(4) of the Milan Rules, Art.9 of the ICDR Rules, Art.11 of the Swiss Rules, Art.14.4 of the ACICA Rules.

[372] *See* II.2. above.

V.3. Arbitration rules conflicting with laws regulating other issues than arbitration

Arbitration is sometimes influenced by legislative provisions whose aim is to regulate other legal aspects – sometimes completely unrelated to arbitral proceedings. For example, although not a frequently encountered situation, arbitral procedure may also be influenced by criminal legislation. In case an arbitrated dispute raises questions of organized crime (like money laundry or bribery), the arbitrators are faced with the question of the hierarchy between the rules providing for the confidentiality of arbitration and the laws providing for state officials to report crimes discovered while performing public activities.

Although there is a long-standing legitimate expectation for confidentiality in arbitration, actual confidentiality requirements may vary in extent and degree, depending on the rules and laws governing each case. Some rules only provide for a general obligation to keep the award confidential, while others impose strict confidentiality obligations with an extended scope[373] – including the secrecy of the existence of the dispute itself, of all documents and evidence, of all hearings and decisions – and while some rules anticipate a

[373] Like Article 7 of the Romanian Rules, or Art.43.1. of the DIS Rules, or Art.34 of the SIAC Rules.

possible conflicting obligation for disclosure[374], many do not. In the latter situation (but also in case there is an express duty of disclosure for limited reasons only) it is for the arbitrator(s) – if discovering a crime related to the dispute in front of them – to verify and to decide whether there is a legal duty of disclosure towards the state authorities[375] possibly provided by other laws.

Just as the scope of confidentiality rules differ, the intensity and the extent of the duty to announce criminal offences also vary greatly between legislations. Moreover, the particular duty of an arbitrator may also depend on the perception of the arbitrator's work and position within a particular legal system – i.e. that of performing justice administration or a private service[376] – since public institutions and individuals performing under such public institutions, but sometimes even individuals entrusted to represent judicial persons, are often required to report a crime. Moreover, if reporting a crime is more a right than a duty, than it will be left to the arbitrator's conscience whether to disclose the information to the state officials; but even in the absence of a compulsory obligation, this right "*would be enough to*

[374] *e.g.* Art.43(1) of the Swiss Rules (2004) providing for disclosure required by a "*legal duty*"; or Art. 34.2.e of the SIAC Rules (2007) providing for disclosure as compliance with legal provisions "*of any State which is binding on the party making the disclosure*".

[375] On this topic *see* Dragor Hiber and Vladimir Pavic, *Arbitration and Crime,* 25 Journal of International Arbitration 4 (2008), 461-478.

[376] Regularly, arbitration is perceived as falling outside of a state justice mechanism, but exceptions may exist.

excuse the non-observance of the duty of confidentiality that arbitrators owe to the parties as well as to the arbitral institution"[377].

This conclusion - even if at first sight contradicts the principle of party autonomy[378] – is supported by the underlying principles to any rule, namely that one has to look for what is the reason behind a right. In this case the reason behind confidentiality is only to "*protect a legitimate business interest, and not an illegitimate objective of evading detection and prosecution*"[379]. Consequently, yet not directly regulating arbitration, even a criminal law provision may impair the provisions of applicable arbitration rules. And while criminal aspects are not (or should not be) something to normally consider in advance in commercial arbitration, the influence of these – otherwise irrelevant – legislative provisions cannot be disregarded when planning arbitration.

[377] Hiber and Pavic, *supra* note 375 at 467.

[378] In this particular case the right to opt for strict confidentiality rules.

[379] Hiber and Pavic, *supra* note 375 at 477.

V.4. Procedural gaps not covered by either arbitration rules or laws

Issues not regulated by state law or by the chosen rules are also a source of potential divergence causing delay and unnecessary costs. Especially in the area of evidencing, where details on production of evidence (like preparation or cross-examination of witnesses and/or of experts, use and depth of discovery) are not covered by either the applicable law or the applicable rules, the different background experience and consequently different expectation of the parties, their counsels and the arbitrators may lead the proceedings into exhaustive procedural debates.

The laws or rules may well say that the tribunal should decide in the spirit of efficiency[380]; but in light of party autonomy (often misused as lawyers' rather than parties'

[380] UNCITRAL Model Law Art.19:

"*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

UNCITRAL Rules Art.17.1:

"...The arbitral tribunal [...] shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

autonomy) in arbitration, a lot of time and money may be spent by the time common ground is reached only with regard to procedural issues. The IBA Rules on the Taking of Evidence in International Commercial Arbitration, expressly "*set out to assist parties by providing a mechanism to fill in the gap*"[381], is a good solution with regard to evidence procedures, but unless the parties or a tribunal expressly adopt the IBA Rules, this useful tool is not automatically attached to any institutional rules and cannot assist in avoiding unnecessary complications caused by the absence of regulations from the applicable rules and law.

In order to cover this regulatory gap, more and more rules on the taking of evidence are adopted by institutions, and even the UNCITRAL Rules now provide for more detailed evidentiary procedures for ad hoc proceedings. In this sense, Art. 27 of the revised 2010 UNCITRAL Rules, for example, is in line with the 2010 version of the IBA Rules and with the latest development in practice; the changes made under the aegis of time and cost efficiency allow tribunals to reduce the scope of discovery in order to "*conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*"[382]. Similarly, the 2010 Stockholm Rules got its

[381] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0>.

[382] Art. 17.1. of the 2010 IBA Rules on the Taking of Evidence in International Arbitration. For opinion *see* Fraser Milner, Stefan Martin and Michael D. Schafler, *New UNCITRAL Arbitration Rules*, Lexology Newsletter of November 17, 2010, available at <http://www.lexology.com/library/detail.aspx?g=e5cacfa6-72c0-427e-9af6-3d0c64fba165>.

rules on evidence updated from the old version based on state court litigation, to match the current standards of international arbitration. Another recent amendment – which, however, does not seem to be similarly efficient – is the 2010 version of the Milan Rules, whose Art. 25.3. has a most unfortunate formulation, providing that "[t]*he Arbitral Tribunal may delegate the taking of evidence to one of its members*". What exactly is to be delegated and what would be the consequences of such delegation with regard to costs and review of evidence is not clear from the rules, but this innovation – while most probably done in the spirit of efficiency – rather leaves a large door open towards further disagreements and misinterpretations, instead of avoiding or solving them. The intention to "*allow the tribunal to adopt a more balanced and flexible approach to determination without sacrificing reasonable expediency*"[383] is appreciated, but broadening the institution's administrative powers and imposing the arbitrators' increased procedural powers upon the parties may eventually work against arbitration in general, if perceived as an excessive limitation of party autonomy.

Apart from the potential misuse of powers, filling the legislative gaps often fails because arbitration rules generally contain vague provisions with regard to the "*admissibility, relevance, materiality and weight of the evidence offered*"[384]; most of them failing to address the methodology to be applied by the tribunal in taking evidence. Similarly, those state laws

[383] Giovanni De Berti, *New rules for Milan Chamber of Arbitration*, ILO Newsletter of August 12, 2010, available at <http://www.internationallawoffice.com/newsletters/detail.aspx?r=21248>.

[384] UNCITRAL Rules Art.27.4.

providing for regulation on evidence taking (like the Swiss legislation following the Model Law provisions[385]) only ensure the availability of court assistance in obtaining evidence from the other party[386]. Although these provisions are useful in cases where evidence is in the other party's possession, they do not offer any support in determining how exactly to produce evidence in arbitration.

In the absence of a clear guideline, common law lawyers will most probably want the benefit of a full discovery, while there are civil law professionals who are not only unfamiliar with the details of the process, but are reluctant to make even just a mental connection between discovery and arbitration[387]. Similarly, while most civil law lawyers would find it fair and appropriate to solve the technical problems with the assistance of a tribunal-appointed expert, most common law lawyers would wish to have party-provided experts advocating in favor of their clients. The golden middle-road solution bridging such opposing

[385] UNCITRAL Model Law Art. 27:

"*The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence*."

[386] Art. 184.2. of the Swiss Private International Law Act (1987):

"*If the assistance of state judiciary authorities is necessary for the taking of evidence, the Arbitral Tribunal or a party with the consent of the Arbitral Tribunal, may request the assistance of the state judge at the seat of the Arbitral Tribunal; the judge shall apply his own law*."

[387] Professor Martin Hunter, a famous arbitration professional and scholar even refuses to pronounce 'discovery', only calling it 'the D word", considering that such evidentiary proceedings have no place in arbitration whatsoever.

expectations would be conferencing or teaming the witnesses (the so-called 'hot-tubbing'), which is more and more often used by tribunals – sometimes to the disappointment of the common law counsel.

Full consultation of the parties should, of course, assist in determining the procedure, but arbitrators need to have the power to establish limits to the evidentiary process (with regard to the particular need of the parties and of the issues in dispute, to be determined based on a case-by-case analysis). Many commercial disputes can be solved exclusively on documentary evidence, where the procession of a long line of witnesses only serves as a demonstration of power – not effectively contributing to solving the dispute. Similarly, even when witnesses are needed, the cross-examination of those witnesses (as practiced in common law litigation) may not be essential at all; but it may be useful if the credibility of the witness is in question – a rare occurrence in commercial disputes. Finally, for whatever evidentiary method is decided to be admitted, delimiting the testimonies of witnesses and/or expert witnesses to a list of issues to be addressed or a list of clear-cut questions to be answered, can also significantly contribute to an efficient case management.

Another area which suffers from confusions due to the regulatory gap uncovered by many arbitration rules or laws regards procedural time limits; a source of common dilemma for arbitral tribunals on whether to follow a timeline indicated by the parties or one that the tribunal finds more suitable, if there is none provided by the applicable rules and law. The question raises several implications: on one hand, one has to consider the balance between

the right of arbitrators and the right of the parties to shape the procedure, and whether this right is shifting from one to the other throughout the different phases of the proceedings[388]; on the other hand, if the arbitrators have the right to reshape exaggerated time limits requested by the parties, one has to consider the grounds and reasons upon which the tribunal imposes its own timeline. Furthermore, there is a third side to the same coin, when arbitrators themselves cause delays and generate inflated timetables – an aspect against which the parties can do little, if anything, in the absence of an express regulation.

Few institutional rules provide for fix time limits for each procedural phase – from the filing dates of submissions[389] through the appointment of arbitrators[390] and to the overall duration of the arbitral proceedings[391] – with even fewer providing for a timetable whose fate depends on the parties' agreement[392]; but the vast majority leave the issue of time to be handled entirely by the tribunal, subject to the parties' free will. An exception indicating strict approach to time management is contained in the Rules of the Netherland Arbitration

[388] Pryles, *supra* note 10.

[389] Like Art.3. of the ICDR International Arbitration Rules.

[390] Like Art.33 and 34 of the Romanian Rules.

[391] Like Art. 13(2) of the Ukrainian Rules.

[392] Like Art.15.1 of the LCIA Rules:

"*Unless the parties have agreed otherwise [...] or the Arbitral Tribunal should determine differently, the written stage of the proceedings shall be as set out below*" – listing then in the rest of Art.15. the recommended time limits for written submissions.

Institute, stipulating that upon request of the parties, the Administrator[393] is the only one entitled to amend the timeframes provided by the rules[394].

Within the already mentioned increasing need for efficiency-driven regulations, recent amendments to institutional rules reflect serious concern for time as well, creating an obligation for tribunals to conduct the proceedings in an expeditious manner[395]. These new provisions indicate that as soon as practice identifies the traps of unregulated procedural aspects, the easily amendable institutional rules fill the gaps relatively fast, providing for new – and more-or-less still flexible – regulations over the recently loosely controlled areas. Consequently, while conflicts and gaps in the regulation of international commercial arbitration by rules and laws may generate practical difficulties, the open market of arbitration eventually defines – through the frequently amended rules of competing arbitral institutions – the rules based on which the international game of commercial arbitration is played. It is yet another question whether over-regulating the procedure serves indeed the best interest of the parties, or returning to the basics – with higher risks but perhaps more appreciated flexibility – would ensure arbitration a more appreciated role in the resolution of international commercial disputes overall.

[393] *i.e.* the Director of the NAI.

[394] Art.5.3. of the NAI Rules:

"*The Administrator is, at the request of a party or on his own motion, authorised to extend or to shorten in exceptional cases the periods of time referred to in Articles 7(4), 12(3), 14(3), 14(9), 57(5) and 59(6).*"

[395] *See* Art. 17.1. of the 2010 UNCITRAL Rules, Art. 14.1.(ii) of the LCIA Rules, Art.19(2) of the Stockholm Rules, and the revision plans of the ICC Rules, also referred to at II.2. above.

CHAPTER VI. COHABITATION AND CONFLICT BETWEEN DIFFERENT NATIONAL SOURCES OF NORMS

Possible conflicts are understandable when occurring between different sources of norms – like party autonomy and mandatory state law – and are also somewhat easier to solve by establishing a hierarchy between the different levels. However, norms originating from the same – or same type of – source can exceptionally also generate conflicts. The present chapter will analyze the relationship between different state laws of a country, state laws of different countries, as well as the tensions raised by the judicial interpretation of statutory provisions affecting arbitration.

VI.1. Conflicting legislative provisions within the same state

The relationship between the statutory provisions of a country has no obvious international reference. Nevertheless, if a law regulating international arbitration is involved in a possible conflict with another national legal provision, the need for addressing such conflict is clearly justified. Conflicts may arise between an arbitration law and other laws,

and while there is an obvious hierarchy when this conflict involves the Constitution, the contradiction may be more difficult to solve when other statues not directly regulating arbitration, or when judicial interpretation are causing the dilemma.

VI.1.1. Unconstitutionality of arbitration law provisions

We can speak about a conflict between two national sources when a legal provision is found unconstitutional; a situation from which arbitration acts are no exception. Moreover, in the unfortunate situation of a new constitution imposed - for example - by a temporary government, it is very easy for a pre-existing law to suddenly become unconstitutional, especially when it comes to foreign relations. But there is no need in sudden changes in a country's political situation to face the unconstitutionality of arbitration provisions – as proven by the case of the Egyptian Arbitration Act[396].

The Constitutional Court of Egypt, in a 1999 decision[397] ruled that certain provisions of Art. 19 were violating a number of constitutional provisions. Art.19(1) provided that "*unless the challenged arbitrator withdraws from his or her office, the arbitral tribunal shall decide on the challenge*" of which the last part was found to be "*a violation of the general principles*

[396] Law No.27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters.

[397] Decision of November 6, 1999, in case No. 84/19 .

of justice and fairness, and puts paid to impartiality and independence, It also violates the rights of any party to a legal proceeding to a just defense"[398]. As a direct consequence of this decision, the Egyptian Parliament amended the law in question[399]; the new Art.19(1) providing for court jurisdiction to decide on the challenge of arbitrators, instead of the arbitral tribunal itself, as initially regulated.

Although the new legislation does solve the issue of constitutionality, it nevertheless opens a new problem of a potential conflict with institutional rules. In spite of the fact that Art.19 of the Arbitration Law was targeted to *ad hoc* proceedings, the Constitutional Court analyzed the issue in general, irrespective of whether it is for the purposes of *ad hoc* or institutional arbitration. Consequently, the same principles – of court jurisdiction over challenges – now seem to apply even to cases administered by institutions, even though the institutional rules may set a different procedure (and different jurisdiction) to decide over a challenge. And although the Supreme Court of Cassation has decided[400] that the choice of institutional rules excludes the application of the Arbitration Law "*save for those provisions which are mandatory in nature and pertain to public policy*"[401], the problem is that it is not clear which provisions of the Arbitration Act are mandatory or 'pertaining to public policy'.

[398] Decision related by Mohamed Salah Abdel Wahab, *Challenging Arbitrators and the Egyptian Constitutional Court*, in ILO Arbitration Newsletter of May 1, 2008, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=de7779c2-9bdc-4548-bf13-becb835ffc6d>.

[399] By Law 8/2000.

[400] Decision of February 8, 2007 in case No. 7307/76.

[401] As related Wahab, *supra* note 398.

Consequently, although institutional rules often have their own rules on challenge that fulfill the requirements of fairness and justice[402] – being thus in line with the decision of the Constitutional Court – they may nevertheless be found to be inconsistent with the new provision of the Arbitration Law.

While one constitutionality issue is being solved, another conflict with the national arbitration law is being created – again in Egypt. A decree issued by the minister of justice in 2008[403] created conflicts with the Arbitration law[404], undermining the entire system when empowering a Technical Office for Arbitration at the Ministry of Justice to decide and approve whether an award can be deposited, and accordingly enforced or not. The decree is still applied – even though it has since been challenged in court[405] – casting a serious danger over the entire arbitration process; especially considering that the approval upon which the initial deposit of an award for enforcement depends is sometimes refused for cases dealing with title to real property, or if the award concerns family/personal status[406].

[402] *See* for example Art.10(4) of the LCIA Rules; Art.11(3) of the ICC Rules; Art.12(1) of the CRCICA Rules; Art.26(6) of the CIETAC Rules.

[403] Minister of Justice Decree 8310/2008, as amended by Minister of Justice Decree No. 6570/2009.

[404] Nr.27/1994.

[405] Challenge related by Khaled El Shalakany, *Minister of justice decree subject to challenges of validity*, ILO Newsletter of January 14, 2010, available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=af371e3a-cda7-434f-96c2-c24525cf2380>.

[406] *See* "A Q&A guide to arbitration law and practice in Egypt" on the law stated as of March 1, 2011, available at <http://arbitration.practicallaw.com/3-501-7485?q=*&qp=&qo=&qe=>.

Laws are far from being perfect, and some deficiencies are identified and solved by constitutional courts. However, as just seen, some of the 'solutions' may themselves be imperfect; generating new, different conflicts between the various sources of norms regulating arbitration. Solving an unconstitutionality issue in a less than perfect manner can, thus, lead to a legislative provision – albeit constitutional – impairing the proper functioning of institutional rules, and implicitly restricting party autonomy.

VI.1.2. Conflicts between arbitration laws and acts not directly regulating arbitration

Even when arbitration legislation does not raise any questions of constitutionality, it may nevertheless be the source of possible conflicts with other national laws of the same country, especially with regard to the affect in time of conflicting provisions enacted at different moments. And even though such conflicts could theoretically be more common to domestic arbitration, in the era of electronic commerce virtually anything can have cross-border reference, particularly when it comes to consumer-related disputes. Moreover, when it comes to laws regulating – or omitting to regulate – that a certain issue is not arbitrable, the conflict is only waiting for a case to face it in practice. A classical conflict between arbitration and non-arbitration laws is regarding the parties' right to submit a dispute to

arbitration. Restrictions on arbitrability are generally based on protectionism – by protecting either public values or a certain category of parties. One such category of people is consumers, whose rights are often protected by legislation; which can then easily conflict arbitration laws.

In Canada, for example, the conflict between arbitration law and class proceedings legislation was just recently solved through statutory interpretation after an entire series of cases turning around the same issues, and a meanwhile amended legislation; with the cases also bringing into attention the variations of the same legislation enacted in the different states of the same country. In 2007 the Supreme Court of Canada upheld in *Dell*[407] an online consumer arbitration agreement contained in a hyperlinked 'terms and conditions' accepted by a simple click, on the ground that the online existence of the arbitration agreement is not in itself a "*relevant foreign element*" to determine the applicability of Art. 3149[408] – which falls under a title dealing with the jurisdiction of Quebec courts in international-related cases[409]. At the same time when the Quebec court gave preference to arbitration agreements to ban the consumers' right to commence class proceedings, two Canadian jurisdictions have enacted amendments to their consumer protection laws to prohibit mandatory arbitration,

[407] Dell Computer Corp v Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801.

[408] Art. 3149 (a) of the Quebec Civil Code providing that "*Quebec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his or her domicile or residence in Quebec; the waiver of such jurisdiction by the consumer or worker may not be set up against him or her.*"

[409] "*Title three. International jurisdiction of québec authorities.*"

especially if that would deprive the consumers of their right to file a class action[410]. In spite of this, the Supreme Court continued in the same spirit as in *Dell*, and based on the same reasoning gave again priority to arbitrators to decide whether an arbitration agreement was abusive in a consumer-contract[411] – ironically it did that on the same day when the arbitration-prohibiting amendment to the consumer protection legislation came into effect. While this decision is reflecting a much appreciated pro-arbitration approach and application of the *competence-competence* principle, it raises both consumer-protection and conflict of laws questions – even if the Supreme Court expressly stated that the new legislation had no retroactive effect.

After these two decisions, however, the balance now seems to have turned in favor of consumer class actions through a decision of the Ontario Superior Court of Justice[412]. According to this new approach, in the conflict between the public policy represented by the Class Proceedings Act (*i.e.* ordering a court to certify a class when certain applicable criteria are satisfied) and the public policy represented by the Arbitration Act (*i.e.* ordering a court to stay whenever there is an arbitration agreement between the parties), the motion for certification should be the preferred stage to determine the validity of the arbitration agreement – but without the meaning that arbitration agreements are automatically

[410] *See* Section 7(2) of the Consumer Protection Act of Ontario (2002), and Section 11(1) of the Consumer Protection Act of Quebec (R.S.Q. c. P-40.1).

[411] Rogers Wireless Inc v Muroff, 2007 SCC 35.

[412] Smith Estate v. National Money Mart Company, 2008 CanLII 27479 (ON S.C.), confirmed by the Court of Appeal for Ontario 2008 ONCA 746 (CanLII).

invalidated. Rather, the court should decide whether arbitration is preferable to the class action or not.

By this, the conflict is reduced to the level of timing and the right to determine the nature of action is allocated primarily to state courts, in order to best ensure the consumers' right and access to justice. In order to reach this conclusion, justice Perell reasoned that on one hand, the jurisdiction conveyed by a law to state courts[413] cannot be removed through an arbitration agreement, and on the other hand, the Supreme Court's interpretation of the Quebec Civil Code in *Dell* cannot influence the interpretation of the Arbitration Act to solve the tension with the class proceeding provisions in Ontario.

Within the same reasoning, justice Perell also acknowledged the *competence-competence* principle, as incorporated in legislation[414] and recognized by the Supreme Court, but subject to the exceptions expressly stated in *Dell*, namely:

> *"A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be*

[413] In this case the Class Proceedings Act.

[414] Art.943 of the Code of Civil Procedure:

"*The arbitrators may decide the matter of their own competence.*"

reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause."[415]

Further limitations of the *competence-competence* doctrine were later identified by a court in British Canada as well[416], raising increasing concerns towards Canada's overall approach towards arbitration; but at least in the cases presented above the solution to the conflicting arbitration and 'non-arbitration' legislative provisions does not seem to be either pro or against arbitration, but it is rather pro party - the interest of consumers ultimately determining the fate of an arbitration agreement, irrespective of the consumer's acceptance of that agreement. And while the conflict seems to be settled only with regard to arbitration agreements not governed by the Quebec Civil Code, Perell's reasoning "*suggest that Rogers*

[415] Dell Computer Corp v Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801, at Para 84.

[416] H & H Marine Engine Service Ltd. v. Volvo Penta of the Americas, Inc., 2009 BCSC 1389; case also discussed under II.1.2. above.

and Dell do not stand for the proposition that the jurisdiction of the courts is automatically ousted when there is an arbitration agreement in a consumer contract"[417].

Another – perhaps not so obvious – conflict between different national laws can be observed when comparing provisions originating in different acts, but nevertheless referring explicitly – but more often implicitly – to the same issues. One such issue is regarding timeframes imposed for various procedural actions determined differently in the codes of civil procedure and in arbitration laws. For example in Spain, according to Art.11(1) of the Arbitration Act, the objection to court jurisdiction for existence of an arbitration agreement has to be raised in the form of a '*declinatoria*'[418]; the act does not contain any further specification regarding time limits. However, the procedure of '*declinatoria*' is generally regulated by the Code of Civil Procedure, which sets a time limit of 10 days from the date of serving the claim[419]. Professionals and academics already raised their voices claiming longer timeframes for international arbitration, but the problem does not consist in the short time period alone.

A more challenging issue is that, although the two provisions do not come in direct contradiction, the restrictions imposed on a procedure in another legislative act may be a

[417] Wendy J Earle, *Conflict between Arbitration and Class Proceedings Statutes in Ontario Explained*, ILO Newsletter of March 5, 2009, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=b87ce2dc-d400-439d-a7c1-ef2ad71f5301>.

[418] Art.11(1) of the Arbitration Act Nr.60/2003 (in force from March 26, 2004).

[419] Art. 63 of the Code of Civil Procedure, Law Nr.1/2000.

serious source of difficulties, by *quasi* hiding vital information from those only interested in the provisions regulating arbitration. A proposal saying that Art.11 of the Arbitration Act should be interpreted in a progressive way, allowing objections to jurisdiction until the first appearance in court irrespective of the moment of such appearance[420] would solve the problem as long as some express provisions – excluding the applicability of the deadline set in the code of civil procedure – would be implemented. Up to now, however, neither such provision, nor a court decision supporting such interpretation exist, leaving the time frame for contesting court jurisdiction an issue to be argued.

The Spanish example is a good reminder that procedural rules affecting arbitration are not always contained in the arbitration act, but can originate from other legislative provisions as well. And although the combination of the different origins of procedural regulations can make legal research more troublesome, as long as there is no conflict between them, it is only a matter of being aware of all the rules, and not so much of interpreting potentially conflicting ones. Interpretation does come in to play a significant role – potentially being a source of conflict itself – when it comes to court decisions.

[420] David Arias, *Supreme Court Champions Maximum Validity of Arbitration Agreements*, ILO Newsletter April 24, 2008, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=c0c0c62c-6ad5-4a95-bd48-c2c1be3e7191>.

VI.1.3. Tensions created by the judicial interpretation of arbitration acts

Even if court interpretation cannot be considered as a distinct source of rules to directly clash with other sources of norms regulating arbitration, there are, however, examples of interpretation – and even some trends in interpretation – which may create conflicts that are comparable to conflicts between different sources of norms. Not very commonly, but yet sufficiently often to be mentioned, it may happen that a state court, when applying and interpreting a legal provision, would in its conclusion contradict that provision to some extent. And while real solution against such 'conflicts' does not exist, these controversial judicial interpretations are a valuable resource, indicating national practices and the relation towards arbitration – otherwise not clearly reflected by legislation.

More-or-less conflicting situations may be based on court interpretations that prove to be much broader or narrower than the one proposed by the legislator or reflected by previous practice; or which are not in line with the international practice - as was recently noticed in Portugal, for example. The Lisbon Court of Appeal rendered a decision in late 2010[421] which

[421] No case reference is available; *see* José Miguel Júdice and Filipa Cansado Carvalho, *A step back? Lisbon Court of Appeal decision contrasts with international practice*, ILO Newsletter of December 2, 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=5a19e31f-e931-4806-b84e-3e0c9d2ac674>.

contained such a narrow interpretation of Art.2(2) of the Voluntary Arbitration Act[422] that it practically contradicted both the provision itself and the international practice. More precisely, in spite of the provision expressly allowing arbitration agreements to be included by reference, the court decided that an arbitration agreement incorporated in a sale promissory agreement was not valid for a dispute based on a subsequent giving in payment promissory agreement, in spite of the relationship between the two contracts (*i.e.* that the latter, concluded just one day after the former, expressly absorbed elements of the former agreement – albeit not expressly the dispute resolution clause). The court held that the parties should have included their intention to arbitrate expressly in the second contract; a decision that raises concerns in the local arbitration community, as reflecting a new tendency towards non-acceptance of referred agreements[423] – a practice otherwise internationally recognized.

[422] Alternative Dispute Resolution (Voluntary Arbitration), Law No. 31-1986, 1986, Article 2(2) providing:

"An arbitration agreement included either in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication of which there is written proof, is considered as concluded in writing if those documents contain the agreement directly or refer to a document in which the agreement is included" [emphasis added] (Unofficial translation prepared by DárioMoura Vicente, Professor of Law, University of Lisbon).

[423] See Júdice and Carvalho, *supra* note 421.

The judgment also seems to be in clear contradiction to other recent decisions[424], reason for which the local arbitration professionals are expecting it to be reversed[425].

In any case, such unusual court interpretations are a good indication of a state's pro- or anti-arbitration approach, and worth to be considered together with the existing legislation when choosing a seat of arbitration. Court decisions are of particular relevance in common law countries, where statutes are not the only law to be considered; nevertheless, civil law court decisions are also important to observe, as they may become relevant as practice when court intervention is needed during any phase of arbitration. Therefore, one should choose a seat for arbitration not only in light of the existing law, but also in light of the existing court practice in the given jurisdiction. Choices are much more limited when it comes to enforcement of an already existing award – jurisdiction at this phase being determined by the location of assets – but nevertheless, awareness of local court practices is important, even if one cannot fully escape the risks of an unfriendly jurisdiction.

[424] Decisions of January 13, 2010 and November 25, 2009 of the Lisbon Court of Appeal, referred by Júdice and Carvalho, *supra* note 421. The decision is of relevance for analyzing the extension of arbitration agreements to non-signatories – *see* II.3.2. above.

[425] Not yet filed at the date of the submission of the present thesis.

VI.2. Contradictions and conflicts between arbitration laws of different states

The variety of contradictions between different national laws is almost endless, representing a potential subject of an individual research in itself. However, in practice there is rarely a real conflict between the state laws of different countries within the same arbitration, as – apart from the obvious possibility of regulating each arbitral element by a different law[426] – it is not common to combine several applicable laws to the same segment of arbitration. (For the purpose of clarification, conflict here should not be understood as a 'conflict of laws', but as an actual contradiction between the provisions of different equally applicable laws.) Parallel legislation from different states may nevertheless affect the same arbitration case, especially with regard to post-award proceedings.

[426] *i.e.* one for the procedure, one for the merits, another one regulating the contract itself, and a different one governing the arbitration agreement.

VI.2.1. The regulation of judicial review of arbitral awards in different countries

A source of eternal debate is the extent, the scope, and the jurisdiction of courts exercising judicial review of arbitral awards – with naturally differing opinions and accordingly different state legislations. As shown above, the issue of court review generally can appear in conflicts between party stipulation and the applicable law[427]; sometimes there is also a tension between state law – as interpreted by courts – and the international sources of norms[428] with regard to the recognition and enforcement of foreign arbitral awards. For the purpose of the present chapter, however, only the appeal and setting aside procedures - as regulated by different state laws – are included here, while the recognition and enforcement procedures are left entirely for the analysis of conflicts involving international sources of norms of Chapter VII[429].

[427] *See* II.2.2. above.

[428] *See* VII.2.2. below.

[429] *Id.*

VI.2.1.1. The scope of judicial review

The existence of some court scrutiny of arbitral awards increases the efficiency of international arbitration overall, even if the scope of such scrutiny is subject to variations under the different legal systems – a source of difficulties and conflicts that determines some scholars to prefer no or very little scrutiny[430]. Some court review at the seat of arbitration decreases the risk of arbitrators' improper conduct and increases the efficiency and speed of enforcement procedures, and most enforcing courts respect and rely on the review made within a challenge procedure conducted at the seat of arbitration[431]. Consequently, the solution to some states applying "*whatever measures of judicial control*" they want to cases conducted within their jurisdiction[432] is not the complete abolition of any judicial scrutiny, but is rather the harmonization of legislative provisions with regard to the grounds for such review of arbitral awards[433].

The UNCITRAL Model Law – the most comprehensive attempt for harmonization so far - provides for the procedure of setting aside as the "*exclusive recourse against arbitral award*" on an exhaustive list of grounds[434]; provision adopted by many state legislations

[430] *See* Philippe Fouchard, *La Portreé international de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 Rev. arb. 329.

[431] Abedian, *supra* note 225 at 4.

[432] W. Laurence Craig, *Uses and abuses of appeal from awards,* 4 Arb. Int'l 174 (1988).

[433] Abedian, *supra* note 225 at 4.

[434] UNCITRAL Model Law Art.34:

verbatim. Some, however, although following the guideline of the Model Law, have restricted or even expanded the list provided by the Model Law – and by this the possible grounds for judicial scrutiny of awards – creating discrepancies that should be considered when choosing one seat over another.

"Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

In this sense – without pretending for this to be an exhaustive list – France and Switzerland have restricted the grounds of review, while for example Finland expanded the list offered by the Model Law. France excluded the grounds of incapacity and arbitrability, and in reformulating in a much shorter form the other ground, it omitted to say under which law the arbitral agreement should be valid; Switzerland also excluded incapacity and arbitrability, doesn't even mention the arbitration agreement – although wrong decisions on jurisdiction appear among the permitted grounds – and listed all other grounds in a very simplified form. Finland, on the other hand, provides for an additional ground (compared to the Model Law), namely that "*an arbitrator could have been challenged under section 10, but a challenge properly made by a party has not been accepted before the arbitral award was made, or if a party has become aware of the ground for the challenge so late that he has not been able to challenge the arbitrator before the arbitral award was made*"[435].

Similar extended scrutiny is permitted under the Iranian Arbitration Act[436] "*leav*[ing] *open, at least in theory, the possibility of revisiting the merits of the case by the reviewing court in certain instances*"[437]. The new grounds introduced by the Iranian Act refer to the decisive vote of an arbitrator whose challenge has been sustained (as the arbitrator's bias or lack of independence questions the integrity of the tribunal rendering the award); to the reliance on a document found forged by a *res judicata* judgment; and to the discovery of new

[435] Section 41.1(3) of the Finland Arbitration Act 967/1992.

[436] International Commercial Arbitration Act (1997).

[437] Abedian, *supra* note 225 at 12.

evidence concealed by the opposing party. In addition, the Iranian Act (just as the Finnish one) is also talking about awards that can be found null and void *ab initio.* Grounds for nullity in Iran are non-arbitrability, public policy, good morals, mandatory law and immovable properties situated in Iran regulated by the laws of the Islamic Republic of Iran[438]; while in Finland nullity is caused by non-arbitrability, public policy, obscurity or incompleteness and written, signed form of the award[439].

These grounds open the door to an extensive review of evidence and of the merits by state courts, but are apparently rarely invoked – at least in Iran; and the mere existence of the possibility "*should not be a cause of concern for the arbitration community*"[440]. Nevertheless, these grounds are presented here to raise awareness of the slight differences that may exist between different legislations potentially chosen by the parties even only through the choice of a seat. Although many of the grounds are very similar to what we know from practice and from the Model Law, the nature and the extent of the judicial review allowed by them is different, as well as the consequences of this review.

Apart from the 'slight' differences just presented, there are extremes as well – although not so common anymore. In the past, in certain circumstances no judicial review of awards was allowed whatsoever in some jurisdictions. The first country to compulsorily eliminate the

[438] Art.34 of the Arbitration Act.

[439] Section 40(1) of the Finland Arbitration Act 967/1992.

[440] Abedian, *supra* note 225 at 15.

review of the awards rendered within its jurisdiction was Belgium, through the 1985 version of Art.1717(4) of the Judicial Code[441], following the French principle that "*a State would have no entitlement, or indeed no benefit, to review awards rendered on its territory as long as neither party is seeking enforcement of the award in that State*"[442] – as reflected in the French case law before 1981[443]. Due to concerns from the arbitration and business community however, the idea of total lack of judicial scrutiny was then abandoned both in France[444] and in Belgium[445], the latter now providing for similar grounds as those existing in Iran - still allowing the state courts to look into the merits of a case[446].

[441] Art.1717(4) of the Belgian Judicial Code:

"*Belgian courts can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral award is either a physical person having Belgian nationality or residing in Belgium or a legal person formed in Belgium or having a branch or some seat of operation in Belgium*."

[442] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 63 (Nijhoff Publishers 2010).

[443] General National Maritime Transport Co. v. Société Götaverken Arendal, Paris Court of Appeal, February 21, 1980, 1981 Rev. arb. 524; AKSA v. Norsolor, December 9, 1980, Paris Court of Appeal, 1981 Rev. arb. 306.

[444] Through the International Arbitration Decree of May 12, 1981.

[445] Through the amendment of Art. 1717(4) and grounds for setting aside included in Art. 1704 of the Judicial Code on May 19, 1998.

[446] Art. 1704(3) of the Judicial Code:

"*An award may also be set aside:*

if it was obtained by fraud

The extension of the judicial review to the merits of the case, although diminishing one of the main differences between arbitration and litigation, is still practiced in some countries. In this sense, section 69 of the English Arbitration Act provides for an appeal on a question of law[447] – albeit through a non-mandatory provision, and under limited conditions[448]. Similarly,

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if it is based on evidence that has been declared false by a judicial decision having the force of res judicata or on the basis of evidence recognised as false;

if, after it was made, a document or other piece of evidence is discovered which would have had a decisive influence on the award and was withheld through the act of the opposing party".

[447] Section 69. "*Appeal on point of law.*

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings."

[448] Section 82(1) defining a "*question of law [as meaning] (a) for a court in England and Wales, a question of the law of England and Wales, and (b) for a court in Northern Ireland, a question of the law of Northern Ireland"*;

The appeal must be registered within 28 days from the award or any other review process (Section 70(3));

Section 69(3) list a set of conditions, providing that " *Leave to appeal shall be given only if the court is satisfied that the determination of the question will substantially affect the rights of one or more of the parties, that the question is one which the tribunal was asked to determine, that, on the basis of the findings of fact in the award—*

the decision of the tribunal on the question is obviously wrong, or

the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question";

And in addition, according to Section 70(2), "*An application or appeal may not be brought if the applicant or appellant has not first exhausted—*

the Swiss Intercantonal Arbitration Concordat[449] applicable to international arbitration held in Switzerland if the parties expressly and explicitly agree so, contains an expansion of the classical procedural and public policy grounds for annulment, supplementing them with "*arbitrariness*" to include "*evident violations of law and equity*"[450] – a notion vague enough to allow review on the merits. In any case, the risk of unwillingly falling under the provisions of the Concordat and consequently to face an extended judicial scrutiny is minimal, as the courts are very strict in accepting its applicability[451]. Finally, the Egyptian Arbitration Act[452], although based on the Model Law, also contains an additional ground permitting review on the merits, providing that an award may be annulled "[i]*f the arbitral award failed to apply the law agreed upon by the parties to govern the subject matter in dispute*"[453]; thus allowing courts to review awards on issues of law - a scrutiny not allowed by the Model Law and not common to other jurisdictions either.

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any available arbitral process of appeal or review, and

any available recourse under section 57 (correction of award or additional award)."

[449] Intercantonal Arbitration Convention of August 27, 1969.

[450] Art.36(f).

[451] Subject to the unambiguous exclusion of the Swiss Federal Statute on Private International law. *See* Case 4P.243/2000 decided by the Federal Supreme Court on 8 Januar 2001 (ASA Bulletin, Kluwer Law International 2010 Volume 28 Issue 2 , 335 – 341).

[452] Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters.

[453] Art. 53.1.(d) of the Egyptian Arbitration Law.

A proposal for a harmonized reform of the scope of judicial review by the courts at the seat of arbitration[454] suggested the possible exclusion of public policy grounds completely, as a source for contradictory interpretation and practice; or at least its replacement with the ground of 'international public policy', based on the model of the French provision[455] – an example already followed in practice by Italian and Swiss case law.[456] The same proposal (probably following the Iranian model) also argued in favor of including "*the possibility of action in revision in cases of fraud, forgery and concealment of documents […] arbitrator bias and corruption as possible grounds for annulment*"[457] as contributing to the efficiency of the system of judicial review.

Somewhere between the total absence of judicial review and the review on the merits of arbitral awards, a proper solution - that would also reflect the party autonomy principle – seems to be rather the possibility of a fair review combined with the right of the parties to opt out from such review. In any case, in the presence of strict legislative limitations, any party stipulation increasing, decreasing or opting out of judicial scrutiny may be of no effect in the

[454] Proposal made by Abedian, *supra* note 225 at 20.

[455] Art. 1520.5 and 1514 of the Code of Civil procedure, as amended by the Decree No. 2011-48/ 2011.

[456] Abedian, *supra* note 225 at 20; also containing detailed analysis of cases of the Milan Court of Appeal and the Swiss Federal Tribunal.

[457] Abedian, *supra* note 225 at 18.

best case - or may be a source of undesired complications causing excessive loss of time and money, as already shown above[458].

VI.2.1.2. The jurisdiction of courts executing judicial review

Besides the concern of finding a balance between too much or insufficient judicial review, the second major issue to generate contradictions between different state laws is which courts should execute the review. As anticipated above with regard to the conflict between the different legislative provisions regulating judicial review, these laws would normally not come in direct conflict, due to the fact that one case could hardly involve the application of so many state regulations. Nevertheless, precisely due to the different regulations, this question does raise conflicts, if courts of more than one state find to have jurisdiction over the review of an arbitral award – each acting on its very different grounds presented above; situation that could lead to conflicting judgments.

As always, there are two sides of this story as well. On one hand, there are voices claiming that 'for many theoretical and practical considerations' the courts of the seat should have primacy to perform any kind of judicial review[459] – advocating in favor of exclusivity of

[458] *See* II.2.2.

[459] Abedian, *supra* note 225 at 3.

"*any judicial review, other than the control exercised by enforcement courts*"[460] in favor of the courts at the seat of arbitration; including "*the exclusion of any indirect attempts by courts of other jurisdictions to obstruct international arbitration, by inter alia, exercising jurisdiction to issue anti-arbitration injunctions*"[461].

On the other hand, however, in spite of strong incentives also coming from the Model Law (in favor of giving exclusive jurisdiction over annulment to the court of the seat[462]), practice doesn't always reflect the same perception. There are states whose national courts, while not being the seat of arbitration, nevertheless do interfere with the arbitral proceedings, assuming extraterritorial jurisdiction over a set aside action (or in more disguised forms, issuing 'anti-arbitration' or 'anti-enforcement' injunctions) based on the applicability of the law of that country irrespective of the seat. Such situation may arise, for example, due to lack of a legislative definition of the scope of application of the Arbitration Act, the gap allowing national courts to assume jurisdiction even if the arbitration was seated abroad - such gaps exist for example in the Iranian Act[463], as well as in the Brazilian Act[464].

[460] *Id.*

[461] *Id.*

[462] Art.1(2) of the Model Law provides that "*the provisions of this Law […] apply only if the place of arbitration is in the territory of this State.*"

[463] The Law on International Commercial Arbitration (1997).

[464] Law No 9.307 of 23 September 1996.

A gap created by improper definition of foreign arbitral awards may create a similar situation, courts being able to assume jurisdiction to set aside an award qualified as domestic if any connection to the country exists[465], even if the seat is in a different jurisdiction. India, for example - already notorious for its court practice and for leaving "*the task of evolving the law to a judiciary influenced by precedents, old fears, and some rare instances of modern outlook*"[466] – has relied on the deficient formulation of its Arbitration Act to conclude that Indian courts can intervene in any arbitration involving an Indian party, irrespective of the seat and even if the award was not rendered under Indian procedural law - unless the parties have expressly excluded the provisions of Part I of the Arbitration Act, otherwise dealing with domestic arbitration[467]. Luckily enough, this excessively stretched extraterritorial approach has been since then brought within the focus of the legislator through a Consultation Paper[468], with the aim of prohibiting courts to set aside foreign awards; and consequently to avoid contradictory court decisions from different jurisdictions.

[465] Like an applicable law.

[466] Alok N. Jain, *Yet Another Misadventure by Indian Courts in the Satyam Judgment?*, Volume 26 Issue 2 Arb'n Int'l (2010), 251 – 280.

[467] Venture Global Engineering v. Satyam Computer Services Ltd, Supreme Court of India, AIR 2008 SC 1061, case referred in Jain *supra*

[468] Consultation Paper on the Proposed Amendments to the Arbitration and Conciliation Act 1996 issued by the Indian Ministry of Law and Justice, available at <http://lawmin.nic.in/la/consultationpaper.pdf>.

A severely criticized example of conflicting judgments resulted from two state courts finding to have jurisdiction to set an award aside is the case of *Pertamina*[469], in which a Swiss award was set aside in Indonesia (the country of the losing party) after a request to set aside has been refused in Switzerland; and enforcement of the award was sought in several NY Convention states, including the US. The central District Court of Jakarta annulled the award on public policy grounds and also issued an anti-enforcement injunction providing for a considerable penalty. As request for recognition and enforcement has already been filed in the US, this injunction gave rise to a debate and several judgments, until finally a US District Court found that "*although Indonesia has already purported to annul the Award, such annulment in no way affects the authority of the district court (or this court) to enforce the Award in the United States - which is, after all, the principal task of a U.S. court under the Convention*"[470]. Although in the case of *Pertamina* the US accepted recognition and enforcement, such conflicting setting aside decisions may lead to refusing enforcement under Art. V.1.(e) of the New York Convention[471] – in spite of another parallel judgment refusing annulment.

[469] Karaha Bodas Ccompany LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357.

[470] 335 F.3d 357, at 374.

[471] Art. V.1. provides that "*recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

[...]

The risk of such annulment decisions may exist especially in case of state-owned companies from countries that would make use of extraterritorial jurisdiction to protect their assets and to obstruct international arbitration. And while the national legislation of the contracting parties is not a matter of free choice, the applicable law is; thus the parties should pay extra attention when opting for a seat or an applicable law, in order to avoid the later application of Art. V.1.(e).

VI.2.2. The issue of state sovereignty in international commercial arbitration

Whenever a state is party to arbitration, additional legal issues are getting involved besides the exclusively arbitration-related regulations, due to the specificities of one of the parties and its special rights and obligations. One such additional issue is related to a state's sovereign rights – considering that, according to international law principles of state immunity, no enforcement against the assets of a state can be executed in court without the consent of the state. This principle, however, raises the question of whether this immunity is

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

then automatically waived by the state's consent to arbitration[472]. Since the question of state immunity is not uniformly regulated – as the *Convention on Jurisdictional Immunities of States and Their Property* (UNCSI) is not yet in force[473] – the issue is a potential source of problem for arbitration, depending on the different and often contradictory ways it is regulated under the different national laws; or more precisely, depending on the different interpretation given by courts of how state immunity is regulated.

The two existing theories are both represented, with only a few states left today to adopt the theory of absolute immunity, and most states adopting the notion of restricted immunity limited to sovereign acts of the states – and hence not covering commercial acts. Strange enough, though, a recent OECD working paper (while not focused on investment arbitration) noted that according to a review made by the Council of Europe, "[o]*verall, […] the theory of absolute immunity continues to play a role, albeit a marginal one, in the practice of European States*"[474]. Similarly, China seems to retain the practice of absolute

[472] For the purpose of the present analysis, only the state's sovereign rights and immunity will be considered, disregarding the different question, whether this immunity is, or can be extended to a state entity or not.

[473] United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), having 28 signatories; text available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf>.; status available at <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en>.

[474] David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on International Investment 2010/2, 11.

immunity in spite of its signature of the UNCSI[475], creating thus internal conflicts between the adherence to the Convention and the state officials' expressed standpoint. On the other hand, jurisdictions like the UK, USA, Canada and Australia seem to have express regulations favoring the restrictive theory, specifically addressing arbitration as an exception from the state's sovereign immunity[476].

The question of state sovereignty is usually raised at two different stages, namely as an objection to jurisdiction and as an objection against recognition and enforcement - with the governing laws and the chosen rules determining both cases. At the arbitration phase, the objection can raise the question of whether state sovereignty is applicable to arbitration at all – as opposed to court proceedings involved in setting aside or enforcement procedures. From the court decisions not directly addressing this question it can be implied that state sovereignty is applicable to arbitration, and as such, it can be waived. There are, of course, contrary opinions as well, claiming that the defense of sovereign immunity is simply unavailable in arbitration[477] and as such cannot be subject to any waiver. In any case, the

[475] Signed the Convention on 14 September 2005.

[476] *See* section 9 of the UK State Immunity Act 1978; Section 1605(a)(6) of the US Foreign Sovereign Immunities Act (28 USC 1605); Art.5. of the Canadian State Immunity Act R.S.C. 1985, c. S-18 – not expressly on arbitration, but on commercial activities generally; and Section 17 of the Australian Foreign States Immunities Act 1985.

[477] *See* J. Gillis Wetter, *Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals* , Volume 2 Issue 1 Journal of International Arbitration (1985), 7 - 20.

issue of immunity can be raised in front of a state court during enforcement or setting aside procedures, and the waiver of such immunity may become relevant within that phase.

In this sense, in *Creighton v Qatar*[478] the French Supreme Court decided that Qatar has waived its sovereign immunity by its consent to arbitrate under the ICC Rules, which provide for a waiver of the right to any appeal against execution[479]. Similar provisions are included in other institutional rules as well[480], but whether the mere adoption of these rules validly implies a waiver of the sovereign immunity is still debatable. The rules themselves make such waiver subject to legal possibility, when stating "*insofar as such waiver may be validly made*"[481], the applicability of the rule thus depending on the applicable law. And as mentioned before, the laws are not identical, and even more courts may have differing interpretations of apparently similar legal provisions in different states.

[478] Creighton Ltd. v. Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of the State of Qatar, Cour de Cassation, 25 Yearbk. Comm. Arb'n (2000), 443 – 534.

[479] The case was decided based on Art.24 of the 1988 version of the ICC Rules, the content of which is currently included in Art.28.6.:

"*... By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*."

[480] For example Art. 26.9 of the LCIA Rules.

[481] Art. 26.9 of the LCIA Rules, having almost identical wording as Art.28.6 of the ICC Rules.

In the same case of *Creighton v Qatar*, for example, a US Court of Appeal reached the opposite conclusion[482] based on US legislation[483], holding that by agreeing to arbitrate in France, Qatar (who is not a signatory to the NY Convention) has not demonstrated any, at least implied intention – as requested by the US Immunities Act – to waive its sovereign immunity in the US. The contradiction between the two interpretations seems to have caused some dilemma to the Hong Kong Court of Appeal in a recent case[484], eventually deciding that a separate waiver of immunity from execution is needed. In the opinion of the Hong Kong court, adopting the ICC Rules (containing the waiver provision) does not automatically imply the state's intention to waive its immunity. According to the court, "*the doctrine of restrictive immunity was part of customary international law […] incorporated into the common law of*

[482] Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118.

[483] Section 1605 of the US Foreign Sovereign Immunities Act (1976):

"(a) A foreign state shall not be immune from the Jurisdiction of courts of the United States or of the States in any case

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver".

[484] FG Hemisphere Associates L.L.C. v. Democratic Republic of Congo & Ors, CACV 373/2008 & CACV 43/2009 (10 February 2010), currently under appeal before the Hong Kong Court of Final Appeal – case reported in the Allen & Overy eBulletin of May 2010, available at <http://elink.allenovery.com/getFile.aspx?ItemType=eBulletin&id=9c8a3268-91b0-47a8-9b1b-ba92c70b59e6>.

Hong Kong which prevailed in the absence of any legislative intervention by the People's Republic of China (PRC) following the Hong Kong handover"[485].

It is worth to be added here, that the Chinese Ministry of Foreign Affairs Office in Hong Kong submitted a letter to the case above, stating:

> *"The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government issued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government*"[486].

[485] *Id.*

[486] As quoted in FG Hemisphere Associates LLC v. Democratic Republic of The Congo and others, High Court of Hong Kong, judgment of 12 December 2008, at para 31, available at <http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=(firm)&TP=JU>.

The official position did not contribute to solving in any way the above-mentioned Chinese internal conflict, but instead left the judge "*at a loss on how the stance stated in the Letter is to be reconciled (if at all) with the signing of the Convention*"[487].

Having a national legislation on sovereign immunity expressly addressing arbitration is, of course, the ideal solution for such issues. The English State Immunity Act, for example, is expressly stating that "[w]*here a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration"*[488]. The provision has only one exception, namely that "[t]*his section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States"*[489], and its court interpretation also shows that the presumption of immunity should not be narrowly construed as limited to arbitration and challenging the award only, but that the wording of Sec.9(1) also extends to proceedings to enforce the award[490] – as also reflected by the provision of Section 13(4) expressly referring to "*enforcing an arbitration award*". Same conclusion was reached in a decision[491] in which immunity from enforcement was refused

[487] *Id.* at para 81.

[488] Section 9(1) of the State Immunity Act (1978).

[489] Section 9(2) of the State Immunity Act (1978).

[490] Svenska Petroleum Exploration AB v Lithuania (No.2), Court of Appeal (Civil Division) 13 November 2006, [2007] 1 Lloyd's Rep. 193.

[491] Orascom Telecom Holding SAE v. The Republic of Chad, [2008] EWHC 1841 (Comm).

under Sec.13(4); but in the absence of a law expressly regulating the relationship between sovereign immunity and arbitration, the opinions are far from being in consensus.

The solution, as always, would be legislative harmonization – the most at hand being the adoption and entry into force of the Convention on Jurisdictional Immunities of States, which expressly addresses the issue of arbitration in its Article 17 by providing for the waiver of the immunity defense by agreeing to arbitrate[492]. Nevertheless, the provision is flexible, allowing the parties to depart from it; and in any case, it only refers to 'court of another State', thus leaving the initial question of whether sovereign immunity can be raised in arbitration, still open[493]. Hence, until a more comprehensive legislative harmonization will eliminate – or at least decrease – the conflicts between differing regulations of state immunity

[492] Art.17 of the UN Convention on Jurisdictional Immunities of States and Their Property (2004):

"*If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:*

(a) the validity, interpretation or application of the arbitration agreement;

(b) the arbitration procedure; or

(c) the confirmation or the setting aside of the award,

unless the arbitration agreement otherwise provides."

[493] With authority saying that it cannot – *see* JEAN-FLAVIEN LALIVE, *Quelques observations sur l'immunité d'exécution des Etats et l'arbitrage international*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE (Yoram Dinstein and Mala Tabory eds., Kluwer Academic Publishers 1989) at p.327, quoting Professor Pierre Bourel who states "*The notions of immunity from jurisdiction and arbitration are mutually exclusive*".

in arbitration, it is left to the ICSID to provide for a more-or-less uniform case law through its investment arbitration practice.

With regard to conflicts between parallel state legislation affecting arbitration in general, it is enough for even just two conflicting rules to become relevant for one case to generate problems and to question the entire system. Again, harmonization of national arbitration legislation – beyond the degree achieved through the Model Law and the NY Convention – could solve the current divergences, serving a double purpose of enhancing trust towards arbitration and increasing trust in legal systems to host arbitration.

CHAPTER VII. COHABITATION AND CONFLICT BETWEEN NATIONAL AND INTERNATIONAL SOURCES OF NORMS

International sources of norms are rarely of relevance in their purely international form, since – irrespective of whether they come into being in the form of conventions, treaties, or general principles of law – they are eventually incorporated and become applicable as part of a national legislation. In this sense, therefore – since the basis of the present analysis is at a moment when the applicable national laws are already identified – we could not even talk about international sources of norms in this respect. However, as indicated at the beginning of the thesis, it would be highly impractical to consider the laws of each and every country separately; and since many of them are very similar by mirroring the adopted international conventions, for the purpose of the present research the main comparison will be of the conventions, treaties, principles, and not of their nationally adopted state law equivalent. Therefore, in the present Chapter – besides a few national particularities – mostly the provisions of the New York Convention (*et al*) will be considered, as potentially conflicting with other international or national sources of norms regulating international commercial arbitration.

Although out of the direct scope of the present thesis, it has to be mentioned that the reasons of a state in adopting one form or another of an international source into its national

legislation range from internal socio-cultural expectations to external political and financial interests, and are often driven by a strong need for globalization – and accordingly, for legislative harmonization.

VII.1. National laws cohabitating with international regulations

Although international arbitration is regulated by a very complex net of laws and conventions, for the purpose of efficient functioning of the arbitration system, states strive for legislative development that is in line with other, foreign legislation, as well as international agreements. The rationale behind such endeavor can consist – among others – of political relationships intended to fit within the requirements of the international arbitration practice. In this sense, for example, the Swedish Arbitration Act amended to accommodate the USA–USSR agreement to arbitrate under the UNCITRAL Rules in Stockholm[494] is a very positive example of legislative amendments made for the purpose of cohabitation and cooperation between national and international regulations. Most often, however, it is the New York

[494] 1992 agreement between the USSR Chamber of Trade and Industry, the American Arbitration Association and the Chamber of Commerce in Stockholm, containing an optional arbitration clause for use in contracts in USA – USSR; *see Optional Clause,* 19 Yearbk. Comm. Arb'n (1994), 279 – 282.

convention that determines states to amend their legislation in order to be in line with the provisions and also with the spirit of the Convention. For the same reason, the UNCITRAL Model Law (serving as model for many national arbitration laws) adopted all the grounds that can serve as basis for refusing recognition and enforcement under the New York Convention[495], to serve as grounds for refusing recognition and enforcement, but most importantly for setting aside of arbitral awards, in order to ensure uniformity.

Very often, however, there is a double regulation of the recognition and enforcement of foreign arbitral awards – based on one hand on a national legislation, and on the other hand on the New York Convention (as adopted by that country). One example of such double standard can be met in Turkey, where the provisions of Art. 60-63 of the Code of International Private and Procedural Code[496] and the provisions of the New York Convention are equally applicable to recognition and enforcement of foreign arbitral awards. The two regulations are able to coexist due to the fact that the Convention – being a more specific

[495] Lack of capacity to conclude an arbitration agreement provided by ML34(2)(a)(i), ML36(1)(a)(i), NYC.V.1(a); invalidity of the arbitration agreement provided by ML34(2)(a)(i), ML36(1)(a)(i), NYC.V.1(a); lack of notice of appointment of an arbitrator or of the arbitral proceedings provided by ML34(2)(a)(ii), ML36(1)(a)(ii), NYC.V.1(b); inability of a party to present his case provided by ML34(2)(a)(ii), ML36(1)(a)(ii), NYC.V.1(b); award dealing with matters not covered by the submission to arbitration provided by ML34(2)(a)(iii), ML36(1)(a)(iii), NYC.V.1(c); composition of arbitral tribunal or conduct of arbitral proceedings contrary to the agreement of the parties or, failing agreement, to the applicable law provided by ML34(2)(a)(iv), ML36(1)(a)(iv), NYC.V.1(d); non-arbitrability of the subject-matter of the dispute provided by ML34(2)(b)(i), ML36(1)(b)(i), NYC.V.2(a); violation of public policy provided by ML34(2)(b)(ii), ML36(1)(b)(ii), NYC.V.2(b).

[496] Law 5718/2007.

regulation – takes precedence over the Code, which expressly acknowledges this in its Art.1. And since Turkey made a reciprocity reservation to the New York Convention, only the awards made in a non-contracting state will be enforced pursuant to the provisions of the Code; the legislation, hence, allowing the applicability of both the national regulation and of the international convention without conflicts.

VII.1.1. International arbitration norms supplemented by state laws not directly regulating arbitration

International sources of norms do not regulate arbitration as a self-standing body of rules alone, but rely on a set of national laws – whether of arbitration or not – to complement areas left uncovered. Even the New York Convention does not regulate every aspect of the recognition and enforcement of foreign arbitral awards, leaving the "*rules of procedure*" to be regulated by the law of the "*territory where the award is relied upon*"[497]. In many cases, however, these rules are not included in the arbitration law of that 'territory', but gaps may be supplemented by other procedural laws, not specifically addressed to arbitration.

[497] Art.III of the New York Convention.

One of such procedural aspects not directly regulated by arbitration norms, but supplemented by other laws, are limitation periods. Neither the New York Convention, nor the UNCITRAL Model Law provides for any time limits for the commencement of recognition and enforcement procedures; hence there is no uniformity or minimum standard in this regard. The issue is rather left for the national legislation from the place of enforcement to establish whether any limitation periods are to be considered or not, in accordance with Art.III of the Convention. But different legal systems treat limitation periods differently; common law jurisdictions usually considering them as procedural, while civil law jurisdictions characterize them as a matter of substantive law[498]. In any case, identifying limitation periods in a foreign jurisdiction may be problematic for someone not familiar with the local legislation; and discovering a limitation period after it has elapsed due to mere ignorance will eventually lead to (rather unjustified) indignation – as it was the case related to a series of Canadian decisions recently ended.

In 2010 the Supreme Court of Canada has put an end to a three-year long litigation about the existence and extent of a limitation period for the enforcement of a foreign arbitral award[499], confirming the decisions of the Court of Queen's Bench of Alberta and of the Court of Appeal of Alberta, who both found that the request for enforcement is time-barred. The

[498] Yugraneft Corporation v. Rexx Management Corporation & Others, Supreme Court of Canada 20 May 2010, Case No. 32738, citing Tolofson v. Jensen, [1994] 3 S.C.R. 1022, at pp. 1068-70, 35 Yearbk. Comm. Arb'n (2010), 343 – 345.

[499] *Id.*

court stated that an arbitral award is not equal with a judgment or court order[500] and that "*unlike a local judgment, an arbitral award is not directly enforceable*"[501]. And although the court admitted that the Arbitration Act[502], the Limitations Act[503] and the Reciprocal Enforcement of Judgments Act[504] create an ambiguous lacuna in the regulation of limitation periods for the enforcement of foreign awards rendered in non-reciprocating countries, it ultimately reached the conclusion that "*an application for recognition and enforcement of a foreign arbitral award is an application for a remedial order*"[505] – consequently, the time limit applicable in this case was of two years.

The *Yugraneft* decision is a good reminder to arbitration participants and practitioners that the apparently exhaustive list of grounds in Art.V. of the New York Convention, on which recognition and enforcement can be refused, is not exhaustive after all; but that in light of Art.III, additional procedural grounds for refusal may also exist. As there is no international standard with regard to limitation periods and no harmonization is yet undertaken in this regard either, the very different national regulations have to be carefully examined and one should not rely on assumptions based on home practices. Limitation

[500] *Id.*

[501] *Id.*

[502] R.S.A. 2000, c. A-43.

[503] R.S.A. 2000, c. L-12.

[504] R.S.A. 2000, c. R-6.

[505] *Id.* at para [40].

periods are often regulated by non-arbitration specific legislation, will often depend on how a particular jurisdiction qualifies a foreign arbitral award, and may range from two to 30 years or longer[506], with variations even within the same country.

It is a different issue whether the limitation periods practiced in a jurisdiction actually reflect the jurisdiction's approach towards arbitration in general, but it may certainly be an indication of it – as well as of the overall treatment of foreign decisions taken in a broad sense. To stay in Canada with the examples, while courts in several Canadian provinces "*have expressed support for a more generous approach to foreign judgment, whereby foreign court judgments are given 'full faith and credit'*"[507] under certain conditions, this practice is not reflected in the Alberta legislation yet; a not so liberal approach towards foreign decisions having probably a strong influence over the way foreign awards are also treated. Whether this makes Canada a less arbitration-friendly jurisdiction is a question for one's own judgment; in any case, the simple fact that some rules affecting arbitration are not included in arbitration laws, does not in itself make a jurisdiction worse for arbitration.

[506] *See* the survey by the ICC Arbitration Commission's NY Convention Task Force, published in a Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards, Special Supplement to the ICC International Court of Arbitration Bulletin (2008).

[507] If the foreign court had jurisdiction and the judgment is not contrary to public policy, obtained by fraud or contrary to the principles of natural justice. Gerald W. Ghikas, *The Yugraneft Limitation Period Controversy - A Hollow Debate?*, ILO Newsletter of December 11, 2008, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=278435b5-66fb-4930-b655-30149f2c09c8>.

Procedural regulations form a complex net of legislative provisions in every jurisdiction, with various rules affecting arbitration being placed in different laws or codified under different logical constructions. For this reason, one has to look beyond the arbitration acts of the targeted jurisdiction to become aware of the gap-filling provisions that are incorporated in other laws – not expressly regulating arbitration – in order to avoid conflicts.

VII.2. Conflict between national laws and international regulations

State law regulating arbitration may come in conflict with a large range of various international norms, for a number of various reasons; ranging from differences between the definitions of even basic notions related to the field to constitutional requirements clashing with international trade agreements. In addition to these concrete conflicts – as always when arbitration laws and conventions are analyzed – a comparison between the provisions of the Model Law and of the New York Convention serves as a good exemplification for conflicts between national and international sources of norms regulating international commercial arbitration.

VII.2.1. Conflicts between the UNCITRAL Arbitration Model Law and the New York Convention

The heading may seem wrong at first sight, since obviously a direct conflict between the Model Law itself and the New York Convention cannot exist. Nevertheless, for the purpose of a wider analysis covering countries that adopted the Model Law, and also considering the possible consequences of adopting the latest amendments of the Model Law without the New York Convention being amended accordingly, a confrontation of these two sources of norms is made in theory (and in practice where the text of the Model Law becomes a municipal arbitration act).

Practice development made certain amendments necessary in the UNCITRAL Model Law to make arbitration possible and more accessible under the current business and technological circumstances. For these reasons, in 2006 several provisions of the Model Law were radically modified – amendments which were adopted by some, but not all model law countries; many countries, even though having relatively new arbitration legislation, cannot keep up with the latest amendments occurred at international level. As there are a few countries which followed and adopted the novelties of the Model Law in short time, while the majority remained with the old standards, discrepancies and contradictory provisions emerged in the international arena. In light of this, the role of the Model Law in creating uniformity becomes questionable.

The countries that decide to adopt the new Model Law provisions may face possible conflicts with the New York Convention, as some of the 2006 new amendments are not in line anymore with the provisions of the Convention. In this respect, the new Article 7 of the Model Law could be adopted in two different forms; Option 2 defining arbitration agreement in the very broad sense of "*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*"[508]. This definition has the purpose of allowing and accepting agreements which are not concluded in writing, making arbitration more accessible to parties using other forms of communication, and the scope of the provision is laudable; however, it comes in contradiction with the requirements of the New York Convention regarding the written form.

According to Art.II.1. of the Convention, "*each Contracting State shall recognize an agreement in writing*"; while paragraph (2) of the same article specifies that "*the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*" – leaving outside the scope of the Convention any agreement which is not in writing. Moreover, Art.IV.1.(b) requires for "*the original agreement referred to in article II or a duly certified copy thereof*" to be submitted to the court together with the award for recognition and enforcement.

[508] Art. 7 Option 2 of the UNCITRAL Model Law.

In countries that adopted the Model Law amendments such conflict between the Model Law and the Convention is solved by the 'most favorable law' principle laid down in Art. VII.1. of the New York Convention itself; providing for the more preferential conditions that may exist in the applicable national law to prevail against the conditions set in the Convention. But in countries where only the old Model Law provisions and the New York Convention requirements are available, obtaining recognition and enforcement of an award made under a law providing for an Art.7 Option II definition may become very problematic, mostly due to the failure of the Convention to adapt to the changing needs of the field.

VII.2.2. Conflicts between state law – as reflected by judicial interpretation – and the New York Convention

The New York Convention, while being probably the most important tool in legislative harmonization in the area of international commercial arbitration, is far from being perfect – especially in light of the fast and extensive development that the field has reflected since the Convention's adoption. As very categorically stated in the Dublin Draft[509], *"[a] number of provisions needs to be added […] [a] number of provisions needs to be revised […] [a] number of provisions is unclear […] [a] number of provisions is outdated […] and […] a*

[509] Van den Berg, *supra note 49*.

number of provisions needs to be aligned with prevailing judicial interpretation…"[510]. Besides the original defects of the text and the backlog compared to modern case law development, the difference between the different court interpretations of the convention represent an additional source of difficulties – and an obstacle in the way of real and efficient harmonization.

Local patriotism and populism still plays a significant political role in some places, amounting to resistance against the enforcement of foreign arbitral awards, and accordingly against the uniform – and arguably proper – application of the New York Convention. The solution against small provincial courts favoring the local 'almighty' losing party was to confer jurisdiction on recognition and enforcement procedures upon specialized courts; but there is no real solution against general court practice twisting in their judicial interpretation even the core principles of the Convention itself.

For a state court to grant or to refuse recognition and enforcement of a foreign arbitral award under the New York Convention[511], a certain degree of judicial scrutiny is allowed and expected. But as we have seen above[512], judicial review of arbitral awards is an issue that raises controversies at several levels, involving interconnected conflicts between party stipulations, national legislative provisions and their judicial interpretations, and ultimately

[510] *Id*. at para 1

[511] As adopted and implemented in the legislation of the country in which the court from which recognition is sought sits.

[512] *See* III.2.2, IV.1.2, VI.2.1 and VII.2.2

the New York Convention. And while these later conflicts practically all happen at national level, due to the incorporation of the convention into each member state's national legislation, for the purpose of the present analysis they are considered as a conflict between the New York Convention itself and the national law reflected and supplemented by its judicial interpretation at state level – in order to show the potential source of conflicts that could exist in any jurisdiction that adopted the Convention.

VII.2.2.1. The scope of review of arbitral awards

While the scope of judicial review of arbitral awards for the purpose of a setting aside procedure is regulated by national legislation[513] – often based on the provisions of the Model Law – the scope of review for the purpose of recognition and enforcement is regulated by the New York Convention. And as naturally happens, for whatever the Convention does not clarify, the courts faced with a request for recognition will create definitions and interpretations to supplement the gap; including the extent of the review allowed under the Convention – as recently happened in the *Dallah* case[514].

[513] *See* VI.2.1 above

[514] Dallah Real Estate & Tourism Holding Co v Pakistan, [2010] UKSC 46.

The High Court - while looking at Art.V.1.(a) of the New York Convention[515] and analyzing the issue of "*what is the scope of the enquiry that the court has to undertake*" when a party challenges the recognition and enforcement of a Convention award – found that it is faced with a matter of facts, subject to civil evidentiary procedures, allowing full rehearing of the merits of an issue decided by the arbitral tribunal[516]. Justice Aikens, while accepting that "*questions of issue estoppel may arise (as in this case), which would prevent one or other party re-fighting issues of fact that have already been specifically argued and decided, as between those parties, 'on the merits' by a competent* tribunal"[517], nevertheless went on to find that "*the statutory wording […] requires that the party wishing to challenge the recognition and enforcement of a Convention award must be entitled to ask the court to reconsider all relevant evidence on the facts (including foreign law), as well as apply relevant English law*"[518]. The Supreme Court (accepting the analysis of the High Court) admittedly followed the US interpretation of the Convention, where courts in several cases[519] expressly adopted the view that the Convention not only allows, but even requires an extensive court review of the award (when verifying whether there was a valid arbitration agreement, and thus whether the dispute was arbitrable at all).

[515] As adopted in section 103(2)(b) of the English Arbitration Act (1996).

[516] [2008] EWCH 1901 (Comm).

[517] [2008] EWCH 1901 (Comm) para 83.

[518] *Id*.

[519] *See* China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp, 334 F 3d 274, 288 and First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938.

Disregarding the fact that the issue reopened by the *Dallah* court was that of the jurisdiction of the tribunal (raising a separate concern with regard to the court's relationship towards the principle of *competence-competence*), the decision is a source of concern not only for England as an arbitration-friendly jurisdiction, "*highlit[ing] a possible divergence between the apparent pro-arbitration and pro-enforcement attitude of English law to arbitration, and the reality of practice before the English courts*"[520], but also for the international interpretation of the New York Convention. The fact that an English state court considers it necessary to review in full detail the decision of a distinguished international arbitral tribunal – beside raising issues of prestige for lack of trust in the judgment of the arbitrators[521] – also raises legal concerns regarding "*the efficacy and relevance of Article V of NYC and the purpose it is meant to serve*"[522].

It is a legal fact that each state has the right to adopt or not the New York Convention, and each state court has the right and power to adopt judicial interpretations of the Convention either to better define its rules or to supplement the gaps left open by this rather brief international norm. Nevertheless, extending the scope of judicial review over the merits

[520] Gary B. Born and Timothy Lindsay, *Enforcement of International Arbitral Awards in England and the New York Convention*, Kluwer Arbitration Blog, 21 August 2009, available at <http://kluwerarbitrationblog.com/blog/2009/08/21/enforcement-of-international-arbitral-awards-in-england-and-the-new-york-convention/>.

[521] The ICC tribunal in the Dallah case was composed of Lord Mustill, former Chief Justice of Pakistan Mr. Justice Dr. Nassim Shah and prominent Lebanese international lawyer Dr. Ghaleb Mahmassani.

[522] Ashutosh Ray, *Dallah v. Pakistan: Why the buzz?*, Lex Arbitri - the Indian Arbitration Blog, November 11, 2010, available at < http://lexarbitri.blogspot.com/2010/11/dallah-v-pakistan-why-buzz.html>.

seems not to be a regular interpretation, but rather a shier contradiction with the aim and spirit of the Convention; and appears to be a big step back from the development of international arbitration in general.

VII.2.2.2. The jurisdiction of courts to review arbitral awards

The second aspect of the judicial review of arbitral awards that causes frictions between the New York Convention – primarily regulating it – and national regulations – including court decisions interpreting and supplementing it – is the issue of jurisdiction of the different courts to perform such review. In light of Art. V.1.(e) and Art.VI of the Convention, judgments of annulment rendered in a country other than the country of the seat of arbitration are not in conflict with the provisions of the Convention - in spite of all the criticism against decisions like *Pertamina*[523]. Art.V.1.(e) of the Convention acknowledges the possibility of an award to be set aside not only in the country in which, but also "*under the law of which, that award was made*"; and although the NY Convention is not directly applicable to the setting aside procedure, as long as the national legislation of a country allows such jurisdiction, the judgment will be within the limits of perfect legality.

The draft Convention initially did not refer to annulment in any other country than the one in which the award was rendered; the requirement being "*substantially the same as*

[523] Judgment of the Central District Court of Jakarta of 1 April 2002 – *see* Karaha Bodas Ccompany LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, referred to at VI.2.1.2 above.

Article 2(a) of the Geneva Convention"[524]. After an amendment proposed by Germany, providing for annulment "*in accordance with the applicable law*"[525] the draft later still referred only to the country in which the award was made[526]. However, after a very vague *intermezzo* in which annulment was related to a 'competent authority' without any further definition[527], the current text of Art.V.1.(e) - providing for setting aside by "*a competent authority of the country in which, or under the law of which, that award was made*" - was adopted by the Conference at its 23rd meeting of June 9, 1958[528]; and was left unchanged ever since. Although it is unlikely that this provision of the Convention was meant to allow

[524] *Travaux préparatoires,* Report of the Committee on the Enforcement of International Arbitral Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention), 28 March 1955, E/2704, E/AC.42/4/Rev.1, para 41.

Annex to the report: Draft Convention Article IV provides that "*...recognition and enforcement of the award may only be refused if [...]*

(e) the award [...] has been annulled in the country in which it was made"

Art.2. of the Convention on the Execution of Foreign Arbitral Awards, 26 September 1927 provides that "*…recognition and enforcement of the award shall be refused if the Court is satisfied:*

(*a) That the award has been annulled in the country in which it was made*"

[525] *Travaux préparatoires,* Federal Republic of Germany: amendments to Articles 3, 4, 5, E/CONF.26/L.34, 28 May 1958.

[526] *See Travaux préparatoires,* United Nations Conference on International Commercial Arbitration, Working party No.3 on 3 June 1958, E/CONF.26/L.43.

[527] *Travaux préparatoires,* Text of the Convention as provisionally approved by the Drafting Committee on 9 June 1958, E/CONF.26/8.

[528] *Travaux préparatoires,* Consideration of the draft Convention: New text of Articles 1 (3), 5 (1)(a), (b) and (e) adopted by the Conference at its 23 rd meeting, E/CONF.26/L.63.

conflicting parallel decisions on annulment, this is nevertheless a possible result of the wording approved.

Art.VI. of the Convention again expressly confers the right to state courts to give priority to annulment procedures eventually conducted in the country of the seat of arbitration or of the law under which the arbitration has been decided[529]. If we consider the New York Convention as a guideline for harmonization regarding international commercial arbitration in general – and not only with respect to the recognition and enforcement of foreign arbitral awards – then, in light of the current wording of the Convention, the proposal as to follow the US approach and to "*assess the 'lawfulness' of the judicial decision setting aside the award*" to see whether the setting aside decision "*has been rendered by a court with no competence – of course, based on international standards*"[530] and ultimately to possibly enforce an award annulled in another country (disregarding the annulment "*for lack of proper jurisdiction based on internationally acceptable standards*"[531]) is not in line with the principles put forward by the Convention. And while following this path would probably create uniformity in practice and would eliminate conflicting court decisions with regard to setting aside, the

[529] Art.VI provides that "*If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security*."

[530] Abedian, *supra* note 225 at 33.

[531] Abedian, *supra* note 225 at 34.

ground on which the courts at the seat of arbitration would have exclusive jurisdiction in an action for annulment (in the presence of the applicable law of a different country expressly chosen by the parties) is, at least, questionable[532].

Although theoretically there is no clearly identifiable conflict with the New York Convention with regard to the jurisdiction of courts performing judicial review of arbitral awards, court practice does reflect an apparent conflict with regard to the scope of such review. While the ultimate solution for any such conflict would be further legislative harmonization, until that becomes reality, the everyday solution to arbitrating parties is to avoid – to the extent possible and practical for other purposes – the applicability of legislations allowing excessive review as to both the scope and jurisdiction.

VII.2.3. Conflicts between national and international norms regarding the definition – or the lack thereof - of arbitration-related terms and procedures

Contradictions and conflicts can be caused sometimes by differences between basic definition of arbitration-related notions and terminology – as reflected by international

[532] Even the author of the proposal admits that this practice "*may seem to be contrary to the principle of comity of nations*" (Abedian, *supra* note 225 at 34).

sources of norms and by national laws. Quite often, however, such notions are not defined at all, leaving their interpretation to state courts; which, on their turn, can come up with definitions that are not entirely in line with the intended meaning behind the text of a convention or treaty – thus being a source of contradictions and conflicts.

VII.2.3.1. Definition for 'contracting state'

The term 'contracting state' is not defined by the New York Convention, the text only implicitly referring to the acts of signature, ratification and accession as conferring the status of contracting state[533]. A court in Malaysia, however, revealed an unusual interpretation of what an applicable international convention - and more specifically, what a contracting state - can mean. The Putrajaya Court of Appeal held that it cannot consider the United Kingdom to be a party to the New York Convention, because this was not officially declared by *His Majesty the Yang di-Pertuan Agong* in the Official Gazette[534]. By this the court was in fact endorsing an earlier decision[535], in which Singapore was similarly not accepted as being a party to the New York Convention.

[533] *See* for example Art. I.3 or Art. X of the New York Convention.

[534] Alami Vegetable Oil Products Sdn Bhd v. Lombard Commodities Limited, [2009] MLJU 0214, decision of February 26, 2009.

[535] Sri Lanka Cricket v World Sport Nimbus Pte Ltd, [2006] 2 CLJ 316, Putrajaya Court of Appeal.

The Foreign Arbitral Awards Convention Act[536] gave effect to the New York Convention in Malaysia with a specification included in Section 2(2), according to which *"The Yang di-Pertuan Agong may, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention"*. The court interpreted this provision as a reservation made under the Convention and the acceptance of any contracting state as depending upon such notification. Consequently, as *The Yang di-Pertuan Agong* did not declare that the United Kingdom (or Singapore) is a party to the New York Convention, the court refused enforcement of the awards originating in those countries; disregarding the fact that it can easily be established by other means whether a country is a contracting state or not.

The court's reasoning is even more troublesome, as there were other, theoretically more acceptable and reasonable grounds for refusing enforcement (*e.g.* the failure to produce an arbitration agreement, as required by Section 4(b) of the Foreign Arbitral Awards Convention Act), but these grounds were only ancillary touched upon by the court, and did not form the primary basis for the decision. Fortunately, the provisions of the Foreign Arbitral Awards Convention Act were repealed by the 2005 Arbitration Act[537], which does not contain any such notification condition anymore; thus clearing the way for all arbitral awards to be enforced on the basis of Articles III and IV of the New York Convention. In a very recent

[536] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 320/1985.

[537] Arbitration Act 646/2005.

decision[538] the Federal Court also took the opportunity to clarify that a notification in the Gazette is not a precondition to the recognition of an award under the New York Convention, reassuring the concerned international community that any additional condition imposed for the enforcement of a convention award in Malaysia would be contrary to the object of the Foreign Arbitral Awards Convention Act, to Art. III of the New York Convention, and would undermine the system for the enforcement of convention awards[539]. This twisted definition for a notion that is – or should be – so basic but which is still so important for the recognition and enforcement of foreign arbitral awards was fortunately solved by legislative clarification; but there are others that still cause confusions.

VII.2.3.2. Definition of the 'award'

As just seen, questions of definitions can sometimes be raised in post-award phases, raising issues to be decided on several different sources of norms. One such 'simple' issue is the definition of an 'award'; an important question with regard to the effects of that award in recognition and enforcement. At this stage however, the court may be faced with three different relevant sources of norms, namely the law of the place of recognition and enforcement, the law of the country of origin of the award, and any convention governing the

[538] [2010] 1 CLJ 137.

[539] *See* Shanti Mogan, *Official Gazette notification not required for enforcement of convention award*, ILO Newsletter April 1, 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=0d651cb5-c6f7-44f2-8ec0-6bfcfc5240ac>.

recognition of foreign awards in that particular state. Which one of these should define the arbitral award is a much disputed question, and while some authors consider that international sources should prevail, according to others both the law of the origin and the law of the country of enforcement should be relevant[540].

The New York Convention itself does not define what and arbitral award is, saying only that the term includes "*awards made by arbitrators appointed for each case […] [and] those made by permanent arbitral bodies to which the parties have submitted*"[541]. Although during the drafting of the Convention there were requests to define the term, "*the Committee considered it unnecessary to include a provision to this effect in the text of the Convention […] and decided that a reference in the report would suffice*"[542].

Other international regulations - even if less significant than the NY Convention - also fail to specify what exactly is to be considered an award[543]. Moreover, the UNCITRAL Model Law, which forms the basis for many national arbitration acts, also fails to give a clear definition; the only implied explanation being offered through a reference to the termination

[540] *See* Philipp Peters and Christian Koller, *The Notion of Arbitral Award: An attempt to overcome a Babylonian confusion*, Austrian Yearbook on International Arbitration (2010), 138.

[541] Art. I.(2) of the New York Convention.

[542] *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention), 28 march 1955, E/2704, E/AC.42/4/Rev.1, para 25.

[543] *See* the Geneva Convention on the Execution of Foreign Arbitral Awards (1927); the European Convention on International Commercial Arbitration (1961).

of the proceedings[544]. Although the Working Group on International Contract Practices did propose a definition[545] when drafting the Model Law – just as the drafters of the New York Convention did – the proposal was eventually not adopted.

Similarly to the international sources of norms, most state laws also fail to define the arbitral award, only a few countries having such definitions. Accordingly, the arbitration laws of Croatia, New Zealand, British Canada (Canada), Singapore and Malaysia, all state that only a decision on the merits can constitute an award[546]; with some of these countries also specifying that the term includes interlocutory, interim or partial awards as well[547]. This approach, however, may be in contradiction with interpretations that consider finality an essential characteristic for an award; or with practices also including procedural decisions among awards - not to mention the different qualifications of such decisions as either partial or interim awards[548].

[544] According to Art.32(1), *"[t]he arbitral proceedings are terminated by the final award ..."*

[545] "*'award' means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine any question of substance or the question of its competence or any other question of procedure, but, in the latter case, only if the arbitral tribunal terms its decision an award*" (UN Doc.A/CN.9/246, at 192).

[546] Art.2(1) 8) Croatian Arbitration Act (2001); Art. 2 New Zealand Arbitration Act (1996); Art.2 Singapore International Arbitration Act (2002); Art.2(1) Malaysia Arbitration Act (2005); Art.1 British Columbia Arbitration Act (1996).

[547] Singapore and New Zealand.

[548] See Peters and Koller, *supra* note 541.

Consequently, as there is no uniformity in defining such an essential, and yet basic term of arbitration, a potential conflict is not difficult to arise. For example, if a tribunal renders an award that satisfies the definition provided by the law of the seat, but the enforcement court considers only its own legislation relevant – law which gives a different definition (possibly qualifying the 'award' in question as an ordinary order, attracting the applicability of different regulations, especially on enforcement) – the problem is difficult to be avoided or overcome. In addition, the question that naturally arises is, what if, in the absence of any legal definition, the parties themselves define in their agreement what an arbitral award could/should be? Can a state court faced with a request for enforcement accept whatever the parties consider to be an arbitral award, or are there still some limits; and if so, then limits imposed by whom? Legal practice and literature may address the issue from different perspectives, but in the end, it is for the courts' – possibly quite subjective – understanding to decide which one to follow.

Even more, in spite of the advantage of institutional arbitration rules that they usually cover legislative gaps through detailed provisions, the rules of major institutions do not define the notion of 'award'; neither do the UNCITRAL Rules, failing to establish how to make a difference between an award and other decisions. Nevertheless, institutional rules are still more helpful than national laws, offering at least some assistance in defining criteria to identify different types of awards. The most common criteria based on which a decision can be considered to be an award are the forum rendering the decision, finality, and the subject-

matter of the decision. These criteria, however, may lead to definitions that are not in line with what different states would find acceptable.

In spite of this unfortunate lacuna, this issue is surprisingly rarely met in practice, and even then rather related to party stipulations creating procedures which do not qualify as arbitration[549]. Moreover, the eventual conflict between the different interpretations of the term 'award' is not something that can be avoided through party agreement – on the contrary, any party-provided definition may lead to unnecessary further complications.

VII.2.3.3. Definition of 'public policy'

Another gap in the arbitration terminology causing confusions and controversies between national and international regulations is the definition of public policy. While many states limit the scrutiny of international awards to public policy and procedural irregularities, the issue of the "chameleon-like concept" of public policy[550] is in itself of eternal hot debate; mostly due to the fact that even today there is no clear definition of this notion, its interpretation differing from jurisdiction to jurisdiction. The only relatively common understanding is that there is internal/national public policy[551] on one hand, and international public policy on the other hand. As Van den Berg summarized in his famous New York

[549] *See* III.2.1. above.

[550] William W. Park, *Amending the Federal Arbitration Act*, 13 Am. Rev. Int'll Arb. 75 (2002), 106.

[551] *e.g.* comprising every mandatory legal provision in France.

Convention analysis, "[t]*his distinction is based on the proposition that what pertains to public policy in domestic cases is not necessarily to be regarded as pertaining to public policy in international cases. Accordingly, the field of public policy in international cases may be narrower than in domestic cases. Pursuant to the notion of international public policy, a violation of public policy is to be deemed present in very serious cases only. Article V(2) (a) and (b) can be said to refer to international public policy*"[552].

According to the same author, the New York Convention should finally be amended to expressly indicate international public policy in Art.V(2)[553]. However, very broad interpretations of public policy can sometimes be determined by political reasons for refusing recognition and enforcement; using the public policy ground as a pretext to cover the real reasons behind political decisions[554]. For this reason – and not only – "*it is clearly impossible for our national judges to define and apply public policy as a uniform principle […]. Any redraft of this article V(2)(b) could therefore achieve nothing*"[555].

International public policy - although difficult to define or to locate - represents one of the most important limitations to party autonomy. Due to Articles V.1(e) and V.2(b), public policy is an eternal concern for the enforceability of awards. Recognition and enforcement

[552] VAN DEN BERG, *supra* note 257 at 381.

[553] *See* Van den Berg, *supra* note 49.

[554] *See* V. V. Veeder, *Is there a need to revise the New York Convention*, keynote speech at the IAI Foprum Dijon (2008), in The review of international arbitral awards (Emmanuel Gaillard ed), 191.

[555] *Id*.

may be refused directly on public policy grounds[556], but also if the award has been set aside[557] – which on its turn, could also happen for public policy reasons. The problem, however, is not that public policy can appear as an issue in two different fora, but that the notion itself is not defined by the New York Convention. Even the view that the provision is understood to refer to international public policy is not universal[558]; moreover, different states may have very discrepant interpretations of public policy – whether international or not[559]. For this reason even the proposed new text of Art. V.2(b) of the *Hypothetical draft convention*[560] is of insufficient help, when stating that "*enforcement of the award would violate international public policy as prevailing in the country where enforcement is*

[556] Art.V.2(b) of the New York Convention:

"*Recognition and enforcement of an arbitral award may also be refused if [...] the recognition or enforcement of the award would be contrary to the public policy of that country*."

[557] Art.V.1(e) of the New York Convention:

"*Recognition and enforcement of the award may be refused [...] [if] the award [..] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*."

[558] *See* Günther Horvath, *The duty of the tribunal to render an enforceable award*, 18 Journal of International Arbitration (2001), 135.

[559] Section 19 of the Australian International Arbitration Act 1974 (as amended in 2010), is a rare example of an attempt to clarify this issue, by providing that "[w]*ithout limiting the generality of subparagraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is hereby declared, for the avoidance of any doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia if:*

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

[560] Van den Berg, *supra* note 49.

sought"[561]; since the only certainty that it offers is that "*the public policy is limited to the narrower category of international public policy as developed by courts in many countries in relation to public policy, including arbitrability, under the New York Convention*"[562], but it does not offer any solution against the different interpretations of state courts of this 'narrower category of international public policy'.

Thus, even if one accepts that for the purposes of the New York Convention international public policy is the relevant one, as long as this notion is not concretely regulated as such, it is theoretically almost impossible to enforce. As the professional literature rightly observed, "*there is no generally accepted, comprehensive definition of what constitutes international public policy. Rather one has to search for the constituent parts of international public policy in various sources of law and in other norms*"[563]. In this sense, an arbitral tribunal may indeed be better off applying the national public policy of a state, rather than making reference to an undefined international correspondent; but public policy can cover very different things in different jurisdictions, and the variations in definition are a potential source of conflict.

[561] Proposed new Art.5.3.a of the Hypothetical Draft Convention.

[562] Explanatory note to the Hypothetical Draft Convention, at para 95.

[563] HOBÉR, KAJ, EXTINCTIVE PRESCRIPTION AND APPLICABLE LAW IN INTERSTATE ARBITRATION 131 (Iustus Frölag, 2001).

As a respected judge and arbitrator once said, "*public policy is a dangerous animal*"[564]; an animal that within national legislations could stretch to cross the boundaries established – or rather imagined – by the New York Convention. In its possibly broadest interpretation, public policy – this omnipresent source of potential conflicts – could even comprise justice as such – if providing justice in general is in the interest of society, then excessive court review on the merits of any arbitral award could theoretically fall under public policy principles, simply to ensure justice. Any such extremely broad understanding introduced in a legal system[565], claiming a much too extensive judicial review as necessary, would seriously undermine the trust in the skills of international arbitrators and would eventually extinguish the core advantages of arbitration against litigation by making them too much alike; finally, it would overall work against arbitration itself – albeit in the name of a fairer arbitration.

Nevertheless, examples of dangerously broad interpretations of public policy do exist, creating difficulties in enforcement and conflict with other, narrower definitions. In India, for example, every misinterpretation of the law is a matter of public policy; while in Canada the lack of reasoning in an award was found to be against public policy, in spite of the previous recognition of the award at the seat of arbitration. The Court of Appeal of Quebec thus refused to recognize the award rendered by a tribunal in New Mexico in a cased based on the UNCITRAL Model Law, although the award was recognized by the US District Court in

[564] Statement by Hon. Justice Robert Tang, HKSAR Judiciary, Court of Final Appeal, at the HKIAC 25th Anniversary Conference in Hong Kong (2010).

[565] To the knowledge of the author, no such approach currently exists.

New Mexico in the form it was rendered (i.e. without containing the tribunal's reasoning). At first instance, the Quebec Superior Court grounded its refusal for recognition and enforcement on the fact that the governing UNCITRAL Model Law requires an award to "*state the reason upon which it is based*"[566]. The judgment was confirmed and further elaborated by the court filed with the appeal, finding that lack of reasoning is not in itself violating public order, but the choice of the Model Law, requiring awards to be reasoned, impedes the enforcement of an unreasoned award.

What is strange, however, is that recognition was refused based on a provision similar to Art.V(2)(b) of the New York Convention, on public policy grounds[567]; while it would have been probably easier to apply the Art.V(1)(d) provision, also reflected in the Canadian legislation, for the procedure not being in accordance with the parties' agreement[568]. Accordingly, it would have been more logical to justify that the award, as the final procedural phase, was not in accordance with the procedural law expressly chosen by the parties, than to argue that non-observance of the chosen Model Law violates Canadian public order – even if

[566] Art.31(2) of the UNCITRAL Model Law.

[567] Section 949 of the Code of Civil procedure, containing similar grounds with Art. V(2)(b) of the New York Convention:

"*An arbitration award shall be recognized and executed if […] its recognition and execution are not contrary to public order*."

[568] Art.36(1)(a)(iv) of the Commercial Arbitration Code, based on Art.36.(a)(iv) of the UNCITRAL Model Law.

defined as "*public order as understood in international relations*"[569]. The court did mention this as an additional, secondary ground, together with the fact that apparently, the award also dealt with issues not submitted to the tribunal, and it also omitted to decide issues which had been submitted to it; concluding that these grounds[570] would, independently from the public policy grounds, properly give rise to a refusal of recognition and enforcement of the award.

Nevertheless, the court preferred to primarily rely in its decision on the idea that "*reasons are fundamental in understanding the basis upon which a tribunal renders an award and confirming that it was not rendered arbitrarily*"[571], and that the legal provisions it relied on "*are intended to allow Quebec courts to refuse the recognition and enforcement of decisions that do not respect certain fundamental procedural guidelines*"[572]. This is an interesting example of how a court, instead of relying on more at hand and easier to justify grounds, opts instead to construct undefined notions like public policy in sometimes stretched ways; especially in a case in which the award was already recognized in another state and – even more – the losing party did not oppose to that recognition; lack of action which was not qualified by the Quebec court as a waiver of its right to object to procedural irregularities.

[569] Art. 3155 of the Civil Code of Quebec.

[570] Art. 950.4 and 950.5 of the Code of Civil Procedure.

[571] As related by Henri C. Alvarez, in a contribution by the ITA Board of Reporters to Kluwerarbitration.

[572] As related in Simon Gregoire, *Court of Appeal Refuses to Recognize Foreign Arbitral Award*, ILO Newsletter of May 29, 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=f4ebe6a7-e2f4-4dd5-b261-21bb78d1901a>.

The Swiss Supreme Court, on the other hand, is well-known for its non-intrusive approach to international arbitration, and it rendered its first annulment decision on procedural public policy grounds just recently. In spite of this being a *premiere*, the decision does not really contribute to the definition of public policy grounds; not even in the limited procedural sense. The judgment[573] annulled an award rendered in a case between two football clubs on a stated ground of 'procedural public policy', which in fact looked more like a *res judicata* exemption. Apparently, the changing dispute resolution process of FIFA[574] made it possible for the same dispute between the same parties to be submitted and eventually solved twice, by two different institutions. Both claims were submitted to FIFA, but the first decision was challenged at the then competent Zurich Commercial Court, while the second decision was referred to the newly designated appellate institution (i.e. the Court of Arbitration for Sport).

In spite of the fact that both cases had the same object and the same parties involved, the Supreme Court found it difficult to establish that this was a case of *res judicata*, on one hand precisely because of the changes intervened in the adjudication process involving

[573] Swiss Supreme Court's Decision 4A_490/2009, April 13 2010, Club Atlético de Madrid SAD v Sport Lisboa E Benfica - Futebol SAD and Fédération Internationale de Football Association referred to in Frank Spoorenberg and Isabelle Fellrath, *International award annulled on grounds of procedural public policy infringement*, ILO Newsletter of July 29, 2010, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=774924c1-0da6-497a-9c08-38b3c77230aa>.

[574] *Fédération Internationale de Football Association* (French for International Federation of Association Football).

different institutions, and on the other hand, because the first challenge proceedings failed to involve all the parties. But since that decision of the Zurich Commercial Court was not appealed, the Supreme Court - finding the judgment valid with regard to everyone, not only those involved in the proceedings - held that the award later rendered by the Court of Arbitration for Sport "*disregarded 'the material legal effect of the judgment of the Zurich Commercial Court […] and had therefore 'violate[d] procedural public policy'*"[575].

Although this rare decision does not really assist in properly defining public policy, it is a representative example of how this notion can be adapted and used for almost any situation when the strict conditions of other grounds cannot be met, but the court does not wish to allow the survival or the enforcement of an award – even if the Swiss court generally favors a narrower interpretation of public policy, expressly specifying that, for example, inaccurate application of Swiss law governing the procedure, does not in itself violate public policy[576].

Similarly, a Hong Kong Court found that "[*a]n error (whether of law or fact did not matter here) by an arbitrator in an award could not by itself counterbalance the public policy bias towards enforcement*"[577]. Loosing parties often try to abuse of public policy grounds in order to obtain a review on the merits of their case, just as state entities may attempt to abuse for political reasons, to avoid enforcement. But public policy itself is supporting enforcement

[575] *Supra* note 576.

[576] *See* for example X. Ltd. v. Y. AG, 4A_444/2009, Judgement of February 11, 2010 First Civil Law Court Federal Tribunal, at 4.2.1.

[577] A v R [2010] 3 HKC 67.

of awards, for reasons of comity. Hence, in spite of the lack of a universal definition, and in spite of the very different interpretations of public policy at state level, a court's pro-arbitration approach will almost certainly mean that public policy will be used in a narrow sense, representing "*something more, that was, a substantial injustice arising out of an award which was so shocking to the court's conscience as to render enforcement repugnant*"[578]. Nevertheless, differences may – and often will – occur, making reliance on a definition or another insufficiently justified and risky. Hence, one should be careful in researching the court practice from both the seat and the place of enforcement, in order to ascertain the definition of public policy in these relevant jurisdictions through its judicial interpretation.

VII.2.3.4. Setting aside procedure of awards rendered 'under the law' of a country

As just indicated above[579], according to Art.V.1(e) of the New York Convention, an award can be set aside in a member state even if rendered outside that member state – as long as it was rendered under the law of that state[580]. The Convention leaves the grounds and the

[578] *Id.*

[579] *See* VII.2.2.2 above.

[580] Art.V of the New York Convention:

"1. *Recognition and enforcement of the award may be refused [...]*

further regulation of the procedure to be set by each national legislation; in an ideal situation the national and international norms complementing each other. However, national legislations – although generally providing for the grounds of annulment – very often do not regulate the procedure of challenge for awards rendered outside that country, but limit such procedure to awards rendered within their own jurisdiction.

By this procedural gap awards rendered in one place but under the law of a different country can be left without the possibility for challenge (otherwise ensured by both national and international regulations) for a purely technical reason. Considering that recognition and enforcement of an award set aside may be refused, the unfortunate consequence of this procedural gap is that a defendant having assets in another member states does not benefit of the same fair protection conferred by the Convention, simply because of having a different seat than the country of the applicable law.

An example of such gap can be found in the Kazakh legislation[581], where the Law on International Commercial Arbitration distinguishing between the setting aside and recognition and enforcement procedures does not govern the terms and procedure of setting

(e) The award [...] has been set aside or suspended by a competent authority of the country [...] under the law of which, that award was made."

[581] Vladimir P. Furman and Dianara M. Jarmukhanova, *Different Treatment for Arbitral Awards Issued in and outside Kazakhstan*, ILO Newsletter May 1, 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=f2d03ca3-3b9b-476e-8025-dc68df3e83aa>.

aside an award issued outside of Kazakhstan[582]. The Code of Civil Procedure gives authorization to the Kazakh courts to set aside awards "*at the place of resolution of the dispute*"[583], therefore such courts do not have the power to set aside an award issued outside Kazakhstan but rendered under Kazakh law; even if the award contradicts Kazakhstan's public order or otherwise fulfills the substantive conditions for setting aside. But as local professionals argue, the court should be able "*to look beyond the formal limit of the scope of the law*" especially as "*it is the responsibility of Kazakhstan's civil dispute resolution system to safeguard public order in Kazakhstan*"[584].

Such approach is even more supported by legal provisions of the Code of Civil Procedure, which provides in its Article 6 that in the absence of legal rules, the court should apply rules governing a similar relationship, or if no such analogous rules exist, than resolve the dispute based on general legal principles, the meaning of law and general notions of justice and reason. In spite of this vague legal basis, according to local professionals it is more likely to the Kazakh courts "*to take the path of least resistance*" and find that awards rendered outside Kazakhstan may not be set aside at all in Kazakhstan.

[582] Art.33.1) of the Kazah Law on International Commercial Arbitration, stipulating as ground for refusing recognition and enforcement, if the award "*has been cancelled or suspended by a court of the country, under the law of which that award was made*".

[583] Art. 426(1) Kazakh Code of Civil Procedure.

[584] Furman and Jarmukhanova, *supra* note 584

While the annulment of awards in a country other than the seat is a practice widely criticized[585] – and luckily not often performed – as long as the New York Convention permits such a review through its Art.V.1(e), it would be clearer to have the possibility reflected by state laws as well. Otherwise, as with any legislative gap and discrepancy in definitions or procedures between national and international norms, equality in treatment in different jurisdictions cannot be ensured. As for many similar situations, legislative harmonization could solve this concern – or in the absence of such harmonization, a uniform transnational court practice could serve the same purpose.

VII.2.4. Conflict between a constitution and BITs containing arbitration clauses

Just as a national law can be in contradiction with the constitution of the same state[586], international agreements entered into by a state can similarly raise issues of constitutionality – hence creating a conflict between the national and international sources of norms regulating arbitration. Ecuador has recently faced such a conflict, with the Constitutional Court

[585] *See* VII.2.2 above

[586] *See* VI.1.1 above

declaring several bilateral investment treaties unconstitutional[587]. The conflict appears to be between the dispute resolution clauses of these BITs providing for arbitration and Art.422 of the new Constitution providing for exclusive state court jurisdiction under treaties - with a single exception allowed, namely that of 'regional arbitration' to solve disputes between the state and Latin American individuals[588].

In spite of the fact that the government has recently entered into several foreign investment contracts providing for arbitration, and in spite of the finance minister's pro-arbitration declaration (when recently signing international contracts with China also providing for arbitration at the LCIA[589]) that "*the rulings of this court […] are very flexible and neutral*"[590], the Constitutional Court seems to have a very different standpoint – apparently rather in line with the position of the country's president[591]. The Court appears to follow the so-called '*Calvo doctrine'*, according to which only national state courts have

[587] *See* Hernán Pérez Loose, *International arbitration with Ecuador: a new legal minefield*, ILO Newsletter 21 October 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=b7740f30-d2ab-4603-a3c6-c3f3cc3ffeaa>, and César Coronel Jones, *The future of international arbitration in Ecuador: the boomerang effect*, ILO Newsletter of July 22, 2010, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=e46353d6-6931-47da-9acd-a187dcf9cf84>.

[588] Constitution adopted in 2008.

[589] Executive Decree 466 of 27 August 2010, Official registry 277, 13 September 2010.

[590] *See* Pérez Loose, *supra* note 590.

[591] Rafael Correa, head of state and head of government since 2006, having a strong nationalistic approach against investment treaties and international arbitration (*see* Jones, *supra* note 590).

jurisdiction over cases between the state and foreigners[592] – using this doctrine in spite of the fact that it is not reflected in the new, 2008 Constitution of Ecuador, and in its original version is not followed anymore in most of Latin-America. And while its omission from the Constitution seemed to finally allow more flexibility to the state to enter into arbitration agreements, the Constitutional Court has just decided that "*the Constitution does not allow the state (or any public entity) to recognize the jurisdiction of international tribunals for settling disputes with foreign individuals or corporation*"[593]. Hence, the Court tested the constitutionality of the arbitration agreements incorporated in 12 different BITs, the legislative Assembly eventually denouncing these treaties together with the ICSID Convention[594].

Furthermore, the President requested the denunciation of other BITs as well[595] precisely because of their arbitration provisions – allegedly violating the new Constitution and the country's interests. As an indirect consequence caused by the practice (shared in most Latin American courts entrusted with constitutional scrutiny) that "*interpretations of the Constitution made by the court go beyond the narrow confines of the cases at hand*"[596], the

[592] Roffe, *Carlos Calvo y su vigencia en America Latina*, UNCATD, Reprint Series 53, 1984, as referred to in Loose, *supra* note 590.

[593] Loose, *supra* note 590.

[594] *See* Jones, *supra* note 590.

[595] With Germany, France, Finland, Sweden, Canada, China, the United Kingdom, the Netherlands, Ireland, Argentina, Chile, Venezuela, Switzerland and the United States (*see* Jones, *supra* note 590).

[596] Loose, *supra* note 590

arbitration agreements incorporated in contracts signed by the state or its entities could be found just as unconstitutional than those incorporated in the bilateral investment treaties.

The conflict between the Constitution and the denounced BITs, as well as the contracts facing similar constitutional issues, is created by the government manifesting an "*ideological hostility towards bilateral investment treaties"*[597]*;* but which lately realized that obtaining the desired foreign capital is much too often conditioned by accepting the jurisdiction of international arbitration tribunals – a desire being also in direct contradiction with the nationalistic approach towards foreign investors. As a result, the government started to accept contracts containing arbitration clauses, but by an absurd split personality manifestation it also decided to denounce BITs for their alleged unconstitutionality. The same government is now trying to solve the conflict by enacting a legislation that expressly permits international arbitration clauses in agreements between the state or its entities and foreign individuals or corporations[598]. It is debatable whether this new law can indeed counter-balance the decisions of the Constitutional Court; it rather seems that it will become just an additional source of conflict itself, instead of solving the existing one, while the most efficient – although not the

[597] *Id.*

[598] "*With the prior authorization of the General Attorney it is permitted to accept other jurisdiction and laws for the solution of divergences or controversies connected with contracts, agreement or legal instruments executed by the State and the entities or organs of the public sector with foreign governments, public or private entities*" – translation of the Fifth General Provision of the 'Código de Planificación y Finanzas Públicas' adopted on 15 October 2010, in Loose, *supra* note 590 at fn.10.

easiest – way to solve this state-created mix-up would probably be a constitutional amendment.

While the case of Ecuador is particular enough, it may well not be the only one having such internal conflicts between pro- and anti-arbitration provisions. A foreign investor contracting with such state has to be extra cautious in verifying not only the relevant BIT's, but also the state's other laws and constitution, because a conflict like the one described above – especially if based on strong political underlying motives – may eventually lead to either a contract annulment, or to undesired litigation in the courts of the state which is the source of the problem itself.

VII.3. Conflicts between general principles of law and national and/or international sources of norms

Principles in general are (theoretically) undisputable and general principles of law are (again theoretically) beyond law. But irrespective how universally accepted these principles are, they are not absolutely untouchable; and their value – if not anchored in a national legislative provision – is subject to questioning and strict judicial interpretation. We have already seen how the basic principle of arbitration, party autonomy, can come in conflict with

various other sources of norms; but in the present section another important basic principle, competence-competence will be analyzed, as interpreted – and sometimes restricted – by both state and international courts.

The doctrine of competence-competence[599] is one of the governing principles of arbitration – probably the most important after party autonomy – that empowers arbitral tribunals to be the judge of their own jurisdiction. Following its almost universal acceptance in practice, the principle is today expressly incorporated in many state laws regulating arbitration[600]. Nevertheless, the doctrine also seems to have its weaknesses (in both applicability and effect), the arbitration practice and the expectation of arbitrating parties being sometimes severely limited by its judicial interpretation.

Firstly, according to the Supreme Court of British Columbia, the principle seems to be inapplicable if it is not incorporated in the parties' agreement – through express provision in the arbitration agreement or by reference to rules or a law containing the competence-competence principle[601]. The holding is of serious concern, as it questions the existence of the competence-competence doctrine as a free-standing principle, unless expressly stated in rules or a law applicable. It is interesting, however, that at the same time the court expressly

[599] Or *Kompetenz-Kompetenz.*

[600] The tribunal's jurisdiction to rule on its own jurisdiction is incorporated in the UNCITRAL Model Law Art.16, provision adopted by many model law countries.

[601] See H&H Marine Engine Services Ltd v Volvo Penta of the Americas Inc (2009 BCSC 1389) at paras 51 and 52.

disagreed with the finding that "a*ccording to the common law, it is the courts that determine whether an arbitration clause applies*"[602] (a holding also criticized by the professional literature as unreasonably restricting the competence-competence principle[603]). In spite of an admittedly pro-arbitration position and supporting "*the trend toward restricting judicial intervention in commercial arbitrations reflected in both domestic and international law*"[604], Madam Justice Dickson nevertheless declared that "*in the absence of an evidentiary or statutory basis for application of the competence/competence principle, however, I conclude that the Court should determine whether an arbitration agreement exists before s. 8 of the ICAA can be invoked*"[605].

[602] Deco Automotive Inc. v. G.P.A. Gesellschaft Fur Pressenautomation MbH, 1989 CarswellOnt 3168 (Dist. Ct.), at para 38, quoted in *supra* at para 37.

[603] *See* Cecil O.D. Branson, Q.C., *The Enforcement of International Commercial Arbitration Agreements in Canada*, (2000) Arbitration International, Vol. 16, No. 1, LCIA, p. 19; Frederic Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?*, (2006) Arbitration International, Vol. 22, No. 3, LCIA, p. 463, referred to in *supra* note 604 at para 38.

[604] *supra* note 604 at para 55.

[605] *Id.*

Section 8 of the Canadian International Commercial Arbitration Act (R.S.O. 1990, CHAPTER I.9), identical with Art. 8 of the UNCITRAL Model Law on stay of proceedings, provides that:

"(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.

It is also interesting to mention that she reached this conclusion because apparently the existence of competence-competence principle within the Stockholm Arbitration Rules (indicated in the arbitration agreement) was not proved - since foreign rules are a matter of fact in Canada; while she did accept the likelihood, she could not assume that the competence-competence principle is indeed incorporated in the Stockholm Rules. Consequently, the court decided to have jurisdiction to verify whether there is an arbitration agreement, and found that in this particular case there was no such agreement, due to lack of consensus[606]. The decision seems to be based on a rather circular logic, falling into the same 'vicious circle' argument that the opponents of the *competence-competence* doctrine so often invoke[607]; namely, the court took jurisdiction based on the applicant's failure to prove that the Stockholm Rules would allocate such jurisdiction to arbitrators, but it also found that the parties never agreed to the application of the Stockholm Rules at all.

The second limitation of the *competence-competence* principle seems to be that it does not confer upon the arbitral tribunal a power that could create a final result - as the landmark decision of *Dallah* (already referred to above[608]) has reminded the arbitration community. As

(2) If an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed."

[606] The conflict between two different arbitration clauses involved is analyzed in more detail at II.1.2 above.

[607] *See* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9 at 658.

[608] *Supra* note 514 above

highlighted in *Dallah*, arbitrators are "*entitled to enquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not*"[609]. The critical reactions to this decision are based on a common misunderstanding of the entire *competence-competence* principle – the clarification of which eventually reflects that there is no conflict between the principle and the court decision, after all.

The German terminology of *Kompetenz-Kompetenz*, albeit having an unclear origin, indicates that the arbitrators can decide over their own jurisdiction in a final and binding decision; however, this concept is not accepted even in Germany (or in any other country); and still, this original meaning of the erroneously used terminology somehow led to the general misconception of arbitrators having such a definite power[610]. In spite of the fact that even the literature expressly acknowledged that the arbitral tribunal's jurisdiction will most

[609] [2010] UKSC 46 para 25, quoting a passage from Devlin J in Christopher Brown Ltd v. Genossenschaft Österreichischer [1954] 1 QB 8, 12–13, also quoted in the February 1994 Consultation Paper on Draft Clauses and Schedules of an Arbitration Bill of the DTI's Departmental Advisory Committee ("DAC").

[610] *See* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9 at 651.

probably be reviewed by the enforcing court[611], the general misunderstanding of the limits of the principle led to criticisms and concerns for *Dallah* in the arbitration community[612].

These concerns may be well founded if the *Dallah* decision will be broadly understood by some courts as referring not only to cases where the mere existence of an arbitral agreement is in dispute (as it was in the *Dallah* case[613]). If construed broader than this, the doors towards automatic in-depth review of all awards – primarily of those containing a decision on jurisdiction, but fearfully of all awards – may be opened wide; and although this may not fundamentally jeopardize the principle that tribunals can, and have priority to decide over their own jurisdiction, post-award proceedings could be considerably delayed and rendered more difficult.

Finally, the famous decision of the ECJ in *West Tankers*[614] was understood by some to generate a potential conflict between national legislation (more precisely the principle of

[611] *See* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 9 at 659.

[612] *See* Ray, *supra* note 523; mentioning cases in India already following a "*misconstrued or widened*" understanding of the Dallah judgment; concerns towards the weakening of the *kompetenz-kompetenz* principle were also raised at the HKIAC 25th Anniversary Conference presentations in Hong Kong (2010).

[613] Where the court expressly stated that "[a]*n arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal*" ([2010] UKSC 46 para 26).

[614] ECJ Case C-185/07 Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, Generali Assicurazioni Generali SpA v West Tankers Inc, judgment of 10 February 2009.

competence-competence reflected by many state laws[615]) and European legislation (more precisely the Brussels I Regulation[616]). In spite of the fact that the Regulation expressly states that it does not apply to arbitration[617], the ECJ in West Tankers decided that "*a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its [i.e. the Regulation's] scope of application*"[618]. To reach this conclusion, the ECJ adopted a very narrow interpretation of the term 'arbitration' excluded under Article 1.2.(d) of the Regulation, deciding that an arbitration-related matter does fall under the scope of its application[619] – interpretation that – according to a significant segment of arbitration practitioners[620] – breached the doctrine of competence-competence.

[615] The most representative being most probably Art.30 of the English Arbitration Act (1996) entitled „*Competence of tribunal to rule on its own jurisdiction*", according to which

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part".

[616] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[617] Article 1.(2).(d)

[618] ECJ decision paras 26 and 27.

[619] *Id.*

Soon after the West Tankers decision[621], the European Commission initiated the amendment of the Regulation, the amendment proposal being published just recently[622]. The document aims (among others) to improve "the *interface between arbitration and litigation*"[623], by attempting to eliminate as much as possible abusive court litigations initiated to avoid arbitration. The proposed amendment is trying to reverse the apparent harm done by the West Tankers decision, by including a specific rule obliging a court "*to stay*

"[...] the Court finds, [...] that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. [...]

It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation."

[620] *See* for example Hefin Rees, *Anti-Suit Injunctions after West Tankers – The Rise Of Foreign Tactical Litigation*, Extract of a seminar on international commerical arbitration delivered on 13th May 2010, available at <http://hefinrees.wordpress.com/2010/06/14/anti-suit-injunctions-after-west-tankers-the-rise-of-foreign-tactical-litigation/>; *AG opines in West Tankers: anti-suit injunctions in support of arbitration agreements incompatible with Brussels Regulation*, Herbert Smith Arbitration e-Bulletin of September 5, 2008, available at <http://www.herbertsmith.com/NR/rdonlyres/7FE0F3D6-7DA5-4E1B-AE51-B79B60A14231/8306/WestTankersebulletin050908.html>; and Dr. Gerold Zeiler, *West Tankers, the Heidelberg Report and the principle of competence-competence*, Annals FLB – Belgrade Law Review, Year LVII, 2009, No. 3, 45-53.

[621] In April 2009.

[622] COM/2010/0748 final - COD 2010/0383, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at <http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf>.

[623] *Id.*

proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seized of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration"[624]. Moreover, the Regulation would finally exclude arbitration in a much more specific formulation, providing that "[i]*n particular, it does not apply to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards*"[625], hence avoiding any real or alleged conflict between arbitration and other European regulations.

Apart from legislative harmonization, there is little one can do at individual level to solve or to avoid possible conflicts between national and international sources of norms; but legislative amendments like the proposed amendment to the Brussels regulation are a welcome step towards eliminating even the impression of such conflicts. And although the proposal is not expected to be adopted within the next year, it can already serve as a guideline in applying the Regulation by the courts – just as the Dublin/Miami draft can serve as basis for the interpretation of the New York Convention, even if the Convention itself will never be amended.

[624] *Id*. *supra* note 625.

[625] *Id*. *supra* note 625.

CHAPTER VIII. OTHER SOURCES OF NORMS GENERATING CONFLICTS IN THE FIELD OF INTERNATIONAL COMMERCIAL ARBITRATION

When participating in international arbitration, one must consider not only the written legal provisions that are directly applicable to the case, but should also observe the secondary influences of other sources of norms. Socio-cultural rules or religious practices may easily affect the proceedings just as any written rule; and although their mandatory nature can be invoked to a less extent than that of a legal provision, their influence may nevertheless be just as fatal, or at least have a serious impact on arbitration. Less obviously, but just as importantly, political circumstances may play an important role in the overall fate of arbitration; and although not sources of norms as such, they are worth being considered, as influencing arbitration and potentially conflicting with 'real' sources of norms.

VIII.1. Conflicts between religious and legal sources of norms regulating international commercial arbitration

In religious legal systems arbitration can be directly or indirectly regulated by scripts - even though this is not part of their main objective. The impact of religious norms over arbitration is noticeable in cultures having strong religious traditions, even in spite of the existence of modern statutes adopted with the aim of legislative harmonization[626]. Although scripts can have a role in both the procedure and the substance of a case, due to the limitations of the present thesis, only the procedural aspects will be analyzed here.

VIII.1.1. The influence of religious norms over the constitution of an arbitral tribunal

The desire to attract Islamic finance to western economies plays a significant role in shaping international commercial arbitration, since theoretically any financial relationship

[626] *See* Ahmed S. El Kosheri, *Islamic Law*, in Albert Jan van den Berg (ed), Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, 1994 Vienna Volume 7 (Kluwer Law International 1996), 506 – 512.

may end up in a dispute; and with the traditional religious approach of the Muslim community to arbitration, the various rules, laws and principles regulating arbitration are inevitably subject to conflict with religious norms.

The Koran acknowledges and encourages the settlement of disputes through arbitration, but the rules created during the 7th-8th centuries were limited to existing disputes, to be submitted to "*a given person or persons already known and appreciated by the parties as being in possession of a high degree of integrity*"[627]; leaving thus no room for choice of arbitrators through a third person or appointing authority. Although these practices did make sense in the times they were created, their rigid application today by fundamentalist Islamic lawyers is contradicting not only universal arbitration practices, but also rules and laws of arbitration.

According to Islamic legal tradition, the arbitrator's appointment – based on personal knowledge and trust of the arbitrator – can be unilaterally revoked at any time, simply for losing confidence[628]. Moreover, the procedure practiced under Islamic law seems to be rather a hybrid combination of arbitration and conciliation, in which the arbitrator(s) consult both parties in private, in order to reach a mutually satisfactory solution. This may not be too problematic in case of a single arbitrator appointed by mutual agreement by both parties (or even in case of each party appointing one arbitrator), but in the – otherwise rare - occasion of

[627] *Id.* at 494.

[628] Kosheri, *supra* note 629 at 495.

a three-member panel, the third arbitrator/chairman would have to accompany each party-appointed arbitrator in their private discussions with the parties, in order to avoid losing the parties' confidence; and consequently being revoked[629].

More current practices tend to depart from these old beliefs[630] and adopt the "*view according to which the relevance of the Islamic legal traditions is limited to these few basic aspects not subject to any possible controversy or difference of opinion*"[631] – a perception that allows the application of modern arbitration practices and rules without finding them contradictory with mandatory rules of the Koran. Nevertheless, traditional arbitration is still practiced in Islamic communities, and while the procedure described would probably not even qualify as arbitration under the modern rules (due to lack of independence of the arbitrators), being aware of the historical religious beliefs could be useful in today's intercultural relationships.

Another religious approach – more relevant to international arbitration than the above-described practices and still in place today – is the reluctance to accept non-Muslim arbitrators even in cases involving a non-Muslim party, rather "*imposing a mandatory condition, that the arbitrator should be of Islamic faith, since a non-Muslim could not*

[629] Kosheri, *supra* note 629 at 497.

[630] Or *ijtihad* = opinion.

[631] Kosheri, *supra* note 629 at 496.

exercise authority (Walaya) over a Muslim"[632]. Such strict requirement is currently in place, for example, in Saudi Arabia, where the condition relating to faith and knowledge of Islamic law and local customs and traditions was even incorporated in the Arbitration Regulation[633].

While members of communities of faith are often compelled to resolve their disputes in front of their respective religious institutions, the qualification of such institutions and the enforcement of their decisions can be problematic in front of foreign national courts; a difficulty that may even be held to undermine religious autonomy. A very expressive case of this kind was recently put to end by the New York Supreme Court[634] confirming the jurisdiction of a *Beth Din*[635] to arbitrate matters of Jewish law; by this reversing a Kings County order[636]. Although the legal issue seemed to be one of substance, the real concern raised by the order was on the limitations on arbitration by Jewish courts. Accordingly, the

[632] Kosheri, *supra* note 629 at 498.

[633] Section 3 of the Saudi Arabian Arbitration Regulation. 27.05.1985G (08.09.1405H) 27 May 1985:

"*The arbitrator shall be a Saudi national or Muslim expatriate from the free profession section or others. The arbitrator may also be an employee of the state, provided approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the umpire shall have a knowledge of sharia rules, commercial regulations, customs and traditions applicable in Saudi Arabia.*"

[634] Brisman v. Hebrew Academy of Five Towns & Rockaway, Supreme Court of the State of New York, Appellate Division: Second Judicial Department, January 22, 2010.

[635] Or *beit din* = Jewish rabbinical court invested with legal powers in a number of religious matters in Jewish communities, where its judgments hold varying degrees of authority (depending upon the jurisdiction and subject matter).

[636] New York Supreme Curt Kings County order of December 18, 2008, denying to confirm the award rendered by the Beth Din of America on July 10, 2007.

dayanim[637] ordered that any future disputes between the parties in regard to their disputed contract must be decided by the *beit din* – a retention of future jurisdiction which was qualified by the state court as exceeding the authority of the *Beth Din*. For this reason, organizations like the Agudath Israel of America, the Orthodox Union, and the American Jewish Congress filed amicus briefs to the Appellate Division in support of the *Beth Din*'s decision, pointing to the relationship between religious and state courts. Consequently, the fear of the *beit din* system being devastated by state courts was dissipated by the commitment expressed through the Appellate Division's Decision to respect an award rendered by a *Beth Din* without relitigating the merits of the case.

Although the *Beth Din* is clearly a private dispute resolution body – just as any arbitral institution –, its decisions are based exclusively on religious rules, other than the 'profane' legislative provisions and are sometimes difficult to fit within the framework of what an award is expected to be. Thus, the Supreme Court's decision serves as a much appreciated bridge between classical and religious arbitration, reconciling the conflicts between the two systems.

Another issue worth to be mentioned here is the impact of religious beliefs or preferences over the composition of an otherwise not religious arbitral tribunal[638].

[637] Judges of the *beit din.*

[638] Even though the conflict in such case is between a party stipulation and a state law, the issue will be analysed under the present chapter, as originating from a religious influence over international commercial arbitration.

International arbitration brings together parties from different countries, cultures and religions, all having different expectations with regard to the procedure; but also different preferences with regard to their arbitrators. In this sense, a party may wish to have an arbitrator of a particular religion or to hold a certain religious function; or may want the entire tribunal to be formed of such persons (without actually opting for a religious court, as in the case above). Such limitations, however, may come in conflict with other rules and laws from the seat of arbitration. And while freedom of religion is a valued principle, equality principles are just as important – as recently held by an English court.

In *Jivraj v. Hashwani*[639] the court found an arbitration agreement void for breach of anti-discrimination principles, when providing for arbitrators to be "*respected members of the Ismaili community and holders of high office within the community"* and for the chairman to be "*the President of the HH Aga Khan National Council for the United Kingdom for the time being*"[640]. The Court did not consider this provision as fitting in the accepted practice of 'arbitrators' special characteristics', but found that the requirement is unjustified – since the arbitrators were asked to apply English law, for which no special religious qualification is required. In order to reach this conclusion, the court qualified arbitrators as employees for the purpose of the Employment Equality (Religion and Belief) Regulations[641], and held that the

[639] Sadruddin Hashwani v. Nurdin Jivraj, UK Court of Appeal Civil Division, Case no: A2/2009/1963, decision of 22 June 2010, [2010] EWCA Civ 712.

[640] Excerpts from the arbitration agreement reproduced in the judgment of the court.

[641] Employment Equality (Religion and Belief) Regulations 2003 No.1660.

agreement is void for its breach of the Regulation[642] – while the only exception permitted by the Regulation, namely that of a proportionate and genuine requirement of a job for a particular ethos or belief[643] did not apply to the case. Although there is a possibility under the

[642] More particularly of the following relevant provisions:

"3.— Discrimination on grounds of religion or belief

(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if –

(a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons;

. . .

6.— Applicants and employees

(1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person –

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment; or

(b) in the terms on which he offers that person employment; or

(c) by refusing to offer, or deliberately not offering, him employment."

[643] Employment Equality (Religion and Belief) Regulations 2003 No.1660, Regulation 7:

"7.— Exception for genuine occupational requirement

(1) In relation to discrimination falling within regulation 3 (discrimination on grounds of religion or belief) –

(a) regulation 6(1)(a) or (c) does not apply to any employment . . .

where paragraph . . . (3) applies.

.....

(3.) [...]where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out—

Regulation to appoint a tribunal based on religious or ethical characteristics, this possibility has to be construed narrowly, with regard to all the requirements of regulation 7(3); in this case verifying "*whether, having regard to the ethos of that community and nature of the arbitrator's function, being an Ismaili was a genuine occupational requirement for its proper discharge*"[644] – the Court found that it was not, and since the requirement could not be separated from the rest of the clause, rendered the entire arbitration agreement void.

While the final outcome of this case is yet to be revealed[645], the conclusion of the Court of Appeal raises broader pro-arbitration issues, especially in light of the last paragraph of the judgment – which acknowledges the freedom of the parties to choose arbitration and to determine the composition of the tribunal, as well as the importance of this right, but which nevertheless considered the entire choice of arbitration void for making such a precise determination[646]. By this, the Court practically said that party autonomy exists only to the

(a) being of a particular religion or belief is a genuine occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either—

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

[644] [2010] EWCA Civ 712 para 29.

[645] The case was heard by the UK Supreme Court on April 6-7, 2011, but the decision has not been rendered yet.

[646] [2010] EWCA Civ 712 para 34.

extent to which it observes not only arbitration-related mandatory provisions, but all other regulations – which would be all right in principle, if it wouldn't involve a strong clash between the basic principles of arbitration and other legal principles.

One of the most important features and advantages of arbitration is that it is 'user-friendly' and adaptable even to the most unconventional expectations of the parties, satisfying the sometimes strange necessities of human nature not fitting within court systems. However, if the rules of the rest of the system are imposed upon arbitration and this feature is annihilated under the flag of equality, its advantage is slowly but certainly diminished – probably until arbitration will fit in the square box of the only system state court judges know and understand. And to see how far this decision could reach, it is worth mentioning that the

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"*Although there would be no difficulty in operating the arbitration agreement if the final sentence were struck out, we think the judge was right to hold that it would render the agreement substantially different from that which had originally been intended. Parties may agree to refer disputes to arbitration for a variety of reasons and different factors may weigh more or less heavily with each of them. Privacy is often a motivating factor, but the ability to influence the composition of the tribunal through the appointment of one of its members is often viewed as of fundamental importance. Equally, the ability to restrict appointment to persons who are considered to have specific experience or qualifications may be critical in obtaining the agreement of one or other party to arbitration. Although from a purely objective point of view such experience or qualifications may not be required for the fair and effective resolution of disputes, the parties' own view of the matter is entitled to respect. In this case they stipulated that the arbitrators should be drawn from the Ismaili community and no doubt considered that they had good reason for doing so. In our view that choice is to be seen as an integral part of the agreement to arbitrate and not one that can be disregarded as being of no real significance. We therefore agree with the judge that clause 8(1) stands or falls as a whole and that if the final sentence is void, the remainder of the clause cannot stand*."

Regulation in question was made to give effect to the Council Directive 2000/78/EC[647], and thus, the interpretation given by the English court in *Jivraj* is most probably to receive a wider acceptance throughout the EU member states. As the Court itself stated, "*our decision has a far wider significance than the present case*"[648]. Moreover, if the religious requirement is to be found discriminatory, then there is a chance for nationality requirements – regularly aimed to ensure neutrality and language skills – to follow down the drain.

Although the judgment of the Supreme Court is still awaited and the question may still be referred to the European Court of Justice, due to the fact that the legislation at issue has retroactive effect, the decision puts all arbitration agreements providing for arbitrators having specific religious and/or ethnic characteristics (even drafted before 2003) at great risk. Even more, similar legislation regulating sex- and disability-based discrimination may also come into focus, as implementing principles established by the same Council Directive 2000/78/EC; possibly imposing further limitations to party autonomy in arbitration.

Such limitations may be especially problematic whenever gender is an appointment criterion for parties whose religion provides for differentiated treatment between men and women. A Muslim party may wish to exclude female arbitrators from the composition of the tribunal, as it may feel uncomfortable (or even find it highly inappropriate) to let a woman decide and impose her decision over men. Such preferences – based on religious norms not

[647] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[648] [2010] EWCA Civ 712 para 9.

having any legal manifestation – would most probably be in contradiction either with religion-based or with sex-based discrimination regulations. Consequently, although the UK is a favorite seat for international arbitration – due to local courts' general pro-arbitration approach reflected in a comprehensive system of precedents, the efficiency of the Arbitration Act[649] and the experience and reliability of the LCIA – choices to arbitrate in England may decrease significantly among religious communities; not because any of these communities would favor discriminative agreements, but because the strict interpretation of anti-discrimination regulations restrict certain manifestations of the freedom of religion, and by this also restrict party autonomy in arbitration.

In spite of the fact that the Court of Appeal in *Jivraj* seemed to have solved a conflict between a party stipulation and a state legislation, this 'solution' also raises concerns of further possible conflicts. In this sense, one has to think about the broader consequences of potentially replacing arbitrators (in the aim of respecting discrimination-prohibiting laws), when it comes to enforcement of such award (rendered with the exclusion of 'religiously qualified arbitrators') in a state adhering to religious laws[650]. In light of this post-award phase, the conflict may seem as simply moved to a different time and location, and not actually solved by the English court.

[649] Arbitration Act of England (1996).

[650] *See* Craig Tevendale, *Court of Appeal holds religious criteria for appointment of arbitrators unlawful*, ILO Newsletter of 12 August 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=e5c8e482-2839-46c9-b26b-f389d09daf2b>.

The issue of Islamic finance, and implicitly of arbitration involving Islamic finance, is also a heavily debated subject in France[651]. Due to concerns raised by English courts not accepting *Shari'a* law[652], Paris Europlace[653] established a Commission to research the potential difficulties that Islamic finance may incur in France. The resulted Proposal[654], while dealing mostly with substance-related issues, also touches upon the procedural aspects that Islamic finance arbitration may have to deal with in France – and due to the widespread nature of Islamic practices that may come in conflict with western state laws, not only there.

The Commission particularly addressed two issues relating to the composition of a tribunal and one Islamic rule of evidence; namely the doubts of a jurisdiction of a Muslim over a non-Muslim and of a woman's jurisdiction over a man, and the requirement for the testimony of two women to equate the testimony of one man[655]. The document clarified that both requirements regarding the composition of arbitral tribunals are based on different teachings and not on the Koran itself, and as such, are not to be rigidly followed. In addition,

[651] *See* Hervé de Charette, *No to the rejection of Islam, Yes to Islamic finance, in our country's interest!*, Institute Francaise de Finance Islamique, February 11, 2010, available at <http://www.institutfrancaisdefinanceislamique.fr/en/index.php>.

[652] *See* Shamil Bank of Bahrein EC v Beximco Pharmaceuticals Ltd, [2004] EWCA Civ.19, [2004] 4 All ER 1072.

[653] A French financial organization.

[654] Proposal – Group on Governing Law and Dispute Resolution in Islamic Finance, G. Affaki (Ed.), I. Fadlallah, D. Hascher, A. Pézard, F-X. Train, 21 Septembre 2009, to be published, available at <http://www.institutfrancaisdefinanceislamique.fr/docs/docs/doc_id125.pdf>.

[655] *Id.* at 25-26.

the Commission found that "*the possible application of these rules by an arbitral tribunal, it risks annulling the award by contradicting the public policy of the domestic jurisdiction if its recognition or the enforcement of such award were to be sought in France. Arbitrators should therefore refrain from applying these discriminatory rules since it is their duty to ensure the effectiveness of their awards*"[656]. Hence, the possible conflict was advised to be avoided by observing public laws instead of following religious norms, in order to ensure a valid and enforceable award – an approach reflecting flexibility and awareness of one's own best interests; a potential solution against any conflict that can be solved by individual act.

VIII.1.2. The influence of religious practices over the arbitral proceedings

In addition to the preliminary issues related to the composition of an arbitral tribunal, conflicts between religious traditions and arbitration may occur at later stages as well, during the arbitral proceedings. In a Jakarta case, for example, (related by an arbitrator from

[656] *supra* note 657 at 26.

personal experience)[657] the chairman scheduled hearings during *Idul Fitr* (the biggest Islamic holiday) despite the objections of the involved Indonesian counsels and witnesses, who faced the incompatibility of the arbitral procedure with their religious beliefs and customs. In light of the threat of a default award if parties do not appear at the hearing, the leading counsel and the witnesses could not obey the traditional ceremonies of their religion, and they most probably left the case with an overall bad impression about arbitration practices. They could have made a different choice, of course, giving priority to their religious norms and refusing the rules imposed by the tribunal; the consequences, however, would have been far worse than mere disappointment; a default award against the party represented by the Islamic counsel and supported by Islamic witnesses leaving more behind than just a bad impression.

Even if religious norms are getting significant recognition when building arbitration procedure, their observance is still left to the discretion of arbitrators, as there are hardly any rules or laws that expressly provide for compliance with such traditions. In addition, there is no legal consequence – either at national or at international level – for disregarding religious norms; a conduct biased in this sense not representing violation of due process to be considered as basis for annulment or refusing recognition and enforcement of an award. Consequently, a conflict with religious customs will in most cases end with religion being

[657] Karen Mills, *The Importance of Recognising Cultural Differences in International Dispute Resolution*, The Asian Leading Arbitrators' Guide to International Arbitration (Michael Pryles and Michael Moser eds. 2007), 66.

'the losing party', since the price for protecting one's religious beliefs may raise as to losing the case.

VIII.2. Socio-cultural and political backgrounds influencing arbitral proceedings

Besides the easily identifiable religious norms, there are also local customs categories that raise the question whether international arbitrators should respect them and construct arbitration keeping account of the various social habits; and even more, whether arbitrators should be aware of such traditional events at all, as elements potentially affecting arbitral proceedings. The custom of having legal activities – together with any other work-related activity – practically suspended over a two month long summer holiday in Italy is not only common knowledge, but was also indirectly acknowledged by the court in *Abati v. Fritz*[658]. The Italian Supreme Court, while relying on the fact that time limits before Italian courts are suspended by law for the period of August 1 - September 15, also mentioned in its decision that this is due to habitually concentrating holidays over the month of August; a practice and

[658] SpA Abati Legnami v. Fritz Haupl, Italian Supreme Court case no. 3221, judgment of 3 April 1987, 17 Yearbk. Comm. Arb'n 1992), 529 – 533.

a legal provision which "*leads to a 'thinning out' of all juridical activities"*[659]. While in this case the custom also had a legal correspondent, the issue of similarly widespread (but legally not recognized) customs is just one step away.

Apart from religious and/or social traditions, counsels' background and education is another element that will most surely influence the outcome of arbitration not only in presenting one's case, but also in building up arbitration proceedings. A common law and a civil law lawyer will most probably prefer different procedures to follow during arbitration, the first and probably most striking difference relating to the presentation of evidence[660]. A common law trained counsel will do all his/her best to provide for rules allowing broad discovery, while its civil law counterpart may hardly even understand what 'discovery' is. Due to the fact that a dispute is rarely considered as an anticipated possibility during the early contract negotiation phases – and also because dispute resolution clauses are often left to be dealt with at the very last moment of concluding a business deal[661] – one party will most probably agree to make a hasty compromise just to see the contract signed. The same party, however, will face the difficulty of following a procedure most foreign to it when a dispute arises; and will often feel as being treated unfairly. But as long as an agreement has been reached, the conflict between any internal discontent and the expressly agreed contract looses importance and bears no legal consequences.

[659] *Id.* at 532.

[660] *See* II.2.1.3 above.

[661] For this reason arbitration agreements are often called 'midnight clauses' by arbitration professionals.

Similar Anglo-Saxon – Roman law contradictions may arise also between how counsel and how arbitrators see a case. An arbitrator with civil law background will consider hearing witnesses only to clarify things evidenced by documents, while a common law counsel may try to present evidence through witness statements[662]; and for this reason may also attempt to discredit the witnesses, while insisting on long examinations and cross-examinations, as practiced for a jury trial – method which may seem pointless to a trained and experienced professional arbitrator, especially in commercial cases[663].

Although arbitration is the only forum able to handle cross-border and cross-cultural disputes by developing and adopting compromises on a case-by-case basis, the various procedures are difficult to reconcile; and if the parties fail to agree – as they often do – it is left to the arbitrators' ability to reach over the different legal systems and offer a solution that will suit all parties involved, irrespective of the procedures familiar to them. International institutions try to cover the gaps and offer solutions for such multi-national problems, addressing each segment of arbitration in part; but these recommendations and advices are often optional; and although they can be of great practical assistance, they can be easily disregarded by disputing parties, exactly for being against their own routine.

[662] Under common law trial proceedings, an evidence is only qualified as such if presented by a witness; even if that is a document.

[663] For more on the legal background of the participants affecting arbitration *see* BERNARDO M. CREMADES, *Overcoming the Clash of Legal Cultures: The role of interactive arbitration*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION. OLD ISSUES AND NEW TRENDS 147-168 (Stefan N. Frommel and Barry A.K.Rider eds. Kluwer Law International 1999).

Another aspect of 'routine' not necessarily brought at conscious level is the difference in the perception of ethical duties. In cross-cultural arbitration the participants may follow and expect very different standards of ethics; the problems may be less dramatic if only the parties reflect such difference, but may be more serious if the difference occurs among the arbitrators. While neutrality and impartiality are nowadays basic and mandatory requirements, the perception of what constitutes conflict of interest may be very different. The IBA Guidelines on conflicts of interests[664] as well as the Rules of Ethics[665] do offer guidance, but unless expressly applied to the case, serve little solution. Nevertheless, in spite of all the difficulties that cultural differences may create – as one leading scholar and professional concluded – "*it is not 'in spite of' but 'because of' cross-cultural differences that transnational private arbitration will grow*"[666].

The effect of local political or administrative regulations and practices may also conflict with the procedural requirements of international commercial arbitration. In light of the current worldwide 'pro-efficiency' developments in arbitration, matching tight time limits with the eventual difficulty of obtaining visas (for example) may be a source of dissatisfaction, at least. With commercial disputes between Western and Eastern or African countries and preferred arbitration locations still mostly in Western Europe or the USA,

[664] IBA Guidelines on conflicts of interests in international arbitration (2004).

[665] IBA Rules of ethics for international arbitrators.

[666] MALCOLM WILKEY, *The practicalities of cross-cultural arbitration*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION. OLD ISSUES AND NEW TRENDS 79-97 (Stefan N. Frommel and Barry A.K.Rider eds. Kluwer Law International 1999).

unless the Eastern or African party mandates local counsel from the seat of the proceedings, mere attendance of hearings for both party and its counsel may represent a considerable source of delay. And while everyday reality of life does not in itself constitute a source of norms regulating international commercial arbitration, it evidently influences the proceedings. The flexibility of procedural rules and – above all – of the arbitral tribunal in observing practical reasons generally limits these issues to the level of inconvenience; thus such conflicts are unlikely to cause fatal problems.

Last, but not least, the world and practice of international commercial arbitration – just as any area of life nowadays – has to suffer from en inevitable influence of the media. Since arbitration involves humans, the individuals' perception of reality over the rule of law – rather than the reality of the rule of law itself – will have a significant weight, irrespective of the existing 'real' sources of norms regulating international commercial arbitration. And because this perception is mainly shaped by the printed and visual media, it can practically be influenced by anything – from a real event to a misconceived opinion. For this reason, the role of professional counsel and arbitrators is essential in identifying the limits of those sources of norms that have authority in regulating international commercial arbitration and not leave this wonderful ancient dispute resolution invention to the peril of human errors.

CONCLUSION

Arbitration today is governed by a complex net of regulations consisting of procedural rules, state laws, international conventions and non-legal norms; all regulating arbitral procedure together with its basic principle of party autonomy. As a direct result of the disappearance of the 'town elder' (whom the parties could know and trust), hundreds of rules were invented to serve as procedural safeguard, supplementing the lack of trust. Consequently, although arbitration is in principle still a creation of party autonomy, it has become too legalistic, dominated by high walls of rules and laws restricting party autonomy; often departing from the needs and interests of the business community that the system should serve. On the other hand, human nature itself plays a significant role in complicating procedures sometimes needlessly, hence making the need for complex regulations – justified to some extent already by the complexity of international cases – even more imminent.

In the midst of cross-regulations provided by rules, laws and treaties and influences originating in religious dogma and cultural conventions, practically all phases of arbitration are subject to possible conflicts between these various sources of norms. From the appointment of the arbitrators, through the evidentiary process and the rendering of the award, until the possible challenge or recognition and enforcement of the award, regulations from different jurisdictions all have their say; their collective influence being a constant potential source of conflicts. It has to be observed, though, that there is a real conflict (in the

word's literal sense) only when the content of one regulation contradicts the content of another one of the same value over a given case; in the vast majority of cases, however, we can only talk about restrictions and limitations imposed by norms having authority over a norm with lower level of enforcing power. In any case, establishing a clear hierarchy helps solve this concern.

Although arbitration is mainly based on party autonomy, building up a procedure must take account of national legislation for the entire procedure – as even a party-created dispute settlement mechanism can only exist and function efficiently within the framework of a legal system. Accordingly, arbitration is primarily governed by the law chosen by the parties, but the law of the seat will have a considerable impact even in the presence of a different chosen *lex arbitri*. And because certain provisions of each national legislation are mandatorily applicable, irrespective of the arbitration rules chosen by the parties, it is extremely important to have detailed knowledge of the national legislation at the seat of arbitration before choosing a particular place.

Establishing a hierarchy for all sources of norms regulating a given case could avoid these conflicts, but such hierarchy may not always be self-explanatory, as it is does not follow a clear linear construction. In this sense, while arbitration in general is based on party autonomy – the primary source of norms regulating arbitration –, as soon as this party autonomy chooses the seat or the law to govern the procedure, the mandatory provisions of that law (otherwise applicable only due to party autonomy) become of compulsory

application and override any contrary party stipulation – thus, in a linear ranking raising above party autonomy. Similarly, pre-established institutional arbitration rules chosen by the parties will have the same reactive affect, with any mandatory rules contained therein prevailing over any contrary party stipulation. As for the non-mandatory provisions of the applicable rules and laws, the rules and laws themselves will determine which one prevails over the other – *i.e.* which one serves as a primary gap-filling provision for anything the parties did not regulate themselves. Last, but not least, all these regulations are usually supplemented by the arbitrators' discretion, defined (if at all) by the rules to govern the tribunal's work. Separately from this hierarchy, international norms are only analyzed for the purpose of the theoretical discussion, as they only become applicable (and find their place in the hierarchy) as part of an applicable state law, while religious and socio-cultural norms rarely have any legal affect over the proceedings – and if so, then only if incorporated in the applicable rules or laws, but not on their own.

While pre-existing rules, laws and conventions are relatively easy to compare, possible conflicts between party autonomy and other source of norms are not necessarily apparent from the very beginning – not only because of the unlimited creativity that parties can manifest throughout their relationship and throughout the arbitration, but especially due to the lack of delimitation in time of the parties' right to continuously shape the procedure. Accordingly, the same hierarchy put in light of the time of different procedural events, as nicely synthesized by Michael Pryles, seems to be the following:

> *"The procedures expressly agreed upon within the arbitration agreement cannot be changed after the commencement of the arbitration without the approval of the tribunal, which on its turn should exercise caution in imposing rules against the parties' will; in addition, the parties' right to adopt or create any procedural provision not included in the arbitral agreement after the commencement of the arbitration, is subject to the mandatory provisions of lex arbitri and of the applicable rules, in the sense that any flexibility and freedom conferred by the lex arbitri may be limited by the chosen institutional rules*."[667]

In light of this hierarchy (or any other one, if different according to the laws and rules applicable to a given case), the solution against a conflict between the different sources of norms regulating a particular arbitration consists primarily in the parties' thorough research and understanding of the relationship between these norms; and in making an educated choice in favor of one jurisdiction and institution or another. Agreeing on the place of arbitration is normally considered to be a benefit, also ensuring the opportunity to choose what legislative limitations the arbitrating parties are willing to endure. But even a freely made choice may bring undesired changes, if, for example, the chosen seat is in a politically unstable country, where legislation may change in an unfavorable direction by the time a dispute arises; maybe even prohibiting arbitration as a dispute resolution method. With regard to the physical place of arbitration, this may also become unavailable or inaccessible for

[667] Pryles, *supra* note 10

political or security reasons, creating practical difficulties in conducting the arbitration. While these elements – if expressly agreed upon in the arbitration agreement – can potentially render the agreement inoperable, any change in circumstances is easy to overcome by the parties' mutual agreement in amending the initial dispute resolution clause whenever needed, to keep it efficient and operable

Exceptionally, for conflicts between different national – as well as between national and international sources of norms – the solution does not lie with the parties, but consists in legislative harmonization and in court practice aiming towards uniform interpretations. For this too, however, individual awareness of unfavorable practices and/or regulations can serve to avoid unnecessary deadlocks by opting for a more pro-arbitration legal environment instead. Conflicts between the applicable rules and laws may be noticeable from as early as the drafting of the arbitration agreement, and can be avoided by a proper choice of institution and seat of arbitration. But even then, the relationship of the laws of the country of enforcement with the other norms regulating the case cannot be avoided; sometimes cannot even be identified in advance. And while the conflict between different legal provisions is entirely out of the parties' control, court assistance – through judicial interpretation favoring arbitration – could serve as a solution. Ideally, the relationship between national courts and international arbitration should resemble a relay race – according to Lord Mustill – with arbitrators and courts handing over the baton to each other at clearly determined phases,

without overlaps and conflicts[668]. But there is an inherent tension in this relationship, caused by the tension between the translational character of arbitration and its dependence on the coercive state authority of national courts[669].

Apart from (and in addition to) this tension with arbitration itself, there is also a tension between the courts (*i.e.* judicial interpretations and laws) of different states with regard to arbitration. A potential solution to the conflict between the different national and international regulations could be the networking of courts; national institutions, all using their own national legislation, but cooperating with each-other, creating a transnational unity/uniformity through supranational informational networks. By now, "*judges in transnational commercial disputes have begun to see themselves as part of a global judicial system. National judges are also interacting with their supranational counterparts*"[670]. Ideally, "*in a networked world order […] national government officials […] would each be operating both in the domestic and the international arenas, […] harmonizing laws and regulations, and addressing common problems*"[671]. Judicial comity – even if not at the utopist level imagined by Slaughter and Calabresi, and even though not universally practiced – does

[668] Lord Mustill, *Comments and Conclusions in Conservatory Provisional Measures in International Arbitration*, 9th Joint Colloquium (ICC Publication, 1993).

[669] NV v Ken-Ren Fertilisers and Chemicals [1994] 2 Lloyd's Rep 109 at 116 (HL)

[670] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 3 (Princeton University Press 2004)

[671] *Id*, reflecting the idea formulated by Judge Calabresi (US Court of Appeals for the Second Circuit) on an "*ongoing dialogue between the adjudicative bodies of the world community*" creating "*a global legal system, established […] by national courts working together around the world"*.

indeed play a significant role in creating uniformity in the arena of international arbitration; adding a considerable plus to the effect of legal harmonization through model laws and international conventions[672].

Nevertheless, even the most commonly used convention (*i.e*. the New York Convention) is lacking uniform interpretation in practice – in spite of the fact that the Convention serves as the last safeguard, as the grounds for refusing recognition and enforcement are in fact the last frontier in solving potential conflicts between different sources of norms. In the unfortunate situation that such a conflict is disregarded or omitted by an arbitral tribunal and an award is rendered in spite of an eventual infringement of a mandatory law or of a general principle, the Convention offers the final safeguard possibility to crush down the award.

But even a universal safeguard solution can only work at its best if uniformly adopted by the courts from all over the world. However, as Lord Goldsmith expressed it, "*it is odd not to have any way of uniform interpretation*" of the New York Convention[673]. Thus, according to some professionals and scholars, there should be a body to ensure not only the uniform interpretation, but also to have coercive power to enforce the correct application of the

[672] Positive examples of judicial cooperation between states for the purpose of arbitration development are the bilateral agreements for the reciprocal recognition of arbitral awards, outside the framework of the New York Convention – *see* for example agreements on the mutual recognition of award signed by Mainland China with Taiwan, Macau, and HKSAR.

[673] Lord Peter Goldsmith QC, former Attorney General of the UK, currently European Chair of Litigation at Debevoise & Plimpton, in a presentation at the HKIAC 25th Anniversary Conference.

Convention within the member states[674]. In the opinion of those advocating for uniform application of the Convention, a possible solution would be the establishment of an international higher specialized court to supervise such uniform application; a forum in which populism and patriotism could not play a role. However, such forum is very unlikely to be ever created, due to states' reluctance to give up any degree of sovereignty in this regard. In addition, a too centralized mandatory jurisdiction would be quite impractical, considering the diversity of surrounding legislation.

Amending the Convention to update it to the current requirements of the international practice could be another solution; an initiative launched by Van den Berg but conservatively only accepted as an attempt towards "*uniform interpretation by improving current interpretive patterns rather than attacking the text of the Convention itself*"[675]. It is true that states would most probably not sign a new convention for years, and any attempt to amend the convention would only block its proper functioning, leading to a worse situation than what exists today. Moreover, even if the Convention would be amended, there will always be states that will not apply it as expected – just as there are states that do not apply it today, in spite of formally being a signatory party[676], while there are others who failed to implement it

[674] View expressed by several presenters at the HKIAC 25th Anniversary Conference.

[675] Marike R.P. Paulsson, *The Miami Draft: the Good Twin of the NYC*, Kluwer Arbitration Blog, 7 October 2010, available at <http://kluwerarbitrationblog.com/blog/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/>.

[676] For example, Saudi Arabia signed the Convention in 1994, but its courts have never applied it, the Convention not being accepted as Saudi law – as related by Jan Paulsson at the HKIAC Anniversary Conference

properly[677]. Consequently, the Miami Draft – attracting just as much criticism as many followers – only solves as a first step towards uniform interpretation, and not for legislative amendment creating harmonization.

In any case, it is highly unlikely to ever have an absolutely uniform interpretation even just of the New York Convention – let-alone a worldwide uniform regulation of international commercial arbitration in general. Such extreme harmonization would not be practical anyway, as in arbitration (just as in any other area of law or life in general) there is no 'one size fits all' solution. Nevertheless, in spite of this disillusioning realism, the more-or-less unified trend in interpretation of norms regulating arbitration that exists today, already forces differences to survive only in small segments of these norms – hoping that the devil that lies in the details, will not take the whole issue back into head-ache causing conflicts.

Finally, precisely because there is no 'one-size-fits-all' universally valid formula that one could apply to solve the eventual conflicts between party autonomy, institutional, national, international and socio-cultural sources of norms in any case, and because each case is different, the lawyer's answer to the dilemmas raised will be – as always – that 'it depends'[678]. Because law is not an exact science, the solution to a particular issue will depend on the particularities of each case in its given circumstances, in light of a particular relevant legislation in a given moment in time. But by knowing the possible pitfalls in advance and

[677] *See* Jan Paulsson, *The New York Convention's Misadventures in India*, (1992) 7 Mealey's Int'l Arb. Rep. 18 (June).

[678] With acknowledgment to Prof. Tibor Tajti, from whom the author learned the expression.

having the perception of hierarchy of the relevant norms, the solution may be a lot easier than if based on mere imagination[679].

[679] *Supra* note 1.

LIST OF AUTHORITIES

Bibliography

A Q&A guide to arbitration law and practice in Egypt available at <http://arbitration.practicallaw.com/3-501-7485?q=*&qp=&qo=&qe=>.

AG opines in West Tankers: anti-suit injunctions in support of arbitration agreements incompatible with Brussels Regulation, Herbert Smith Arbitration e-Bulletin of September 5, 2008, available at <http://www.herbertsmith.com/NR/rdonlyres/7FE0F3D6-7DA5-4E1B-AE51-B79B60A14231/8306/WestTankersebulletin050908.html>;

Al-Ahram Egyptian daily newspaper Issue No.45273 of 19 November 2010.

ALVAREZ, HENRI C., in a contribution by the ITA Board of Reporters to Kluwerarbitration

ARIAS, DAVID, Supreme Court Champions Maximum Validity of Arbitration Agreements, ILO Newsletter April 24, 2008, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=c0c0c62c-6ad5-4a95-bd48-c2c1be3e7191>.

BACHAND, FREDERIC, Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?, (2006) Arbitration International, Vol. 22, No. 3, LCIA, p. 463,

Black's Law Dictionary 516 (7th ed. 1999)

BORN, GARY B. and LINDSAY, TIMOTHY, Enforcement of International Arbitral Awards in England and the New York Convention, Kluwer Arbitration Blog, 21 August 2009, available at

<http://kluwerarbitrationblog.com/blog/2009/08/21/enforcement-of-international-arbitral-awards-in-england-and-the-new-york-convention/>.

BORSTEIN, ADAM, Arbitrability enforcement: when arbitration agreements contain unlawful provisions (39 Loy.L.A.L.Rev.1259) (2006).

BRANSON, CECIL O.D., The Enforcement of International Commercial Arbitration Agreements in Canada, (2000) Arbitration International, Vol. 16, No. 1, LCIA, p. 19;

CHERNYKH ,YULIYA S., Arbitration Agreements versus Interim Measures, ILO Newsletter of April 3, 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=1c4ecfd4-ee70-4a27-a586-83baf3ae8211>.

Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0>.

Consultation Paper on the Proposed Amendments to the Arbitration and Conciliation Act 1996 issued by the Indian Ministry of Law and Justice, available at <http://lawmin.nic.in/la/consultationpaper.pdf>.

CRAIG, W. LAURENCE, Uses and abuses of appeal from awards, 4 Arb. Int'l 174 (1988).

CRAIG, W. LAURENCE, WILLIAM W. PARK and JAN PAULSSON, International Chamber of Commerce Arbitration, 295 (3rd ed. 2000).

CREMADES, BERNARDO M., Overcoming the Clash of Legal Cultures: The role of interactive arbitration, in Conflicting Legal Cultures in Commercial Arbitration. Old issues and new trends 147-168 (Stefan N. Frommel and Barry A.K.Rider eds. Kluwer Law International 1999).

DE BERTI, GIOVANNI, New rules for Milan Chamber of Arbitration, ILO Newsletter of August 12, 2010, available at <http://www.internationallawoffice.com/newsletters/detail.aspx?r=21248>.

DONOVAN, DONALD FRANCIS and GREENAWALT, ALEXANDER K.A., Mitsubishi after twenty years: Mandatory rules before courts and international arbitrators, in Pervasive Problems in International Arbitration fn.1 p.11 (Loukas A. Mistelis and Julian D.M. Lew eds., Kluwer Law International (2006).

EARLE, WENDY J, Conflict between Arbitration and Class Proceedings Statutes in Ontario Explained, ILO Newsletter of March 5, 2009, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=b87ce2dc-d400-439d-a7c1-ef2ad71f5301>.

EL KOSHERI, AHMED S., Islamic Law, in Albert Jan van den Berg (ed), Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, 1994 Vienna Volume 7 (Kluwer Law International 1996), 506 – 512.

England and Wales: The jurisdiction of choice', dispute resolution brochure of the Law Society of England and Wales (2007)

FURMAN ,VLADIMIR P. and JARMUKHANOVA, DIANARA M., Different Treatment for Arbitral Awards Issued in and outside Kazakhstan, ILO Newsletter May 1, 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=f2d03ca3-3b9b-476e-8025-dc68df3e83aa>.

GAILLARD, EMMANUEL, Legal Theory of International Arbitration 63 (Nijhoff Publishers 2010).

GAUKRODGER, DAVID, Foreign State Immunity and Foreign Government Controlled Investors, OECD Working Papers on International Investment 2010/2, 11.

GHIKAS, GERALD W., The Yugraneft Limitation Period Controversy - A Hollow Debate?, ILO Newsletter of December 11, 2008, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=278435b5-66fb-4930-b655-30149f2c09c8>.

Gillard Government Policy Statement "Trading our way to more jobs and prosperity", Australian Government Department of Foreign Affairs and Trade, April 2011, available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

GREGOIRE ,SIMON, Court of Appeal Refuses to Recognize Foreign Arbitral Award, ILO Newsletter of May 29, 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=f4ebe6a7-e2f4-4dd5-b261-21bb78d1901a>.

Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards, Special Supplement to the ICC International Court of Arbitration Bulletin (2008).

HIBER, DRAGOR and PAVIC, VLADIMIR, Arbitration and Crime, 25 Journal of International Arbitration 4 (2008), 461-478.

HORVATH, GÜNTHER, The duty of the tribunal to render an enforceable award, 18 Journal of International Arbitration (2001), 135.

JAIN, ALOK N., Yet Another Misadventure by Indian Courts in the Satyam Judgment?, Volume 26 Issue 2 Arb'n Int'l (2010), 251 – 280.

JONES, CÉSAR CORONEL, The future of international arbitration in Ecuador: the boomerang effect, ILO Newsletter of July 22, 2010, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=e46353d6-6931-47da-9acd-a187dcf9cf84>.

KLEIMAN, ELIE, Paris First instance court president upholds 'pathological' ICC arbitration clause, ILO Newsletter of April 22, 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=144f1e59-463d-4989-9920-a7be2feb3f4a>.

LORD MUSTILL, Comments and Conclusions in Conservatory Provisional Measures in International Arbitration, 9th Joint Colloquium (ICC Publication, 1993)

MILNER, FRASER, MARTIN, STEFAN and SCHAFLER, MICHAEL D., New UNCITRAL Arbitration Rules, Lexology Newsletter of November 17, 2010, available at <http://www.lexology.com/library/detail.aspx?g=e5cacfa6-72c0-427e-9af6-3d0c64fba165>.

MOGAN, SHANTI, Are Clauses that Limit Timeframes for Referring Claims to Arbitration Valid?, ILO Newsletter of October 09 2008, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=d522bc2e-f958-4d17-8d17-d9780ef6e06b>.

MOGAN, SHANTI, Official Gazette notification not required for enforcement of convention award, ILO Newsletter April 1, 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=0d651cb5-c6f7-44f2-8ec0-6bfcfc5240ac>.

Paris, Place internationale de l'arbitrage conference organized by the Paris Bar; or the creation of an Association under the same name, in 2008

PARK, WILLIAM W., Amending the Federal Arbitration Act, 13 Am. Rev. Int'll Arb. 75 (2002), 106.

PARK, WILLIAM W., Arbitral jurisdiction in the United States: who decides what? [2008] Int. A.L.R.;

PARK, WILLIAM W., Eason-Weinmann Center for comparative law colloquium: The internationalization of law and legal practice: National law and commercial

justice: Safeguarding procedural integrity in international arbitration [1989] 63 Tul. L. Rev. 647;

PARK, WILLIAM W., The Lex Loci Arbitri and International Commercial Arbitration, [1983] The International and Comparative law Quarterly Vol.32 No.1.

PAULSSON, JAN, The New York Convention's Misadventures in India, (1992) 7 Mealey's Int'l Arb. Rep. 18 (June).

PAULSSON, MARIKE R.P., The Miami Draft: the Good Twin of the NYC, Kluwer Arbitration Blog, 7 October 2010, available at <http://kluwerarbitrationblog.com/blog/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/>.

Proposal on Islamic Finance, Group on Governing Law and Dispute Resolution in Islamic Finance, G. Affaki (Ed.), I. Fadlallah, D. Hascher, A. Pézard, F-X. Train, 21 Septembre 2009, to be published, available at http://www.institutfrancaisdefinanceislamique.fr/docs/docs/doc_id125.pdf

RAY, ASHUTOSH, Dallah v. Pakistan: Why the buzz?, Lex Arbitri - the Indian Arbitration Blog, November 11, 2010, available at < http://lexarbitri.blogspot.com/2010/11/dallah-v-pakistan-why-buzz.html>

REDFERN, ALAN and HUNTER, MARTIN, Law and practice of international commercial arbitration 175-181 (Thomson, 4th ed. 2004).

REES, HEFIN, Anti-Suit Injunctions after West Tankers – The Rise Of Foreign Tactical Litigation, Extract of a seminar on international commerical arbitration delivered on 13th May 2010, available at <http://hefinrees.wordpress.com/2010/06/14/anti-suit-injunctions-after-west-tankers-the-rise-of-foreign-tactical-litigation/>;

ROFFE, CARLOS Calvo y su vigencia en America Latina, UNCATD, Reprint Series 53, 1984, as referred to in Loose, supra note 590.

SCHWARZ ,STEPHEN, 'Manifest Disregard of the Law': Does It Provide Courts a Reason to Vacate Arbitration Awards?, WLF Legal Backgrounder, Vol.24 No.33, October 9, 2009, available at <http://www.wlf.org/publishing/publication_detail.asp?id=2112>.

SHEPPARD, AUDLEY, Arbitration Not Contrary to European Convention on Human Rights, ILO Newsletter of April 26, 2007, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=15f73c4c-8286-46f9-893f-5d75a0f19dc2>.

SLAUGHTER, ANNE-MARIE, A New World Order (Princeton University Press 2004

SPOORENBERG, FRANK and FELLRATH, ISABELLE, International award annulled on grounds of procedural public policy infringement, ILO Newsletter of July 29, 2010, available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=774924c1-0da6-497a-9c08-38b3c77230aa>.

Swiss Chambers of Commerce and Industry Memorandum, available at <https://www.sccam.org/sa/download/Internal_Rules.pdf>

TEVENDALE, CRAIG, Court of Appeal holds religious criteria for appointment of arbitrators unlawful, ILO Newsletter of 12 August 2010, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=e5c8e482-2839-46c9-b26b-f389d09daf2b>.

TSAVDARIDIS, ANTONIOS D., Non-binding invalid arbitration clause can be valid contractual provision, ILO Newsletter of April 22, 2010, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=3eac12a1-187c-432f-a019-d0b30ea11c12>.

VAGENHEIM, ALEXANDRE, "Consent" and the Jurisdiction of Investment Arbitrations: Are the Traditional Rules of Interpretation Still Relevant Today?, Chapter 2 in Investment

Treaty Arbitration and International Law Volume 3, Ian A. Laird and Todd J. Weiler Editors (2010).

VAN DEN BERG, ALBERT JAN, The New York Arbitration Convention of 1958: Towards a Uniform Judicial interpretation 328 (Wolters Kluwer 1981).

VARADY, TIBOR, BARCELO, JOHN and VON MEHREN, ARTHUR, International Commercial Arbitration. A Transnational Perspective 82-88 (West, 4th ed. 2009).

VARADY, TIBOR, The Elusive Pro-Arbitration Priority in Contemporary Court Scrutiny of Arbitral Awards, Collected Courses of the Xiamen Academy of International Law, Vol. 2 (2009) (Martinus Nijhoff Publisher) at 13.

VEEDER, V. V., Is there a need to revise the New York Convention, keynote speech at the IAI Foprum Dijon (2008), in The review of international arbitral awards (Emmanuel Gaillard ed), 191.

WEGEN, GERHARD and MARKERT, LARS, Food for Thought on Fork-in-the-Road – a clause awakens from its hibernation, Austrian Yearbook on International Arbitration 2010, 269-292.

World Bank, Investing across borders project, available at <http://iab.worldbank.org/Data/Explore%20Topics/Arbitrating-disputes

ZEILER, GEROLD and STEINDL, BARBARA, New act leads to revision of Vienna Rules, ILO Newsletter of May 17, 2007, available at < http://www.internationallawoffice.com/newsletters/Detail.aspx?g=27f06b55-341d-4641-80ca-c6f39ba24f75>.

ZEILER, GEROLD, West Tankers, the Heidelberg Report and the principle of competence-competence, Annals FLB – Belgrade Law Review, Year LVII, 2009, No. 3, 45-53.

Case law

[2010] 1 CLJ 137.

10 Ob 20/07z Austrian Supreme Court, decision of March 20, 2007.

129/3-06 Economic Court of Kyiv Region, decision of 14.07.2006.

253/07, Egypt Constitutional Court, decision of April 15, 2007.

373/09.0TTLSB.L1-4 Court of Appeal of Lisbon, decision of 13 January 2010.

4A_279/2010 Swiss Supreme Court, judgment of October 25, 2010.

4A_428/2008 Swiss Federal Tribunal.

4P.114/2006 Swiss Federal Tribunal, First Civil Court, ASA Bulletin, (Kluwer Law International 2007 Volume 25 Issue 1) 123 – 154.

4P.198/2005 Swiss federal Tribunal, decision of October 31, 2005, ASA Bulletin, (Kluwer Law International 2006 Volume 24 Issue 2) 339 – 347.

4P.236/2004 Swiss Federal Tribunal, First Civil Court, judgment of 4 February 2005, ASA Bulletin, (Kluwer Law International 2005 Volume 23 Issue 3) 508 – 519.

4P.243/2000 Swiss federal Tribunal, decision of 8 Januar 2001 (ASA Bulletin, Kluwer Law International 2010 Volume 28 Issue 2) 335 – 341.

7307/76, Egypt Constitutional Court, decision of February 8, 2007.

84/19, Egypt Constitutional Court, decision of November 6, 1999.

1A v R [2010] 3 HKC 67.

AKSA v. Norsolor, December 9, 1980, Paris Court of Appeal, 1981 Rev. arb. 306.

Alami Vegetable Oil Products Sdn Bhd v. Lombard Commodities Limited, [2009] MLJU 0214, decision of February 26, 2009.

Alcatel v. Amkor (ABS case), French Supreme Court First Civil Chamber, March 27, 2007, in Revue de l'Arbitrage Volume 2007 Issue 2, 347 - 348; completing the decision in Peavey v. Organisme général pour les fourrages, French Supreme Court First Civil Chamber, February 6, 2001, in Revue de l'Arbitrage Volume 2001 Issue 1, 229 – 238; confirmed by the decision in HGL v. Spanghero, French Supreme Court First Civil Chamber, 9 January 2008, in Revue de l'Arbitrage, Volume 2008 Issue 1, 160 – 161.

Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, Generali Assicurazioni, ECJ Case C-185/07.

Arvind Construction Company ltd v. Union of India, and Indian Oil Corporation Ltd v. Raja Transport Private Ltd.

Atem LLC v. S.A.S (case No. 17/355), decision of October 12, 2010.

Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing GmbH (2001) 1 QdR 461.

BGH IHR 203, 90; Arbitration Court of the Japan Shipping Exchange of Sept. 1, 1981, Yearbk. Comm. Arb'n (1986) 194.

Brisman v. Hebrew Academy of Five Towns & Rockaway, Supreme Court of the State of New York, Appellate Division: Second Judicial Department, January 22, 2010.

Cargill Rice v. Empresa Nicaraguense Dealimentos Basicos; Empresa Nicaraguense Dealimentos Basicos v. Cargill Rice, 25 F.3d 223.

Central District Court of Jakarta Judgment of the of 1 April 2002

China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp, 334 F 3d 274, 288 and First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938.

Club Atlético de Madrid SAD v Sport Lisboa E Benfica - Futebol SAD and Fédération Internationale de Football Association, 4A_490/2009 Swiss Supreme Court, decision of April 13 2010.

Creighton Ltd. v. Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of the State of Qatar, Cour de Cassation, 181 F.3d 118, 25 Yearbk. Comm. Arb'n (2000), 443 – 534.

Dallah Real Estate & Tourism Holding Co v Pakistan [2008] EWCH 1901 (Comm).

Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.

Deco Automotive Inc. v. G.P.A. Gesellschaft Fur Pressenautomation MbH, 1989 CarswellOnt 3168 (Dist. Ct.).

Dell Computer Corp v Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801.

Dermajaya Properties Sdn Bhd (Brunei) v. Premium Properties Sdn Bhd (Malaysia) and CFE Holdings (Malaysia) Sdn Bhd (Malaysia) [2002] 2 SLR 164.

Dewer v. Belgium [1980] 2 EHRR 439.

FG Hemisphere Associates L.L.C. v. Democratic Republic of Congo & Ors, CACV 373/2008 & CACV 43/2009 (10 February 2010).

General National Maritime Transport Co. v. Société Götaverken Arendal, Paris Court of Appeal, February 21, 1980, 1981 Rev. arb. 524;

Generali SpA v West Tankers Inc, ECJ judgment of 10 February 2009.

H & H Marine Engine Service Ltd. v. Volvo Penta of the Americas, Inc., 2009 BCSC 1389.

Hall Street Associates LLC v. Mattel Inc., 128 S. Ct. 1396 (2008).

Hamburg Chamber of Commerce, SchiedsVZ 2007, 55.

Hooters of America, Inc. V. Phillips, 173 F3d 933 (4th Cir. 1999).

Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, Case No.ARB/05/24; Tribunal's Ruling of May 6, 2008.

ICC Case No. 2321/1974, 1 Yearbk. Comm. Arb'n (1976) 133-135.

Jivraj v. Hashwani [2010] EWCA Civ 712

John Holland Property Limited (Australia) v. Toyo Engineering Corporation (Japan) [2001] 2 SLR 262.

Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on jurisdiction of August 6, 2004.

Karaha Bodas Ccompany LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357,

Lapine Technology Corp. v. Kyocera Corp, Decision of August 29, 2003, 341 F.3d 987.

Lapine Technology Corp. v. Kyocera Corp, Decision of Dec. 11, 1995, 909 F.Supp. 697.

Lapine Technology Corp. v. Kyocera Corp, Decision of Dec. 9, 1997, 130 F.3d 884.

Lapine Technology Corp. v. Kyocera Corp, Decision of March 25, 2008, 128 S.Ct. 1396.

Lesotho Highlands Development Authority v. Impreglio S.p.A. et al., [2005] UKHL 43 (U.K.).

LG-2007-28609 Gulating Court of Appeal, decision of October 22, 2007.

Lisbon Court of Appeal, decisions of January 13, 2010 and November 25, 2009.

M&C Corp. v. Behr & Co., 87 F.3d 844, 847 (6th Cir. 1996).

Methanex Motunui Ltd v Spellman, High Court of New Zealand, judgment of 18 August 2003, [2004] 1 NZLR 95 (HC).

Mobil Corporation and Others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, June 10, 2010.

New York Supreme Court Kings County order of December 18, 2008.

Nirma Ltd. v. Lurgi Energie und Entsorgung GmbH et al., High Court, Gujarat, judgment of 19 December 2002 (28 Yearbk. Comm. Arb'n 2003) 790 – 809.

Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of the Republic of Venezuela, 2010 U.S. Dist. LEXIS 134830 (S.D. Miss. Dec. 4, 2010).

NV v Ken-Ren Fertilisers and Chemicals [1994] 2 Lloyd's Rep 109 at 116 (HL).

Orascom Telecom Holding SAE v. The Republic of Chad, [2008] EWHC 1841 (Comm).

Paul Stretford v. Football Association Ltd [2007] EWCA Civ 238.

Peyras, Hernán Matías v Nordelta Constructora SA, Division II of the Civil and Commercial Court of Appeals of San Isidro, December 21, 2004.

Polish claimant v English respondent, Court of Arbitration Attached to the Hungarian Chamber of Commerce, decision on jurisdiction of March 31, 2005.

Poverkhnost TV v. National TV Company of Ukraine (case No. 12/335), ruling of December 25, 2007.

Prosecutor v. Beqa Beqaj, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations of May 27, 2005.

Rahcassi Shipping Co SA v Blue Star Line (The Bede) Queen's Bench Division (Commercial Court), 27 June 1967, [1969] 1 Q.B. 173, at 183.

Rederi Aktiebolaget Sally v. Termarea, Court of Appeal of Florence, 4 Yearbk. Comm. Arb'n 294 (1979).

Rivadeneira Hugo German v. ABN Amro Bank NA, Division D of the Commercial Court of Appeals, February 28, 2008.

RLI Ins. Co. v. Kansa Reinsurance Co., Ltd., 1991 WL 243425 (S.D. N.Y. 1991).

Rogers Wireless Inc v Muroff, 2007 SCC 35.

Sadruddin Hashwani v. Nurdin Jivraj, UK Court of Appeal Civil Division, Case no: A2/2009/1963, decision of 22 June 2010, [2010] EWCA Civ 712.

Samsung Electronics Co Ltd v. Michael Jaffe, administrator/liquidator of Qimonada AG, case No. 10-50604 Tribunal de Grande Instance Paris, decision of January 22, 2010.

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan CASE No. ARB/01/13, Decision on Objection to Jurisdiction of August 06, 2003.

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case N° ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, of January 29, 2004.

Shamil Bank of Bahrein EC v Beximco Pharmaceuticals Ltd, [2004] EWCA Civ.19, [2004] 4 All ER 1072.

Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd, Queen's Bench Division (Commercial Court), judgment of 7 August 2009, [2009] EWHC 2097 (Comm).

Smith Estate v. National Money Mart Company, 2008 CanLII 27479 (ON S.C.)

Smith Estate v. National Money Mart Company, 2008 CanLII 746 (ONCA).

SpA Abati Legnami v. Fritz Haupl, Italian Supreme Court case no. 3221, judgment of 3 April 1987, 17 Yearbk. Comm. Arb'n 1992), 529 – 533.

Sri Lanka Cricket v World Sport Nimbus Pte Ltd, [2006] 2 CLJ 316, Putrajaya Court of Appeal.

Sumukan Ltd v. Commonwealth Secretariat [2007] EWCA Civ 243.

Svenska Petroleum Exploration AB v Lithuania (No.2), Court of Appeal (Civil Division) 13 November 2006, [2007] 1 Lloyd's Rep. 193.

Termarea v. Rederiaktiebolaget Sally, Court of England Queen's Bench Division, Wkly.L.Rep., Nov.16, 1979.

The Shaw Group, Inc. et.al. v. Triplefine International Corporation (Taiwan), US District Court, Southern District of New York, No. 01 CIV. 4273 (LMM), judgment of 8 September 2003 (29 Yearbk. Comm. Arb'n 2004) 1055

Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 35 Yearbk. Comm. Arb'n (2010), 343 – 345.

UOP NV v. BP France et.al., French Supreme Court decision of February 20, 2007.

Vb 99130/2000, Court of Arbitration at the Hungarian Chamber of Commerce and Industry.

Venture Global Engineering v. Satyam Computer Services Ltd, Supreme Court of India, AIR 2008 SC 1061.

Wilko v. Swan, 346 U. S. 427.

X. Ltd. v. Y. AG, Swiss First Civil Law Court Federal Tribunal 4A_444/2009, judgment of February 11, 2010.

Yugraneft Corporation v. Rexx Management Corporation & Others, Supreme Court of Canada, Case No. 32738, 20 May 2010.

ZTMK v. BEARCO S.A., Switzerland, case No. 24/81/10.

Legislation

National

Australia	Arbitration Act (Cth) (1974, amended in 2010)
	Foreign States Immunities Act (1985)
Austria	Code of Civil Procedure
Belgium	Judicial Code (1998) amended by Law of May 19, 1998
Brazil	Arbitration Act Law No 9.307/1996
	Concessions Federal Law Nr.8.987/95, as amended by Law 11.196/05
	Public-Private Partnership Federal Law Nr. 11.079/04
British Columbia	Arbitration Act (1996)

Bulgaria	Law on International Commercial Arbitration (1988, amended in 1993)
Canada	Arbitration Act (R.S.A. 2000, c. A-43)
	Class Proceedings Act
	Canada Commercial Arbitration Code
	Limitations Act (R.S.A. 2000, c. L-12)
	Reciprocal Enforcement of Judgments Act (R.S.A. 2000, c. R-6)
	International Commercial Arbitration Act (R.S.O. 1990)
	State Immunity Act (R. S.C. 1985, c. S-18)
Croatia	Arbitration Act (2001)
Czech Republic	Act on Arbitral Proceedings and Enforcement of Arbitral Awards (1994)
	Arbitration Act No. 216/1996
Ecuador	Constitution (2008)
	Executive Decree 466 of 27 August 2010, Official registry 277, 13 September 2010
Egypt	Arbitration Act, Law No. 27 for 1994, amended by Law 8/2000
	Commercial Law No. 17/1999
	Minister of Justice Decree 8310/2008, as amended by Minister of Justice Decree No. 6570/2009
England	Arbitration Act (1996)
	Employment Equality (Religion and Belief) Regulations 2003 No.1660
	State Immunity Act (1978)

Finland	Arbitration Act 967/1992
France	Code of Civil procedure, as amended by the Decree No. 2011-48/2011
	Decree No. 2011-48 of January 13, 2011 amending Book IV on Arbitration of the Code of Civil Procedure
	Decree No.80-354 of May 14, 1980 concerning domestic arbitration to be included in the Code of Civil Procedure
	Decree No.81-500 of May 12, 1981 enacting Book IV on Arbitration of the Code of Civil Procedure
Germany	Act on the Reform of the Law relating to Arbitral Proceedings (1997)
Hungary	Act LXXI on Arbitration (1994)
Iran	International Commercial Arbitration Act (1997)
Kazakhstan	Code of Civil Procedure
	Law on International Commercial Arbitration
Malaysia	Arbitration Act 646/2005
	Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 320/1985
Netherlands	Arbitration Act (1986)
New Zealand	Arbitration Act (1996)
Ontario	Consumer Protection Act (2002)
Panama	Legislative Decree No.5 of 8 July 1999
Portugal	Alternative Dispute Resolution (Voluntary Arbitration), Law No. 31-1986
Portugal	Civil Code

Quebec	Civil Code
	Consumer Protection Act (R.S.Q. c. P-40.1)
Romania	Law on the Settlement of Private International Law Relations (1992)
Russia	Law on International Commercial Arbitration (1993)
Saudi Arabia	Arbitration Regulation 27.05.1985G (08.09.1405H) 27 May 1985
Singapore	International Arbitration Act (2002)
	Procedural Arbitration Law
Spain	Arbitration Act Nr.60/2003
	Code of Civil Procedure, Law Nr.1/2000
Sweden	Arbitration Act (SFS: 1999:116)
Switzerland	Private International Law Act (1987)
Turkey	Code of International Private and Procedural Code, Law 5718/2007
US	Federal Arbitration Act (FAA) (1925, amended in 2006)
	Foreign Sovereign Immunities Act 28 USC 1605 (1976)

International

Agreements on the mutual recognition of award signed by Mainland China with Taiwan, Macau, and HKSAR.

Algeria Claims Settlement Declaration (1981)

Algeria General Declaration (1981)

Convention on the Contract for the International Carriage of Goods by Road (1956)

Convention on the Execution of Foreign Arbitral Awards (Geneva 1927)

Council Directive 2000/78/EC on equal treatment in employment and occupation (2000)

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2000)

European Convention on Human Rights (Rome 1950)

European Convention on International Commercial Arbitration (Geneva 1961)

European Convention Providing a Uniform Law on Arbitration (Strasbourg 1966)

ICSID Convention on the settlement of investment disputes between states and nationals of other states (Washington 1965)

Inter-American Convention on International Commercial Arbitration (Panama 1975)

MERCOSUR Agreement on International Commercial Arbitration (1998)

Organization for the Harmonisation of Business Law in Afric (OHADA) Treaty (1993)

Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Proposal COM/2010/0748 final - COD 2010/0383

Switss Intercantonal Arbitration Convention (1969)

Travaux préparatoires, Consideration of the draft Convention: New text of Articles 1 (3), 5 (1)(a), (b) and (e) adopted by the Conference at its 23 rd meeting, E/CONF.26/L.63

Travaux préparatoires, Federal Republic of Germany: amendments to Articles 3, 4, 5, E/CONF.26/L.34, 28 May 1958

Travaux préparatoires, Report of the Committee on the Enforcement of International Arbitral Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention), 28 march 1955, E/2704, E/AC.42/4/Rev.1

Travaux préparatoires, Text of the Convention as provisionally approved by the Drafting Committee on 9 June 1958, E/CONF.26/8

Travaux préparatoires, United Nations Conference on International Commercial Arbitration, Working party No.3 on 3 June 1958, E/CONF.26/L.43.

UN Convention on Jurisdictional Immunities of States and Their Property (2004)

UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958);

UNCITRAL Arbitration Rules (1976, amended in 2010)

UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006);

USSR Chamber of Trade and Industry, American Arbitration Association and Chamber of Commerce in Stockholm Agreement (1992).

Arbitration Rules

Abu Dhabi Commercial Conciliation and Arbitration Center Charter

Arbitration Court Attached to the Hungarian Chamber of Commerce, Rules of Proceedings

Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules (2010)

Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules

Chamber of Arbitration of Milan International Arbitration Rules (2010)

China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (2005)

Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Procedural Rules

German Institution of Arbitration (DIS) Arbitration Rules (1998)

IBA Guidelines on conflicts of interests in international arbitration (2004)

IBA Rules of Ethics for International Arbitrators

IBA Rules on the Taking of Evidence in International Arbitration (2010)

ICSID Arbitration Rules (2006)

Indonesia National Board of Arbitration (BANI) Rules of Arbitral Procedure

International Centre for Dispute Resolution (ICDR) of the American Arbitral Association (AAA) International Arbitration Rules (2009)

International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, Rules

International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Rules (2007)

International Court of Arbitration of the International Chamber of Commerce (ICC) Rules of Arbitration (1998)

Korean Commercial Arbitration Board (KCAB) Arbitration Rules (2008)

Korean Commercial Arbitration Board (KCAB) Rules of International Arbitration (2007)

London Court of International Arbitration (LCIA) Arbitration Rules (1998)

Madrid Chamber of Commerce and Industry, Rules of Arbitration (2009)

Netherlands Arbitration Institute (NAI) Arbitration Rules (2010)

Rice Millers' Association (RMA) Arbitration Rules

Singapore International Arbitration Center (SIAC) Arbitration Rules (2010)

Uniform Self-Administered Arbitration Rules (2011)

Vienna International Arbitral Centre (VIAC) Arbitration Rules (2006)

Quoted persons

Albert Einstein (German-born, US physicist, 1879 – 1955)

Hon. Justice Robert Tang, HKSAR Judiciary, Court of Final Appeal, at the HKIAC 25th Anniversary Conference in Hong Kong (2010)

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Kaj Hober, Professor at the University of Dundee, partner at Mannheimer Swartling in Stockholm

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Lord Peter Goldsmith QC, former Attorney General of the UK, currently European Chair of Litigation at Debevoise & Plimpton

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