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FOREWORD

Maria Casoria

In line with the University mission of fostering its research culture, the College of Law at Royal University for Women has hosted the 1st Annual Research Symposium on International Commercial Arbitration. The Symposium, organised under the scientific direction of Dr Maria Casoria from the Royal University for Women and Prof. Ronal Brand from the University of Pittsburgh – School of Law, was a key event within the 9th Annual Middle East Vis Pre-Moot Programme, held in preparation for the Willem C. Vis International Commercial Arbitration Moot Court Competition under the auspices of local and international partners, namely the Bahrain Chamber for Dispute Resolution, the Commercial Law Development Programme at the US Department of Commerce, the United Nations Commission on International Trade Law, and the Center for International Legal Education at the University of Pittsburgh - School of Law, and the International Court of Arbitration.

The purpose of the Symposium was to bring together practitioners and academics versed in International Commercial Law and Arbitration to engage in a scholarly discussion on highly debated topics pertaining to the practice of international commercial dispute settlement. The speakers delved into cutting-edge issues in the field of Alternative Dispute Resolution by focusing on the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the "Singapore Convention on Mediation", adopted in December 2018 and opened for ratification in August 2019 in Singapore. Such Convention, culmination of nearly four years of negotiations within a UNCITRAL working group, is accompanied by a corresponding Model Law which replaces the existing Model Law on Conciliation of 2002 and is seen as the pivotal tool to support the mediation in conjunction with arbitration as alternatives to State Court trials. Indeed, its main aim is to promote mediation as a method to resolve disputes outside the courtroom, by making the final decision binding and enforceable. The speakers also provided an overview of different rules about mediation, namely the International Chamber of Commerce Mediation Rules. Other speakers focused on the relationships between arbitration and judiciary with special reference to the problem of enforcement, which has always been a conundrum especially with reference to international disputes. One speech focused on the and grey areas of the parties' choice of law in the arbitration agreement between rules of Private International Law and Arbitration rules.

Overall the Symposium created an occasion for active discussion about some of the most critical topics in the field of ADR and has been only the first of a series of research events to be organised by the College of Law on matters related to the peaceful settlement of disputes.

UNDERSTANDING FORUM DIFFERENCES FOR INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

Ronald A. Brand[1]

ABSTRACT

Over the past half century or more the combination of the New York Convention and the reduction of state limitations on party autonomy has resulted in arbitration becoming the preferred means for the resolution of international commercial disputes. But party autonomy is not without limits in international contract practice, and states continue to have some restrictions on the ability of private parties to engage in choice of law and choice of forum. This paper describes the international framework for the exercise of party autonomy in international commercial relationships and how that framework affects decisions involving choice of forum, and particularly arbitration, in international commercial transactions. In doing so, it compares the rules for both honoring choice of forum and for recognizing resulting decisions in the New York Convention and the 2005 Hague Convention on Choice of Court Agreements. Whether the differences between the New York and the Hague Conventions will result in real differences affecting party choice of forum remains to be seen. What is clear is that the similarities are greater than the differences, and that widespread ratification and accession to the Hague Convention will change the climate from one in which there is an enforcement mechanism for arbitration but none for litigation, to one in which there is a balanced enforcement mechanism for both types of dispute resolution.

I. Introduction

The Twentieth Century saw arbitration become the widely preferred means for the resolution of international commercial disputes. In large part, this was a result of the desire of private parties to submit disputes to neutral forums applying neutral law. This was, of course, spurred on by one of the most successful treaties in history, the New York Convention, which provides for the recognition and enforcement of both arbitration agreements and arbitral awards in over 150 countries.[2]

This move to international arbitration followed state authorization of freedom of choice through party autonomy in international business relationships. Arbitration is based entirely on the consent of the parties. But the parties must have the ability to exercise that consent in a manner that provides benefits and reduces risks in international transactions.

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[1] Chancellor Mark A Nordenberg University Professor, John E Murray Scholar, and Director, Center for International Legal Education, University of Pittsburgh School of Law. The author has been a member of the US delegation to the Judgments negotiations at the Hague Conference on Private International Law in both the Working Group and the Special Commissions. The statements in this article are those of the author alone, made in his personal capacity, and should in no way be taken to reflect the position of the United States in the negotiations.

[2] 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (done at New York, 10 June 1958), 21 UST 2517, TIAS No 6997, 330 UNTS 38 ["New York Convention"] <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

This ability is a relatively recent phenomenon in international business relationships.[3] Moreover, party autonomy is still not absolute, and states continue to restrict the ability of private parties to engage in choice of law and choice of forum.

In the following discussion, I will describe both the international framework for the exercise of party autonomy in international commercial relationships and how that framework affects decisions involving choice of forum, and particularly arbitration, in international commercial transactions.

II. The Dispute Resolution End Game: Collection on an Award or Judgment

In the end, the goal of any dispute resolution process is not the decision of a forum itself, but the ability to have that decision recognized and enforced, usually in order to collect money due from the award or judgment debtor to the award or judgment creditor. This goal is affected both by the legal framework in which a transaction is developed and by the contract between the parties, including the provisions dealing with dispute resolution, most particularly choice of forum and choice of law.

The first question in addressing the question of dispute resolution in structuring any international transaction is what forum to select for the dispute resolution process. The principal choices are arbitration and litigation, with mediation and other forms of alternative dispute resolution gaining favor over time. While the New York Convention was for many years the only game in town in terms of a truly global framework for the recognition and enforcement of dispute resolution decisions, that has changed. The development and coming into force of the 2005 Hague Convention on Choice of Court Agreements has begun to place litigation on an equal footing with arbitration for international commercial contracts.[4] It is thus necessary to consider each of these conventions and their advantages and disadvantages when selecting a forum for dispute resolution in an international commercial contract.

A. The New York Convention

With nearly 160 states as parties, the United Nations Convention on The Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), is perhaps the most successful treaty in private international law.[5] It provides a framework for the enforcement of both agreements to arbitrate and the resulting awards.

Article II (1) of the New York Convention provides for the enforcement of arbitration agreements, stating that

Each Contracting State shall recognize an agreement in writing, under which the parties undertake to submit to arbitration all or any differences which have arisen or which

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[3] For a more general discussion of choice of forum, choice of law, and limitations o party autonomy, see Ronald A Brand, Transaction Planning Using Rules of Jurisdiction and the Recognition and Enforcement of Judgments (358 Hague Academy Collected Courses) (Recueil des cours) (2013) 29 at chapters IV-VI.

[4] 'Hague Convention on Choice of Court Agreements' concluded at The Hague (Hague Convention, 30 June 2005) <http://www.hcch.net/upload/conventions/txt37en.pdf>. The text of the Convention, and related documents, are available on the Hague Conference website at: <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>.

[5] The current status of the New York Convention may be found at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. [6]

Article II (3) follows, providing that, once the parties have agreed to submit their disputes to arbitration, they have the support of the courts of Contracting States in seeing that the other party follows through by respecting the agreement to arbitrate. [7]

Article III of the New York Convention then provides the basic rule for the recognition and enforcement of an arbitral award once dispute resolution has occurred:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. [8]

State sovereignty and important party interests are then protected in Article V, which sets forth the exclusive grounds on which the recognition and enforcement of an arbitral award may be challenged:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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[6] New York Convention, *supra* note 1, art II (1).

[7] New York Convention, *supra* note 1, art II (3) ("The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.").

[8] New York Convention, *supra* note 1, art III.

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country. [9]

One of the strengths of the New York Convention has been its relative simplicity. This has both facilitated a greater number of ratifications and accessions and provided for development of its rules through practical interpretation as the world of international commercial relationships grows and evolves. By avoiding complexity at the outset, the Convention created some risk of divergent interpretations, but this has, for the most part, been avoided. Instead, the lack of complexity has resulted in greater uniformity of application, with some aberrations allowing arbitral jurisprudence to grow and develop without the necessity of complex Convention amendment.

B. The 2005 Hague Convention on Choice of Court Agreements [10]

Transactions lawyers tend to justify the inclusion of arbitration agreements in international commercial contracts largely because the New York Convention insures both compliance with the agreement to arbitrate and recognition and enforcement of any resulting arbitral award. With the dawn of the twenty-first century, there is hope for similar treatment of choice of court agreements and judicial judgments. On the litigation side, the 2005 Hague Convention on Choice of Court Agreements provides similar respect for both party choice of forum and the resulting decision.[11] The Hague Convention went into effect for Mexico and the European Union (for 27 of its Member States) on October 1, 2015; for Singapore on October 1, 2016; for Denmark on September 1, 2018, and for Montenegro on August 1, 2019.[12] The People's Republic of China, Ukraine, and the United States have signed, but have not ratified, the Convention.[13]

If, and when, the Hague Convention becomes effective in a significant number of states, those who draft international commercial contracts will find it necessary to make a more balanced choice between arbitration and litigation of potential disputes. If choice of court clauses will be as easy to enforce as arbitration agreements, and court judgments as easy to enforce as arbitral awards, then the choice between the two types of forum will necessarily hinge on the real differences between these two dispute settlement options, and not merely on the fact that one brings successful enforcement more easily than does the other.

[9] *Id* art V.

[10] Portions of this section are taken from, and build upon, Ronald A Brand, *Transaction Planning*, *supra* note 2; and on Ronald A. Brand, 'Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements' (2009) LVII Belgrade Law Review 23-35 (Issue No 3).

[11] Hague Convention *supra* note 3.

[12] *See* the Hague Convention status table <http://www.hcch.net/index_en.php?act=conventions.status&cid=98>.

[13] *Id*.

1. Convention Structure

The Hague Convention applies to non-consumer international agreements that designate a single court (or the courts of a single state) for resolution of disputes.[14] Its structure is built on three basic rules:

1) Article 5 provides that the court chosen by the parties in an exclusive choice of court agreement has jurisdiction;[15]

2) Article 6 requires that, if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case;[16] and

3) Article 8 provides that a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement shall be recognized and enforced in the courts of other Contracting States.[17]

Like the New York Convention, the Hague Convention is intended to enhance predictability by ensuring that party agreements will be honored, and that the results of dispute resolution in the chosen forum will be enforced. Also like the Article V New York Convention grounds for non-recognition of arbitral awards, Article 9 of the Hague Convention contains grounds for non-recognition of judgments. As with the New York Convention, the rules for non-recognition are likely to become a focal point of the Convention, largely because these are the rules which come to the forefront in any dispute over the recognition and enforcement of the resulting decision. The Hague Article 9 list looks much like that found in Article V of the New York Convention:

Article 9 Refusal of recognition or enforcement states that:
Recognition or enforcement may be refused if –

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

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[14] Hague Convention, *supra* note 3, art 2(1)(a).
[15] *Id* art 5.
[16] *Id* art 6.
[17] *Id* art 8.

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.[18]

2. The Effect and Future of the Convention

As more states become parties to the Hague Convention, it is likely to affect private party choice of forum decisions in international commercial agreements. It has already had an impact on sovereign decision-making, however, with the proliferation of international commercial courts. One U.S. commentator, expressing concern with the fact that the United States is not headed toward ratification, explained this aspect as follows:

It's probably only a matter of time before the rest of the world lines up for easy reciprocal enforcement with the nations of Europe.
Once that happens, a court judgment from London will be more valuable than one from New York. For if clients from Asia or Latin America can sue anywhere, which would they rather have in their back pockets? Deal lawyers drafting the dispute-resolution clause in international contracts are sure to take note. And U.S. litigators, having spent the past decade watching their global business flow to arbitration, may be chagrined to see more of it diverted to the Royal Courts of Justice.[19]

While this analysis may be adjusted if Brexit is successful, it nonetheless indicates the belief of some that the Hague Convention will have a significant impact on choice of forum in international contracts.

The United States has not ratified the Hague Convention, not because of concerns over the legal rules involved, but rather because of a political debate over how implementation in the United States should occur. Representatives of the Uniform Law Commission have pushed for implementation through state law and have vowed to prevent implementation through a federal process that would parallel that for the New York Convention.[20]

While the United States has stayed out of the Hague Convention, states which have joined have engaged in sovereign entrepreneurship. Just as the New York Convention helped create a proliferation of regional, national, and local arbitration institutions, the Hague Convention has resulted in a proliferation of international commercial courts, each seeking to attract the financial benefits of litigation business to a local economy. Thus, new international courts have emerged in Dubai, Singapore, Amsterdam, Brussels, Frankfurt, and Paris.[21] Whether these courts will displace such transnational magnet courts in London or New York remains to be seen, but the race is clearly on.

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[18] *Id* art 9.

[19] Michael D Goldhaber, 'Ideology Blocks Arbitration Treaty' Nat'l LJ (6 July 2015) <http://www.nationallawjournal.com/id=1202731197599?keywords=goldhaber&publication=National+Law+Journal>.

[20] For a discussion of the problems of ratification and implementation in the United States, see Ronald A Brand, 'Understanding Judgments Recognition' [2015] 40 N CJ Intl L & Com Reg 877.

[21] For a discussion of the proliferation of national commercial courts for international cases, see Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' Max (Planck Institute Luxembourg

C. Comparing the New York and Hague Conventions

1. General Respect for Party Autonomy in Choice of Forum

Both the New York and Hague Conventions are built on basic assumptions of party autonomy. The forum chosen by private parties is respected, as are the results of the decision in that forum. Whether the Hague Convention will provide a level playing field for choice of court and arbitration agreements will depend on both the level of ratifications of the Hague Convention and the ways in which states elect the various declarations available when becoming a contracting state. That equation will, however, have a significant impact on the practice of arbitration, particularly if it results in more parties including choice of court agreements in their international commercial contracts.

a. The Private Party Perspective

While the Hague Convention has the potential to level the choice of court/arbitration playing field, there are some important differences between the New York and Hague Conventions. These differences can affect party autonomy in choice of forum.

Article II(3) of the New York Convention requires that parties to an arbitration agreement be referred to arbitration, unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed."[22] This rule of substantive validity follows the requirement in Article II(1) that there be consent ("an agreement"), and the formal validity requirement ("an agreement in writing" that is "signed by the parties or contained in an exchange of letters or telegrams") in Article II(1) and (2). The Convention does not, however, provide guidance in determining the law applicable to the Article II(3) question of substantive validity (*i.e.*, whether the agreement is "null and void, inoperative or incapable of being performed"). This is left to the rules of private international law of the forum seized with the matter.[23]

The Hague Convention differs from the New York Convention by inserting the substantive validity issue in three separate articles, and by providing an autonomous Convention choice of law rule for purposes of this determination. Article 5(1) requires that a court chosen in an exclusive choice of court agreement take jurisdiction "unless the agreement is null and void under the law of that State."[24] Article 6(a) requires that any other court in a Contracting State "suspend or dismiss proceedings . . . unless . . . the agreement is null and void under the law of the State of the chosen court."[25] Once a judgment is issued by the chosen court, Article 9(a) provides that a court in another Contracting State may refuse recognition and enforcement if "the agreement was null and void under the law of the State of the chosen court, unless the chosen court has

for Procedural Law Research Paper Series | N° 2019 (2)) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166>.

[22] New York Convention, *supra* note 1, art II(3).

[23] The New York Convention does provide autonomous choice of law rules for specific determinations required in Article V(1)(a) and V(2)(a) at the award recognition and enforcement stage.

[24] Hague Convention, *supra* note 3, art 5(1).

[25] *Id* art 6(a).

determined that the agreement is valid."[26] Together, these three provisions incorporate a single source of applicable law for making the determination of substantive validity of the choice of court agreement.

Article II of the New York Convention contains two substantive validity rules. The first is found in Article II(1) requirement that an agreement to arbitrate concern "a subject matter capable of settlement by arbitration."[27] This "arbitrability" requirement allows national law to differ on what is and is not arbitrable, and thus requires a conflict of laws analysis to determine this aspect of substantive validity.

The second substantive validity rule in the New York Convention is found in Article II(3), which allows non-recognition of an arbitration agreement if it is "null and void, inoperative or incapable of being performed."[28] The Hague Convention provides additional limits on party autonomy at this jurisdictional stage, however, in the form of Article 6 grounds on which a court not chosen may refuse to suspend or dismiss proceedings in favor of the chosen court. These grounds include lack of party capacity,[29] "manifest injustice" or violations of public policy resulting from giving effect to the agreement,[30] situations where "the agreement cannot reasonably be performed,"[31]and situations where "the chosen court has decided not to hear the case."[32] Thus, the Hague Convention provides more limitations on party autonomy at the jurisdictional stage when the question is the recognition and enforcement of the *agreement* on choice of forum.

Party autonomy rules in the New York and Hague Conventions also arise at the recognition and enforcement stage. Article II of the New York Convention provides for the obligation to recognize and enforce an arbitral award, and Article V provides exceptions to this obligation. In the Hague Convention, the obligation to recognize and enforce a judgment is found in Article 8, and the exceptions are found in Article 9.

Several comparisons are possible given the rules of the New York and Hague Conventions. The first is of the rules on recognition and enforcement of the *choice of forum agreement* itself. This comparison can be summarized as follows:

New York Convention	**Hague Convention**
Rule (Article II (1)): Agreements to arbitrate will be honored	**Rule (Article 5):** Choice of court agreements will be honored
Exceptions (Article II (1)): - "concerning a subject matter capable of settlement by arbitration"	**Exceptions (Article 6):** -agreement was "null and void" - "a party lacked the capacity"
Exceptions (Article II (3)): -agreement was "null and void"	- "manifest injustice" or "manifestly contrary to public policy"

[26] *Id* art 9 (a).
[27] New York Convention, *supra* note 1, art II (1).
[28] *Id* art II (3).
[29] Hague Convention, *supra* note 3, art 6(b).
[30] *Id* art 6 (c).
[31] *Id* art 6 (d).
[32] *Id* art 6 (e).

-agreement is "incapable of being performed"	- "cannot reasonably be performed" - chosen court has declined

The comparison between the two sets of bases for nonrecognition of the *resulting decision* can similarly be summarized as follows:

New York Convention	**Hague Convention**
Rule (Article III): Arbitral awards will be recognized and enforced	**Rule (Article 8):** Judgments will be recognized and enforced
Exceptions (Article V): -lack of party capacity -lack of proper notice -outside the scope of the agreement to arbitrate -proper arbitration procedure -award is not yet binding, or has been set aside -subject matter "is not capable of settlement by arbitration" - "contrary to . . .public policy"	**Exceptions (Article 9):** -agreement was "null and void" -lack of party capacity -lack of proper notice -judgment "obtained by fraud" -manifestly incompatible with public policy -inconsistent with local judgment -inconsistent with earlier judgment

Whether these differences provide distinctions important to the choice between arbitration and litigation are likely to depend on the particular transaction and the future development of the law under each Convention.

b. The Contracting State Perspective

Contracting States also have choices to make in ratifying and implementing each of the New York and Hague Conventions. These may affect party autonomy and the choice between arbitration and litigation as a choice of forum.

The New York Convention, in Article X(3), allows two possible declarations: (1) that a state will "apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State,"[33] and that a state will "apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."[34]

The Hague Convention, on the other hand, contains three possible declarations that may limit the application of the Convention, and one that may extend its application:

[33] New York Convention, *supra* note 1, art X (3).
[34] *Id.*

1) Article 19 allows a Contracting State to declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.[35]

2) Article 20 allows a state to declare "that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State."[36]

3) Article 21 allows a state to limit the operation of the Convention by declaring that it will not apply the Convention to a matter to which it "has a strong interest in not applying this Convention."[37] Any state making such a declaration must "ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined," and is subject to reciprocal application such that other Contracting States will refuse to respect exclusive choice of court agreements selecting the courts of the declaring state in disputes involving such matters.[38]

4) Article 22 allows Contracting States to expand the scope of the Convention such that the provisions on recognition and enforcement of a judgment will apply as well to judgments based on non-exclusive choice of court agreements.[39]

D. Leveling the Playing Field for Choice of Forum Agreements

Whether the differences between the New York and Hague Conventions will result in real differences affecting party choice of forum remains to be seen. What is clear is that the similarities are greater than the differences, and that widespread ratification and accession to the Hague Convention will change the climate from one in which there is an enforcement mechanism for arbitration but none for litigation, to one in which there is a balanced enforcement mechanism for both types of dispute resolution. This will require that transactions lawyers draft choice of forum clauses with greater attention to the real differences between arbitration and litigation.

[35] Hague Convention, *supra* note 3, art 19.
[36] *Id* art 20.
[37] *Id* art 21(1).
[38] *Id* art 21(2).
[39] *Id* art 22.

UNCITRAL – THE MULTI-LATERAL SETTING BODY AND ITS TWO NEW MEDIATION INSTRUMENTS[40]

Judith Knieper

ABSTRACT

UNCITRAL instruments are negotiated with universal participation and reflect a balance of national, regional, economic, social, legal and other interests. The result of such universal discussions are texts that provides solutions to cross-border legal issues and contribute to the harmonization and unification of international trade law. For more than 50 years, UNCITRAL has been working in the area of dispute settlement. In 2018, it finalized two new instruments: the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (the "Model Law 2018"), adopted on 25 June 2018 by UNCITRAL, and the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation"), adopted on 21 December 2018 by the General Assembly. Both texts built on previous instruments that UNCITRAL drafted in the area of mediation, and aim to strengthen the respect for binding commitment, inspire confidence in the rule of law and ensure fair treatment in the resolution of disputes arising over contractual rights and obligations.[41]

Introduction

The United Nations Commission on International Trade Law ("UNCITRAL") is recognised as the core legal body of the United Nations system in the field of international trade law, and is mandated since its creation in 1966 to promote the progressive harmonization and unification of international trade law. From its very inception, UNCITRAL has been very actively working on a harmonized system of international dispute resolution, which is an important factor in the advancement of trade. As trade is considered essential for economic development and social progress, it further contribute to peace and stability.[42] Mediation is playing an important and steadily growing role therein. As early as in 1980 when UNCITRAL adopted its first mediation instrument, the General Assembly of the United Nations recognized in its resolution 35/52 the value of mediation "as a method of amicably settling disputes arising in the context of international commercial relations." In 2018, two new instruments were adopted: the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) ("the Model Law 2018"), adopted on 25 June 2018 by UNCITRAL and the United Nations

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[41] This characterization by the General Assembly in its resolution 62/65 dated 6 December 2007 was used to describe the New York Convention; it is also relevant to characterize the Singapore Convention on Mediation.

[42] See Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms to be found under https://uncitral.un.org/sites/uncitral.un.org/files/englishguidance_note.pdf. This Note provides an overview of the principles and the framework to strengthen United Nations support to States to implement commercial law reforms.

Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation"), adopted on 21 December 2018 by the General Assembly.

The following paper presents UNCITRAL's multilateral drafting process, as illustrated by the preparatory work undertaken in the area of mediation.[43]

The Multilateral Drafting Process

Mandate

UNCITRAL has been created as one of the commissions of the General Assembly to fulfill the overarching goals the United Nations, as outlined in Article 1 of the United Nations Charter, i.e., to maintain peace and security, to develop friendly relations among nations and to achieve international co-operation. Such co-operation implies seeking to solve international problems of an economic, social, cultural, and humanitarian character. The United Nations Organization is a centre for harmonising the actions of nations in the attainment of these common objectives. The United Nations General Assembly resolution 2205 (XXI) of 17 December 1966 established UNCITRAL, and mandated it with "the progressive harmonisation and unification of the law of international trade considering that international trade co-operation among states is an important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security.[44]

UNCITRAL was created during the cold war, after the Cuban Missile Crisis in 1962 had shown the limits of a purely confrontational approach. In a speech at the General Assembly, John F. Kennedy, the then US President, argued that peace might be attainable by nations with different ideologies if they negotiate, since peace is "a daily, a weekly, a monthly process, gradually changing opinions, slowly eroding old barriers, quietly building new structures." He advocated that it should not be the differences that matter most, but rather peaceful cooperation in all areas.[45] When discussing the establishment of UNCITRAL, the delegate from the Union of the Soviet Socialist Republics argued along the very same lines. He "considered that the time had come for the United Nations to play a more active part in the legal regulation of international trade. Trade was an important factor in economic development, social progress and the development of international understanding. As a result of economic expansion by the socialist countries along with decolonization, conditions were now favourable for the development of world trade, which in turn could help to promote peaceful coexistence.[46]

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[43] Janet Checkley presents the new Convention in her paper in detail. A comprehensive paper on the Convention and the negotiation process, outlining the different stages of the drafting process including compromises found and difficulties encountered by the Working group has been written by the then American delegate Timothy Schnabel: The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (September 18, 2018). 19 Pepp. Disp. Resol. L.J. 1 (2019). Available at SSRN: https://ssrn.com/abstract=3239527 or http://dx.doi.org/10.2139/ssrn.3239527.

[44] See: http://www.jus.uio.no/lm/uncitral.2205-xxi/doc.html.

[45] See http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-046-041.aspx.

[46] Excerpt from the summary record of the 949th meeting of the 6th committee (6 December1966), para5, *Yearbook of the United Nations Commission on International Trade Law, 1968- 1970, Volume I (Yearbook 1968)*, p. 52; all yearbooks to be found under: http://www.uncitral.org/uncitral/en/publications/yearbook.html.

Building Peace on a Daily Basis

This idea of "building peace on a daily basis" is what UNCITRAL seeks to implement during its deliberations, that is, being a forum where states can peacefully find common solutions to problems that arise in international economic relations and that can be more efficiently solved on a multilateral basis, taking into account the differences between the national systems, finding solutions that are in line with international and regional needs of States and international businesses alike, and benefitting from comparative law analysis of the various approaches developed at national level.

No Replacement of National Legislator

Developing international trade law on a multilateral basis does not mean that the national legislator is to be replaced by an international one. When the General Assembly deliberated on UNCITRAL's creation, it did so based on the Schmitthoff Study, [47] considered to be UNCITRAL's pre-founding document. The study provided the background information and highlighted the main aspects to be considered when dealing with international trade law on a multilateral basis. The study stressed the necessity to establish a Commission at the level of the United Nations General Assembly, advocated for such a Commission to draft internationally acceptable legal solutions, but highlighted that action such as incorporating elements into the national legal framework should be done at the discretion ("leave and licence of national sovereign").[48] Texts developed by UNCITRAL of a legislative nature consequently have to be adhered to, or enacted by the national legislators. Instruments of a legislative nature developed by UNCITRAL are meant to provide models to the national legislators; in developing a national/international legal frame, legislators can make use of such UNCITRAL texts. UNCITRAL's universal and inclusive legislative process assures that the outcome are legal texts that would be compatible with the various legal traditions and can fit into the different national legal frames.

Universal Forum – Limited Membership: A Contradiction?

Before UNCITRAL's establishment, international legal texts have been drafted for a very long time, e.g. by the Hague Conference on Private International Law and UNIDROIT, [49] and continue to be drafted successfully by these organisations. However, when it comes to universal drafting, only a body like the United Nations, encompassing almost every State as a member State, can offer a truly universal forum. However, the General Assembly decided that UNCITRAL should have limited membership so as to make negotiations feasible and increase effectiveness. When UNCITRAL was created, it had 29 member

[47] Clive Maximilian Schmitthoff (1903-1990) was originally from Germany, where he studied and practised law. He emigrated in 1933 and became Professor in trade law in the UK. He was tasked by the General Assembly to provide information on the need and possibilities to establish a Commission on International Trade Law.
[48] Schmitthoff Study, para 24, *Yearbook 1968*, p.22.
[49] These organisations are also increasing their membership. For example, UNIDROIT already has 63 permanent member States. However, not all geographic areas are represented properly, e.g. there are only 4 African member States in UNIDROIT.

States; in 1973 this number increased to 36 States,[50] and in 2002 it again increased to 60 member States.[51]A further increase to 72 member States is currently being discussed.[52] The current 60 member States work on a rotation principle and each has a (renewable) six-year mandate. In order to make sure that all geographic regions, legal traditions and different levels of economic development are properly and equally represented, the States are selected from the different regional United Nations groups as follows: 14 States from Africa, 14 States from the Asia-Pacific Region, 10 States from Latin-America and the Caribbean, 8 States from Eastern Europe, and 14 States from "Western Europe and Others"[53] (the term "others" encompasses for example the United States, Australia, Canada and Israel).

The reasons for increasing the number of UNCITRAL member States were first to reflect the fact that the number of United Nations member States considerably augmented[54] (in 1966, the United Nations had 123 member States; in 1973, when the first increase was decided, the United Nations had 135 member States; in 2002, when the last increase was decided, the United Nations had 191 member States; today the United Nations has 193 member States). However, the increase of the United Nations member States was slower than the increase of UNCITRAL members. In terms of statistics, in 1966 every 4,28th State was an UNCITRAL member, in 1973 every 3,75th State and in 2002 every 3,18th State. The proportionally higher increase of UNCITRAL member States was decided to allow broad participation, and to make sure that the Commission "remained representative of all legal traditions and economic systems".[55] By broadening the spectrum of represented States, all of the texts produced by UNCITRAL to can gain a higher acceptability among all States.[56] Further, an increase in the number of member States would allow more States to attend Commission or Working Group sessions.[57] Indeed, some States could only justify the human and financial resources to attend the sessions if they are members.[58] Developing States are often unable to attend the Working Group and Commission sessions due to limited resources. In that context, a trust fund was created in 1994 in order to allow

[50] See decision by the General Assembly outlined in resolution 3108 (XXVIII) of 12 December 1973.

[51] The discussion before the second significant enlargement took considerable time: a first proposal was already made in 1988 (A/43/17, paras. 112-115), but several times postponed (A/43/17, paras. 116 and *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17* (A/42/17), para. 65 (UNCITRAL Yearbook, vol. XVIII: 1987). In 2000, member States were asked to submit their view (see para. 13 of resolution 55/151, 12 December 2000) and finally by resolution 57/20 of 19 November 2002, the General Assembly increased the membership of the Commission from 36 States to 60 States.

[52] In the last election more applications were submitted than seats being available, which shows a growing demand.

[53] The regional groups have been agreed upon when Europe was still divided following the boundary line of the iron curtain, which resulted in two European regional groups: Western European and Others Group (WEOG) and the Eastern European Group. European member States are therefore still today in two different regional groups.

[54] A/CN.9/500, para. 12.

[55] See the Note by the Secretariat: A/CN.9/299, and see the discussions in the 6th Committee where the need to have a balanced distribution among the regions was highlighted (partly the increase was criticised by Latin American States as not keeping the geographical balance between member States, A/9408, para. 52.
Law on its thirty-fifth session A/57/17, para 238, *Yearbook 2002*, p. 33).

[56] A/CN.9/500, para. 12.

[57] A/CN.9/500, para. 12.

[58] See Report of the Secretary-General A/56/315 to be found under:
http://www.un.org/documents/ga/docs/56/a56315.pdf.

developing UNCITRAL member States to attend the sessions by paying their travel and accommodation costs of the delegates.[59] Unfortunately, contributions to the trust fund remain low, hence the impact of the idea remains limited. Other attempts were made, such as projects funded to increase the number of participants. The European Union and the Swiss Agency for Development and Cooperation are, for example, contributing to the trust funds to provide financial assistance for delegates of Working Group III on Investor-State Dispute Settlement (ISDS) Reform over the next three years until 2020. In the same context, the Deutsche Gesellschaft für Technische Zusammenarbeit (GIZ) agreed to cover travel costs for several delegates. However, these attempts are only short-term solutions; they are not sustainable and therefore not suitable to address the concern effectively.[60]

Observer States

In addition to UNCITRAL member States, all other United Nations member States are invited as observer States. While the question of observer States was not discussed at the time of UNCITRAL's establishment,[61] non-member States soon requested to be able to participate. Their participation was initially informally until the Commission formally allowed the participation of observer States considering such participation in its "interest."[62] Since 1977 when the 10th session took place, all United Nations member States have been formally invited to attend all sessions of both the Working Groups and the Commission.[63]

Observer States can fully participate in discussions. The formal difference is that observer States have "no right to vote and cannot object a decision being recorded."[64] However, as consensus is the principle in the decision-making process, being "reflective of the collaborative spirit that characterizes the deliberations in UNCITRAL,"[65] there is de facto no difference.

The principle of consensus was set and followed for a long time. At the very first session of UNCITRAL, the Commission agreed "that its decisions should as far as possible be reached by way of consensus within the Commission, but that in the absence of a

[59] See para 5 of General Assembly Resolution A/RES/48/32, https://undocs.org/en/A/RES/48/32.

[60] The European Union and the Swiss Agency for Development and Cooperation (SDC) made resources available to provide financial support for the participation of developing countries at Working Group III "Investor-State Dispute Settlement reform" The funds were used to facilitate participation at the 35th session of Working Group III (New York, 23–27 April 2018) for delegates from El Salvador and Sri Lanka, at the 36th session (Vienna, 29 October-2 November 2018) for delegates from Madagascar, Mali, Democratic Republic of the Congo, Myanmar, Togo, Senegal, Gabon, Burkina Faso, Mauritania and Namibia, and at the 37th session (New York, 1-5 April) for delegates from Argentina, Bolivia, Burkina Faso, Colombia, Costa Rica, Democratic Republic of the Congo, Ecuador, Gabon, Guinea, Kenya, Mali and Senegal.

[61] It was reported by a former Legal Counsel of the United Nations that non-member States were allowed to participate informally "without nameplates" before the official decision: see A/CN.9/638/Add.5, p. 5, para 16 with its footnote 26, to be found under: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/876/97/PDF/V0787697.pdf?OpenElement.

[62] See A/31/17, para 74, *Yearbook 1976*, p. 29.

[63] See A/RES/31/99, p. 184, para 10c,http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/31/99.

[64] UNCITRAL rules of procedure and methods of work, Summary of conclusions, para 5, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V10/556/48/PDF/V1055648.pdf?OpenElement.

[65] See the Note of the Secretariat, providing the background information to the discussion on the 2010 UNCITRAL procedural rules, para 8, to be found under https://undocs.org/en/A/CN.9/676.

consensus, decisions should be made by vote."[66] In 2010, after an intensive discussion on UNCITRAL working methods, the Commission confirmed in paragraph 2 of its UNCITRAL Rules of Procedure and Methods of Work-Summary of Conclusion ("2010 UNCITRAL Procedural Rules") that: "The practice in the Commission as reflected by existing procedures long used by the Commission is to reach decisions by consensus. The Commission has decided that Commission decisions should be reached by consensus as far as possible; in the absence of a consensus, decisions are to be taken by voting as provided for in the relevant rules of procedure of the General Assembly." The word "consensus" is not defined in the Rules of Procedure of the General Assembly, which are applicable to UNCITRAL, but the Conclusions of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly, which has been annexed as Annex 4 to the Rules of Procedure of the General Assembly, state in paragraph 104 that "the adoption of decisions and resolutions by consensus is desirable when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations."[67] Generally, it is understood that consensus means the "adoption of a decision without a formal objection and vote"[68] and is not a synonym for unanimity.[69] On the one hand, the result should be acceptable to all participants and all concerns should be successfully addressed. On the other hand, the need for consensus should not allow a "dissident minority"[70] to "hold the others to ransom,"[71] block any solution and hinder other States to proceed with the finding of a solution. Paragraph 4 of the 2010 UNCITRAL Procedural Rules spells out that "[v]oting is to be regarded as an exceptional procedure. It should be noted that voting in the Commission took place only once on a procedural matter." This "procedural matter" mentioned here related to the question of whether the Secretariat should move from New York to Vienna.[72] However, in 2010, a second vote on a procedural matter took place. This vote related to the question of who should become the chair of the Working Group III in November 2017, when this Working Group started to work on reform on ISDS.[73]

Inviting observer States is meant to obtain the best possible text taking into consideration all valuable substantive concerns and suggestions. Observer States could voice their concerns, and thus be probably able to better accept the result achieved and to adhere to the instrument that has been developed. Lastly but most importantly, if any States are excluded from the discussion, the text cannot be regarded as universal the Commission can fulfil its mandate of achieving worldwide unification or harmonization in terms of trade law only when the process is truly inclusive.

[66] Report of the Commission, para 18, *Yearbook 1968*, p. 73.
[67] See https://www.un.org/en/ga/about/ropga/anx4.shtml.
[68] See A/CN.9/638/Add. 4, para 21, p. 9 (FN 21).
[69] A/CN.9/676, see paras. 11, 12 to be found under: https://undocs.org/en/A/CN.9/676.
[70] See A/CN.9/676, para 17.
[71] See A/CN.9/638/Add.4, p. 11, para 24, to be found under: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/875/89/PDF/V0787589.pdf?OpenElement.
[72] See Report of the United Nations Commission on International Trade law on the work of its eleventh session A/33/17, Para. 89-103, http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/vol9-p11-45-e.pdf.
[73] See Report of Working Group III, A/CN.9/930, paras. 11-14, https://undocs.org/en/A/CN.9/930/Rev.1.

Other observers

UNCITRAL being a governmental body, the discussion is government-led.[74] However, the Commission invites other observer entities, such as international governmental and non-governmental organizations, to the deliberations.[75] In the resolution establishing UNCITRAL, it was already emphasized that the Commission should "consult with or request the services of any international or national organisation, scientific institution and individual expert" if it "considers such consultation or services might assist it in the performance of its functions." Furthermore, paragraph 12 entitled the Commission to "establish appropriate working relationships with intergovernmental organisations and international non-governmental organisations concerned with the progressive harmonisation and unification of the law of international trade." These organisations have always played a crucial role, as they brought in essential practical experience. In addition, these organisations have been constantly helpful "to promote awareness" of finalised instruments.[76]

To qualified as an observer, non-governmental organizations need to fulfill certain criteria regarding their relevance and potential contribution to the session to which they are invited:[77] their conformity to the spirit, purposes and principles of the Charter of the United Nations; their internationality in focus and membership; their ability to contribute meaningfully to the deliberations; their legal or commercial experience that is not represented by any other organizations already participating in the session. The goal is to gather broad experience to enable the Commission to develop meaningful texts, and to further ensure a balanced representation of the major viewpoints or interests in the relevant fields in all areas and regions of the world.[78]

In sum, since all States are invited to participate in UNCITRAL's and its Working Group's sessions, one could claim that the deliberations that lead to the finalization and adoption of instruments are potentially universal. In addition, all such instruments are considered, jointly with the report of UNCITRAL's sessions, by the General Assembly. The Conventions are only prepared by UNCITRAL in draft form after which they are usually communicated to the General Assembly for consideration and adoption. UNCITRAL's work is therefore truly universal and under scrutiny of the international community.

As an illustration, when discussing in 2017 whether UNCITRAL should work on ISDS reform, the Commission noted that it "provided an appropriate multilateral forum to discuss relevant issues in an inclusive and transparent manner, where the interests not only

[74] See the mandate given by the Commission to Working Group III, which emphasises the fact that the discussion is government led. The emphasis was declarative to reinsure States they "would be able to openly discuss and consider a wide range of issues. (…) The need for Governments to be represented by officials with adequate expertise and experience in negotiating investment treaties or investment chapters in free trade agreements and with exposure to claims related to investor-State dispute settlement was highlighted." The more expertise the delegates have, the more qualitative the discussions could become. See summary of discussions in the report by the Commission A/72/17, paras. 240-265, especially para. 250.

[75] A frequently asked question is whether individuals are entitled to participate in the deliberations: in principle no. Occasionally individuals have been explicitly invited as expert.

[76] See e.g. A/CN.9/638/Add.5, p. 11, para 31 (FN 10).

[77] See UNCITRAL rules of procedure and methods of work, Summary of conclusions, para. 10, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V10/556/48/PDF/V1055648.pdf?OpenElement
A/CN.9/676, para 28.

[78] A/CN.9/676, para. 26.

of States but also of other stakeholders could be considered."[79]

The above quote demonstrates not only the Commission's commitment to an inclusive approach towards the participants, but also its commitment to working methods that are inclusive and transparent, thereby contributing to the legitimacy of the texts and creating "the broadest consensus" that is key to a successfully negotiated text. The texts are not the work of a limited expert group, but are the result of intergovernmental negotiations, involving both state representatives and international organizations. The mediation instruments were for instance discussed in the six languages of the United Nations simultaneously and prepared by around 90 State delegations and actively observed by 40-50 international organizations.

Areas covered

The areas covered by UNCITRAL derive from a broad range of topics, such as cross-border sale, cross-border insolvency, international arbitration, but also highly specialized subjects, such as the judicial sale of ships.

The decision as to which topics should be discussed is taken by UNCITRAL – such decisions are taken after substantive research work to enable the Commission to make an informed decision and ensure that the legislative work is done in areas of practical relevance. Further, the Commission usually refrains from giving a narrow mandate so as to leave space for creative legal solutions. Texts developed by UNCITRAL go beyond any national solution and provide a new, purely international solution in which national aspects are no longer identifiable.

For instance, in the case of the instruments on the enforcement of International Settlement Agreements Resulting from Mediation (both the Model Law and the Singapore Convention on Mediation), the discussion started with a proposal of the government of the United States of America to draft a multilateral convention on the enforceability of settlement agreements resulting from international commercial mediation with the main aim to encourage mediation in a way the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention) did to promote and facilitate the growth of arbitration.[80]The proposal outlined that mediation was increasingly and successfully used; however, one main legal obstacle to an even greater use was the difficulties associated with enforcing a settlement agreement if a party that agreed to such an agreement later fails to comply. Enforcement under contract law was in general burdensome and time consuming, and a main obstacle to an even greater use.

In light of that proposal, the Commission requested one of its working groups, Working Group II (Dispute settlement), to consider the feasibility and possible form of work on the enforceability of settlement agreements resulting from mediation and report back to it. The Commission also invited delegations to provide information to the Secretariat.[81] The Secretariat of UNCITRAL circulated a questionnaire on various aspects of mediation[82]and, based on the responses received from States, the Secretariat outlined the

[79] A/72/17, para. 258.
[80] See A/CN.9/822, Proposal by the Government of the United States of America: Future work for Working Group II.
[81] A/69/17, para. 129.
[82] See Note of the Secretariat to prepare the discussions within the Working Group: A/CN.9/846, The compilation of responses to the questionnaire are to be found under A/CN.9/846 and addenda.

current legislative trends and possible questions to be considered. After deliberations, based on such available information and further research done by the Secretariat, the Working Group decided to suggest to the Commission "that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns." It could be noted that while the proposal of the government of the United States referred to the drafting of a multilateral convention, the Working Group refrained from defining the type of instrument to be developed, leaving it to future discussions[83]. The Commission followed that approach and a wide mandate was given to the Working Group to commence work on the topic of enforcement of settlement agreements.[84]

This example of UNCITRAL's decision to work on mediation instruments illustrates the careful approach of UNCITRAL when engaging in a new topic. Indeed, such decisions are taken after having explored the need and feasibility.

Decree of harmonization/unification dependent of the instrument

The instruments generally developed by UNCITRAL offer different degrees of harmonization. The conventions unify law by establishing legal obligations. For instance, the New York Convention with 159 member States is a very successful instrument, a nearly universal one;[85] similarly, the United Nations Convention on Contracts for the International Sale of Goods with 91 member states widely contributes to the harmonization of the field of international sales of goods. Conventions need to be taken over in their totality, allowing only a limited degree of flexibility through predetermined reservations. Instruments regarding the adoption of Conventions need to be deposited with the depository, usually the Secretary-General of the United Nations, and communicated to the United Nations Treaty Section, which is the registrar for the Conventions finalized by UNCITRAL. The model laws are legislative texts, which States can enact as part of their *domestic* law. The model law allows for adaptation to the national legal framework and therefore provides more flexibility to the national lawmaker. The degree of uniformity is consequently much lower than in the case of a Convention. In addition, the model law can be easily revoked, and it is much more difficult to control the status of model law compliance. In order to comply with a model law, the national legislator must base the legislation on it; the main legal principles need to be included in the national law and there should not be a contradiction with the model law in question. Compliance of a given national law with a model law is determined by the Secretariat.

[83] A/CN.9/832, para. 59.

[84] A/70/17, para 135-142 outlining the discussion, the mandate being formulated in para 142, https://undocs.org/en/A/70/17.

[85] See the status on the UNCITRAL website, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Please consult further the New York Convention Guide, which collects all information on the New York Convention: see http://newyorkconvention1958.org/.

Under the rubric 'status' on the UNCITRAL Website the model laws are listed in order to inform investors, users, practitioners, and others if a given national framework complies with the internationally standard. The status lists of model laws are however not necessarily complete, as States do not always properly inform the Secretariat on the on-going legislative developments. There are several model laws that have been drafted, the most successful one being the Model Law on International Commercial Arbitration. Legislation based on it has been indeed adopted in 80 States in a total of 111 jurisdictions.[86] Legislation based on the Model Law on International Commercial Conciliation 2002 has been adopted in 14 States in a total of 26 jurisdictions.[87]

Where the Commission does not see the potential to negotiate a Convention or a model law, it can develop a legislative guide, which would resemble a set of principles and legislative recommendations for legislators to consider in their enactment of domestic law, such as the Legislative Guide on Insolvency Law or the Legislative Guide on Secured Transactions. Finally, the drafting of contractual instruments, such as the UNCITRAL Arbitration Rules can be used to harmonize legal contracts but is insufficient to remove legislative obstacles. In addition, UNCITRAL developed some guidance notes for private parties, such as the Notes on Arbitration proceedings, meant to guide potential users through the arbitration procedure outlining all aspects that need to be taken in account, highlighting various solutions and approaches.

UNCITRAL might start preparing an instrument, which achieves a lower degree of uniformity only and then continue further harmonization based on the first instrument developed. The Mediation framework is a good example in that regard.

The UNCITRAL Conciliation Rules (1980)

The Commission started to work in the area of mediation already very early – and adopted the Conciliation Rules in 1980 already. At that point in time, the term conciliation was predominantly used to refer to a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship This is the reason why in the Rules and the Model Law 2002, UNCITRAL used the term 'conciliation' with the understanding that the terms 'conciliation' and 'mediation' were interchangeable. In preparing the amendment to the Model Law and the Convention, the Commission decided to change terminology and use the term 'mediation' instead in an effort to adapt to the actual and practical use of the terms, and with the expectation that this change will facilitate the promotion and heightens the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.[88]

The Conciliation Rules were the first international step taken to harmonize mediation in order to provide parties with rules for "a possible and viable alternative" to arbitration[89]. The rules provide for some procedural features, tailored to "the needs and expectations of the parties,"[90], guaranteeing speed and affordability of the proceedings

[86] See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
[87] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html.
[88] A/CN.9/934, para. 16.
[89] See A/CN.9/167, para .13.
[90] See A/CN.9/167, para .18.

as well as the necessary flexibility, allowing parties to use conciliation/mediation as they seem suitable for their purposes. Parties are free to agree on the procedure to be followed by the mediator during the mediation proceedings and can agree on a different approach than those provided for in the Rules. Parties are further enabled to agree and change the scope of the proceedings, which can be much wider than the one of any other procedures, where the scope is by definition limited to certain specific legal subject matters. A mediation procedure can for example focus on the question of how to preserve the overall business relationship or focus on personal interests.

The Model Law on International Commercial Conciliation (2002)

Over the years, it became apparent that contractual solutions alone do not meet the needs of the parties. Issues regarding confidentiality or regarding the role of the conciliator in a subsequent proceeding, be it a court or an arbitral proceeding, also need a legal basis, which is why the Commission decided to work on a model law on mediation. The Model Law on International Commercial Conciliation from 2002 ('Model Law 2002') seeks to strike a balance between the protections of the integrity of the conciliation process and providing maximum flexibility by preserving party autonomy. The term conciliation is to be understood in a very wide sense. Article 1 Nr. 3 Model Law 2002 defines mediation as a process where two parties in a dispute request a third person to assist them in settling it. It explicitly states that it can be referred to by names such as mediation and 'an expression of similar import' and covers thereby all non-determinative ADR processes. Existing differences regarding techniques and approaches do not matter from a legislative standpoint as the Model Law 2002 is drafted so as to incorporate these different processes. It aims to avoid over-regulation and rigid procedural recommendations in order to preserve mediation as a flexible instrument allowing for a diversity of styles, that allows an approach going beyond the purely legal one, allowing experiments in the proceeding. However, it aims also to ensure consistent quality of the mediation process and offers a framework regarding the core elements of a mediation procedure, i.e. confidentiality, the role of the mediator, party autonomy and fair treatment.

The Model Law 2002 is not regulating all aspects that are of relevance in the mediation context, e.g. nothing refers to ethical and professional standards, the mandatory education of mediators, the accreditation criteria or issues relating to the promotion of mediation. The Model Law is also silent on the application in the context of judicial proceedings. Indeed, the Model Law 2002 focused on the process itself and left the other questions to the national legislators. One important procedural aspect was however left out when the Model Law was adopted. Indeed, the Commission was not able to reach an agreement on enforceability, reflected in Art. 14 of the Model Law, which reads as follows: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable… (the enacting state may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement)." The guide to enactment,[91] which is based on the travaux préparatoires, meaning the deliberations and decisions taken by the Working Group and the Commission, explains why no agreement has been reached: "The text of the article reflects the smallest

[91] Model Law on International Commercial Conciliation with Guide to Enactment, para 88, to be found under: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

common denominator between the various legal systems. In the preparation of the Model Law, the Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted. However, it was realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which do not easily lend themselves to harmonization by way of uniform legislation." This statement documents the failure of the States to overcome their national approaches in 2002.

Twelve years later, the Working Group managed to develop a simplified and streamlined procedure by which settlement agreements, concluded by parties to resolve a commercial dispute are binding and enforceable and which allows parties to invoke such agreements. In order to accommodate States with very different experience with mediation, the Working Group developed two instruments in parallel: (i) a Convention providing a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and allowing parties to invoke such agreements against the enforcement, and (ii) an update of the Model Law 2002, which translates the provisions of the Convention into the provisions of the Model Law by including an additional section 3 called "International settlement agreements" so as to include the provisions on the enforcement and recognition of settlement agreements.

Both instruments should facilitate international trade and promote mediation as an alternative and effective method of resolving trade disputes – thereby paving the way for achieving a higher level of harmonization. As a result of this, enforcement of contracts and access to justice is strengthened. This is a prerequisite for a mature, rule-based global commercial system (implementing the Sustainable Development Goals, mainly SDG 16).

Following the decision of the Commission in 2018 to amend the title of the UNCITRAL texts on conciliation, to refer to mediation instead, and the setting up of a more comprehensive legislative framework on international mediation, the Commission considered it timely to update the UNCITRAL Conciliation Rules of 1980 and tasked the Secretariat to provide a first draft for its 52nd session.[92] The draft should reflect current practice and ensure consistency with the newly adopted instruments contents of the Singapore Convention on Mediation and the Model Law. In addition, the Secretariat was charged with provided a draft of Notes on Mediation.[93]

Conclusion

The newly drafted instruments in the area of mediation show that the UNCITRAL multilateral law-making process is working effectively. However, significant challenges are noted, the most important being the lack of sufficient human and financial resources.[94] As UNCITRAL instruments are not automatically binding, efforts to promote the instruments are required. Regarding the Singapore Convention, special focus is now placed to ensure

[92] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), paras. 246 and 254. The draft UNCITRAL Mediation Rules A/CN.9/986 prepared by the Secretariat can be found under https://undocs.org/en/A/CN.9/986.

[93] See the Note by the Secretariat: International Commercial Mediation: Draft UNCITRAL Notes on Mediation, to be found under: https://undocs.org/en/A/CN.9/987.

[94] The Secretariat has been designated to manage the Transparency registry: due to lack of resources implementation is done via a project: The Registry is operated with the funding by the European Union and by OFID (the OPEC Fund for International Development).

that the Convention is ratified widely, a first step being the signing ceremony on 7 August 2019 in Singapore. In addition, due to the lack of a supreme institution responsible for issuing binding interpretation, efforts are needed to address diverging understanding by practitioners in different States and jurisdictions[95]. Events like the Pre-Moot Bahrain (preparing for the VIS Moots in Vienna and Hong Kong) help to develop a common understanding and will therefore hopefully be continued for many years to come.

[95] UNCITRAL has therefore developed several tools, such as CLOUT, the Collection of **C**ase **L**aw **o**n UNCITRAL **T**exts, the digests, which is kind of a commentary, identifying the main trends of a given texts (and available for CISG and the Arbitration Model Law), the New York Convention website (http://newyorkconvention1958.org/) that relates to the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) and aims to promote its uniform and effective application throughout the world.

INTRODUCING THE SINGAPORE CONVENTION ON MEDIATION

Janet C. Checkley[96]

ABSTRACT

In December 2018, the United Nations General Assembly officially adopted the text of a breakthrough international instrument that is predicted to add a significant new landmark to the international dispute resolution landscape: the UN Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (officially referred to as the Singapore Convention). This paper summarises Ms Janet Checkley's remarks introducing the Singapore Convention, delivered at the Royal University for Women College of Law Research Symposium on International Commercial Arbitration held on 7 March 2019. It describes the Convention's origin, main purpose and features, and the possible approaches to being "convention ready." It also briefly predicts several future potentialities for international dispute resolution as a result of the Convention's adoption.

I. Introduction

In December 2018, the United Nations General Assembly officially adopted the text of a breakthrough international instrument that is predicted to add a significant new landmark to the international dispute resolution landscape: the UN Convention on the Enforcement of International Settlement Agreements Resulting from Mediation. In the same session, the UN determined to call the new convention after Singapore.[97] The Convention will be opened for signing on 7 August 2019, in Singapore.

The Singapore Convention on Mediation presents an exciting new landmark in the international dispute resolution landscape and promises to raise the profile of cross-border mediation processes as a result of its pro-enforcement approach to mediation settlement agreements resulting from mediation processes. This paper will describe the Convention's origins and purpose, review its key features, and explore two possible approaches for adopting states to be "convention ready." Finally, it will predict several potential impacts resulting from the advent of the Singapore Convention on the broader international dispute resolution landscape.

II. Purpose and Significance

Before describing the Convention's main features and functions, it is worthwhile to examine the purpose and significance of the Singapore Convention on Mediation. Some observers have questioned the need for a convention on the enforcement of mediation settlement agreements, because compliance rates with settlement agreements are already naturally high. Various studies have shown that compliance rates with mediation settlement agreements are consistently higher than compliance rates with judgements or

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[97] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2018) 19 Pepperdine Dispute Resolution Law Journal 1-61, 8.

awards.[98] Higher compliance rates with mediated settlement agreements are usually attributed to the parties' voluntary participation in the outcome of the dispute settlement process and their investment in terms of time, money, and carefully negotiated terms.[99] This is clearly a benefit to mediation users, but it does beget the question as to the necessity of a convention for enforcement if parties are not likely to find themselves in need of using it.

Though compliance rates with settlement agreements is high, use of mediation as a standalone dispute resolution mechanism in cross-border disputes is not. While mediation is widely practiced around the world in the domestic context,[100] cross-border mediation has not seen significant uptake, and the lack of a clear enforcement mechanisms for international mediated settlement agreements has been understood to be one of the main barriers to participation in mediation.[101] The Convention's main goal is therefore not to provide a means of enforcement for agreements that would not have otherwise been enforceable; the main goal is, instead, to incentivize the use of mediation where parties would not have otherwise considered it,[102] and to expand this form of dispute resolution to a new class of users by giving it the same "stamp of legitimacy" enjoyed by international arbitral awards under the New York Convention.[103] The Singapore Convention's purpose is to promote the practice of cross-border mediation as a stand-alone dispute resolution procedure in international disputes.[104]

Working Group II at the United Nations Commission on International Trade and Commercial Law (UNCITRAL) took up the work to develop an international instrument on the enforcement of international mediated settlement agreements in 2015.[105] The Working Group was granted a broad mandate from the Commission under which it could determine the final outcome of its deliberations.[106] This reflected the initial lack of consensus around the goal of the deliberations within the Working Group. Many delegates to the 65th Session supported drafting soft law instruments providing guidance for the enforcement of mediated settlement agreements, rather than drafting a binding instrument.[107] This approach was rooted in a concern that the lack of harmonization on the enforcement of mediated settlement agreements would derail any binding texts that resulted from the Working Group's negotiations, or that such a binding instrument would take years to draft.[108] By the 66th Session, however, an important compromise had emerged which

[98] See for example, Lorig Charkoudian, 'Giving Police and Courts a Break: The Effect of Community Mediation on Decreasing the Use of Police and Court Resources' (2010) Conflict Resolution Quarterly, Winter 2010, Volume 28, Issue 2, pages 141–155.
[99] Mattie Roberston, 'Compliance Success with Mediated Settlement Agreements in Small Claims' (2015), available at https://www.mediate.com/articles/RobertsonM1.cfm.
[100] See for example Eunice Chua, 'Singapore: Reflecting on the development of the domestic mediation scene,' (2015) ADR World, 1(1), 20-21; see also Judith Saul, 'The Legal and Cultural Roots of Mediation in the United States' (2012) Opinio Juris in Comparatione, No. 1/2012, Paper No. 8.
[101] Schnabel (fn 97), 2-3.
[102] ibid 100.
[103] ibid 99.
[104] ibid 98.
[105] ibid 101.
[106] ibid 100.
[107] Eunice Chua, 'The Singapore convention on mediation - A brighter future for Asian dispute resolution' (2019) Asian Journal of International Law, Research Collection School of Law, 2.
[108] Chua (fn 107) 2; Schnabel (fn 97) 6.

resulted in the agreement to simultaneously draft a convention and model law at the same time.[109] Therefore, two instruments resulted from the Working Group II negotiations between 2015 and 2018: the UN Convention on the Enforcement of International Settlement Agreements Resulting from Mediation, and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.[110] For the purpose of this paper, only the Convention text will be examined.

III. Main Features

The Singapore Convention is composed of sixteen articles:

- Article 1 – Scope
- Article 2 – Definitions
- Article 3 – General principles
- Article 4 – Requirements for reliance on settlement agreements
- Article 5 – Grounds for refusal
- Article 6 – Parallel applications/claims
- Article 7 – Other laws or treaties
- Article 8 – Reservations
- Article 9 – Effect on settlement agreements
- Article 10 – Depository
- Article 11 – Signature
- Article 12 – Participation by regional economic organisations
- Article 13 – Non-unified legal systems
- Article 14 – Entry into force
- Article 15 – Amendment
- Article 16 – Denunciations

Description and analysis in this paper will be limited to the Convention's scope, general principles, requirements for enforcement, grounds for refusal, and reservations.

a. Scope

The Convention facilitates the enforcement of what can be considered a new international instrument: the international mediated settlement agreement ('iMSA').[111] This document goes beyond a "mere contract;" the Singapore Convention provides a means for mediated settlement agreements to be treated in the manner that arbitral awards are under the New York Convention.[112] In doing so it privileges the outcome of mediated processes in comparison to negotiations and creates a legal framework under

[109] Chua (fn 107) 2.
[110] Ibid.
[111] Nadja Alexander, 'The Singapore Convention on Mediation' (2018) available at: http://mediationblog.kluwerarbitration.com/2018/07/24/singapore-convention-mediation/; Schnabel (fn 1) 9-10.
[112] Schnabel (fn 97) 9.

which iMSAs are enforceable within both a contract law doctrine and a new international space as well.[113]

The Singapore Convention defines several features of this newly created legal instrument. It must be:

- an agreement resulting from mediation;
- commercial in nature; and,
- international in character.[114]

In terms of substance, the Convention does not apply to matters *other* than commercial disputes, such as family, inheritance, consumer or employment matters.[115] These carve-outs exist to address potential sensitivities from state to state regarding the enforcement of legal doctrines around these issues and concerns about unequal bargaining power between parties that may make it difficult for the contracting state to apply the Convention.[116] The Convention does, however, leave open the possibility that investment mediation agreements may be enforced under the Convention.[117]

The Convention also explicitly excludes from its scope settlement agreements that result from court-annexed mediation enforceable as judgements, or settlement agreements that are enforceable as an arbitral award.[118] In some jurisdictions, for example, parties are already familiar with the process of converting their mediated settlement agreement into a consent award or a judgement in order to have it enforced.[119] The Convention does not consider these types of settlement agreements as coming within its scope. Nor does it consider the enforcement of mediated settlement agreements that are enforceable as court-orders (though the mere involvement of a judge or arbitrator would not in and of itself preclude enforcement under the Singapore Convention).[120]

b. Requirements

The Convention defines mediation broadly, whereby any process in which the parties attempt to reach a settlement with the assistance of a third party who lacks the authority to impose a solution upon the parties meets the standard.[121] This broad standard is intended to encompass the wide variety of approaches to mediation currently in practice around the world, and constitutes a nod to the importance of cultural considerations in this form of dispute resolution.[122] In addition, the Convention does not define the extent to which a mediator is to be involved in the process in order for the settlement to "result"

[113] Ibid 107.
[114] UN Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (the 'Singapore Convention', Article 1(1).
[115] Singapore Convention, Article 1(2); Chua (fn 107), 3.
[116] Schnabel (fn 97) 24.
[117] Ibid.
[118] Singapore Convention, Art. 1(3).
[119] See, for example, the Singapore International Arbitration Centre-Singapore International Mediation Centre Arb-Med-Arb Protocol, under which parties may settle their dispute in mediation proceedings and apply to the SIAC to have it converted to a consent award, enforceable as an arbitration award under the New York Convention.
[120] Chua (fn 107) 3.
[121] Singapore Convention, Art.2(3).
[122] Schnabel (fn 97) 15-16.

from the mediation, creating another broad standard intended to capture settlement agreements regardless of what style or approach the mediator used.[123]

The iMSA must result from a dispute of a commercial nature under the Convention, and again this standard is to be interpreted broadly.[124] This means that it is feasible for agreements resulting from some types of investor-state disputes to be enforceable under the Convention.[125] But, if the agreement results from a dispute under one of the excluded categories listed above (investor-state disputes are not included in that list), it will not fall within the scope of the Convention.[126]

The iMSA must result from a dispute that is international. This requirement eases the burden on adopting states to modify existing legal frameworks for domestic mediation.[127] The international characteristic is critical at the time the iMSA is concluded (not before, during the dispute or the mediation proceedings; and not after, during enforcement proceedings).[128] The identity of the parties determines whether the dispute is international, in that they have their places of business in different states, or their places of business are in different states from where the obligations in the iMSA are to be performed or the subject matter of the dispute is most closely connected.[129]

The Convention applies several formality requirements as well. Under the Convention iMSAs must be concluded in writing, but this is also to be interpreted broadly and the Convention does not specify that agreements must be distilled into one writing or one document (an agreement may be contained in a series of email exchanges, for example).[130] The writing must be signed by the parties, and this can be effected by electronic signature.[131] Parties seeking to enforce an iMSA must provide proof that the settlement resulted from mediation.[132] This requirement can be met a number of ways, including by providing the mediator's signature on the settlement agreement, a separate verifying document signed by the mediator, an attestation from the administering institution, or 'any other evidence acceptable to the competent authority.'[133] These formality requirements are exhaustive, and therefore adopting states cannot promulgate additional requirements for the enforcement of an iMSA under the Convention.[134]

c. Enforcement

The Singapore Convention requires adopting states to enforce iMSAs and to functionally recognize them as well.[135] Therefore, parties seeking relief may rely on the

[123] Ibid.
[124] Ibid 119.
[125] Ibid.
[126] Ibid.
[127] Ibid 116.
[128] Ibid 116-119.
[129] Singapore Convention, Art. 1(1).
[130] Singapore Convention, Art. 1(1) and Art. 4(1)(a); Schnabel (fn 97) 29.
[131] Singapore Convention, Art. 4(2).
[132] Singapore Convention, Art. 4(1).
[133] Singapore Convention, Art. 4(1)(b).
[134] Schnabel (fn 97) 33-34.
[135] There was much debate in the UNCITRAL WGII meetings about the functions of recognition and enforcement. For a detailed analysis and description of the compromise leading to the Conventions functional approach, see Schnabel (fn 107) 34-39.

Convention as both a 'sword'[136] and as a 'shield'[137] as is to be determined under the relevant procedural rules of the enforcing court in the party state.[138] The Convention itself does not prescribe the procedure to be used in enforcement or recognition proceedings.[139]

d. Grounds for Refusal

The Singapore Convention requires adopting states to enforce iMSAs and to functionally recognize them as well.[140] Therefore, parties seeking relief may rely on the Convention as both a 'sword'[141] and as a 'shield'[142] as is to be determined under the relevant procedural rules of the enforcing court in the party state.[143] The Convention itself does not prescribe the procedure to be used in enforcement or recognition proceedings.[144]

There are exclusive grounds for refusal of enforcement as well within the Convention.[145] In general the grounds for refusal are comparable to the regime provided in the New York Convention.[146] The party seeking to block relief carries the burden of proof to raise and demonstrate that the grounds for refusal have been met.[147] The grounds for refusal under the Singapore Convention are permissive, in that courts may choose to provide relief or states may choose not to require that courts grant relief under specific grounds.[148] But, this list is also exhaustive, in that adopting states may not establish additional grounds for refusal under the Singapore Convention. Enforcement or recognition may be refused where it has been established that:

- a party was under some incapacity;[149]
- the settlement is invalid;[150]

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[136] Singapore Convention, Art. 3(1): 'Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.'
[137] Singapore Convention, Art. 3(2): 'If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.'
[138] Schnabel (fn 97) 40.
[139] Ibid 137.
[140] There was much debate in the UNCITRAL WGII meetings about the functions of recognition and enforcement. For a detailed analysis and description of the compromise leading to the Conventions functional approach, see Schnabel (fn 97), 34-39.
[141] Singapore Convention Art. 3(1): 'Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.'
[142] Singapore Convention Art. 3(2): 'If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.'
[143] Schnabel (fn 97) 40.
[144] Ibid 137.
[145] Singapore Convention, Art. 5.
[146] Convention on the Enforcement and Recognition of Foreign Arbitral Awards (the 'New York Convention'), Article V.
[147] Schnabel (fn 97), 43.
[148] Ibid 137.
[149] Singapore Convention Art. 5(1)(a). This may include elements such as one party was a minor at the time the settlement was executed, was intoxicated, or was not in his or her right mind.
[150] Singapore Convention Art. 5(1)(b)(i). This may include instances where there has been fraud or misrepresentation.

- the settlement is not binding or not final;[151]
- the settlement has been subsequently modified;[152]
- obligations in the settlement agreement have already been performed;[153]
- obligations in the settlement agreement are not clear or comprehensible;[154]
- granting relief would be contrary to the terms of the settlement;[155]
- there has been 'serious' mediator misconduct or failure by the mediator to disclose circumstances which raise justifiable doubts as to the mediator's impartiality or independence;[156]
- granting relief would be contrary to public policy where relief is sought;[157]
- or, the subject matter of the dispute is not capable of settlement by mediation.[158]

e. Reservations

Last but certainly not least, the Convention does provide for limited reservations. Adopting states may declare that the Convention shall not be applied to settlement agreements to which it is itself a party or to which any government agency or agent of that state is a party, and adopting states are free to determine the extent of this reservation in the declaration.[159] And, adopting states may declare that the Convention shall apply only to the extent that the parties to the settlement agreement have agreed to be subject to the Convention.[160] This reservation essentially permits adopting states to create a national opt-in regime for the Convention if they so desire.

IV. Convention Readiness

Professor Nadja Alexander[161] has elaborated on how countries wishing to ratify the Convention may become "convention ready:" that is, preparing their national legal

[151] Singapore Convention Art. 5(1)(b)(ii). This relief may be granted only where the settlement agreement is not final or binding 'according to its terms,' meaning by the language of the agreement itself (thus presenting a four-corner rule and barring reliance on extrinsic evidence to meet the burden of proof).
[152] Singapore Convention Art. 5(1)(b)(iii).
[153] Singapore Convention Art. 5(1)(c)(i).
[154] Singapore Convention Art. 5(1)(c)(ii). This would only be met if the settlement agreement is so confusing that the competent authority could not confidently issue the relief sought if it found that the requesting party was entitled to relief.
[155] Singapore Convention Art. 5(1)(d). This would apply if the relief sought directly contradicts the intentions stated by the parties in the settlement agreement. Therefore, if a settlement agreement restricts the parties' abilities to seek relief, the competent authority must give effect to those intentions. This ground for refusal is also broad enough to allow parties to opt out of the Convention's applicability to their settlement altogether.
[156] Singapore Convention Art. 5(1)(e) and (f). This would only apply in cases where applicable existing codes of conduct on mediator practices proscribe certain behaviors, those codes of conduct have been breached, and without such breach the party seeking relief would not have entered into the settlement agreement; or where the failure to disclose circumstances raising justifiable doubts as to the mediator's independence or impartiality was so material that had the disclosure been made the party seeing relief never would have entered into the settlement agreement.
[157] Singapore Convention Art. 5(2)(a).
[158] Singapore Convention Art. 5(2)(b).
[159] Singapore Convention, Art. 8(1)(a).
[160] Singapore Convention, Art. 8(1)(b).
[161] Nadja Alexander, publication forthcoming.

framework on mediation for the addition of the Singapore Convention. She has articulated two potential approaches: the minimalist approach, and the integrative approach.[162]

a. Minimalist Approach

Under the minimalist approach, countries may pass or amend legislation to introduce civil procedure rules permitting courts to enforce the new class of legal instrument recognized under the Convention, the iMSA. Courts may issue practice directions indicating what evidence would be acceptable to demonstrate the existence of an iMSA in compliance with Article 4 of the Singapore Convention.

b. Integrative Approach

Under the integrative approach, a more holistic view is taken which would include some or all of the following considerations:

- congruency of domestic and international legal frameworks;
- transparency and clarity of content of mediation laws, including enforceability and confidentiality issues;
- the quality and access of mediation infrastructure and services;
- access to globally recognized and skilled local and foreign mediators;
- attitude and experience of courts in relation to mediation; and
- incentives for legal advisors to engage in mediation as advocates and when appropriate propose it to their clients as a potential pathway to resolution.

V. Future Directions

This author feels confident in offering the following predictions about the future of dispute resolution considering the advent of the Singapore Convention on Mediation. First, the Singapore Convention will expand the suite of services available to dispute resolution users and providers without a corresponding detrimental loss to the use of arbitration services in international dispute resolution. Second, the Singapore Convention will expand the use of mediation and conciliation clauses in free trade agreements and investment dispute settlement clauses. And finally, the Singapore Convention will enhance the use of online mediation services through ODR, thereby increasing affordability of those services and potentially welcoming a new class of users to international dispute resolution: micro, small, and medium enterprises operating across borders.

[162] Ibid 161.

AN OVERVIEW OF THE ICC MEDIATION RULES

Dania Fahs

Introduction

Under the ICC Mediation Rules (the "Rules"), mediation is a flexible settlement technique, conducted privately and confidentially:

- In which a mediator acts as a *neutral facilitator* to help the parties try to arrive at a negotiated settlement of their dispute.
- The *parties* have control over both the decision to settle and the terms of any settlement agreement.

The QMUL 2018 International Arbitration Survey shows with respect to the preferred method of resolving cross-border disputes a difference between private practitioners and in-house counsels' respective preferences.

(International Arbitration with ADR: Private practitioners count for 46% against In house lawyers: 60% International Arbitration (as standalone mechanism): private practitioners count for 51% vs in-house lawyers: 32% - *kindly refer to the diagram in the slide*)

Understandably- and unfortunately, private practice lawyers seem reluctant towards using mediation – they are more familiar with adjudicative processes like arbitration and apprehend a flexible process like mediation that does not have a predefined set of procedural rules.

If we look at some ICC statistics, we note the following:

- Energy, telecommunications and construction are the key economic sectors featured in ICC mediation for the period 2015 -2017.
- In terms of domestic vs cross –border mediation cases, it is worth highlighting that 77% of ICC mediation cases in 2017 feature multiple nationalities involved vs 23% featuring a single nationality.
- In terms of origin of the parties: America count for 41%, Europe 29%, Asia Pacific 21% and Africa 9% of the ICC mediation case filed in 2017.

The above statistics demonstrate that mediation is increasingly being considered as the preferred mode of settlement for international commercial transactions where parties wish to maintain and preserve their long-standing relationship.

As of 2018, ICC introduced the ICC *Mediation template Request:*

- This is a very easy to use template and available in French, English and Spanish.

It allows parties to anticipate questions regarding ICC mediation procedure

- It is a timesaving, an efficient and accessible tool, which encourages new users unfamiliar to ICC Mediation

Note: Parties are not obliged to use the template when filing their request.

The ICC Mediation procedure steps

The procedure starts with a Request for Mediation filed with the ICC International Centre for ADR and, there are 2 scenarios in practice:

- With a pre-existing agreement for ICC Mediation (Article 2);

- Without a pre-existing agreement of the parties: one party is proposing mediation to the other (Article 3).

1- The Centre acknowledges receipt of Request once it has received the complete Request including the documents and the filing fee

2- The Centre invites the parties to provide further comments on any outstanding procedural questions: For example, language(s) of the proceeding, place of the mediation meetings, timing of the mediation, attributes of the mediator, etc.

3- Selection of the Mediator: Jointly nominated by the parties or appointed by ICC.

4- Parties pay a provisional deposit to cover the costs of the proceedings until after the parties' first meeting with the Mediator or beyond.

5- The Centre transfers the file to the Mediator and invites her/him to contact the parties.

6- First meeting between the Mediator and the parties (Article 7(2) of the Mediation Rules) to discuss the conduct of the Mediation.

7- The Mediator communicates the notice pursuant to Article 7(2) of the Mediation Rules to the parties

8- The Mediation is conducted by the Mediator, probably involving one or more physical meetings of the Mediator and the parties, possibly involves the exchange of written documents and conference calls.

9- The Mediation ends with the Settlement Agreement.

Model Clauses

The Clauses can be used for mediation alone or in parallel with or prior to arbitration or other proceedings

4 types of clauses with differing binding effect:
Type 1)- Possibility of using mediation: just a reminder to parties – not binding at all
Type 2)-Obligation to consider the use of Mediation: An obligation to consider but it is not mandatory upon the parties to engage in the process
Type 3)- Arbitration and mediation used simultaneously
Type 4)- Mediation and arbitration used successively.

CLAUSE D – Multi-Tiered Dispute Resolution Model Clause:

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing

of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

Article 2(6) of the Rules deals with specific time issues in relation to multi-tiered dispute resolution clauses, which commonly provide that neither party may move to the next step, such as arbitration or court litigation, until an agreed time period for settling the dispute by mediation has expired. Under this new provision, the starting point of the period reserved for the mediation is the acknowledgement by the Centre of the receipt of the Request for Mediation or the filing of the registration fee, whichever comes later. Consequently, it is no longer possible for a party to defeat the purpose of a multi-tiered clause by filing a Request for Mediation to trigger the running of the time period but then delaying payment of the filing fee and letting the time period expire without the mediation having been able to progress.

MODERN ARBITRATION LAWS: NOT JUST TALKING THE TALK…

Michael Patchett-Joyce[163]

ABSTRACT

Gulf jurisdictions have recently enacted new Arbitration Laws which are based – in whole or very substantial part – on the UNCITRAL Model Law on International Commercial Arbitration. Those new laws are an important step in the right direction but are not an end in themselves.

A new law is a manifestation of political will, but laws must then be implemented and applied for the benefits to be realised. That is the responsibility of practitioners and the judiciary who must be familiar with, and understand, the law, and of academics who should debate and illuminate the law.

Particular attention must be devoted to the application of domestic laws derived from an international model law. As normative instruments, it is not sufficient for model laws to be transposed into domestic legislation only on a linguistic level. That is *harmonised law*. More importantly, there must be a common understanding across jurisdictions adopting an international model law to make sure that the underlying principles and core concepts are faithfully followed. That is *harmonised legislation*.

Professors Bachand and Gélinas of McGill University drew the distinction between *harmonised law* and *harmonised legislation* in a series of articles a few years ago and spoke of the need for *judicial internationalism* in this context.

Building on their work, this article argues that, fully to realise the benefits of UNCITRAL compliance (to "*walk the walk*" as well as "*talk the talk*"), there needs to be cross-sectoral collaboration and understanding between all interested parties – legislators, the judiciary, practitioners, and the business community with academic seats being ideally placed to facilitate that dialogue.

Introduction

There are several good things about speaking at a Research symposium. Let me set out 3:

(1) You can ask more questions than you need to answer;

(2) You can look back and re-visit past theories and ideas considering subsequent experience;

(3) You can look forward to what the future may hold.

I hope to do all 3!

Key points of discussion

My central theme is as follows: while enactment of an Arbitration Law that is UNCITRAL Model Law-compliant is a very good and important step, it is only a step on the way; it is not an arrival at a destination.

[163] FCIArb, Ely Place Chambers, London, UK.

Jurisdictions must do more than enact; they must implement. Paying lip-service to an effective arbitration system is not sufficient. Hence, the title of my presentation this afternoon – talking the talk is just not good enough.

The UNCITRAL Model Law has, of course, been a great success. Since the Model Law on International Commercial Arbitration was adopted by UNCITRAL in June 1985, it has been incorporated – in whole or substantial part – in well over 100 jurisdictions; no more so, recently, than in the Gulf.

As UNCITRAL itself explains: "The UNCITRAL Model Law provides a pattern that law-makers in national governments can adopt as part of their domestic legislation on arbitration." Its purpose is, therefore, normative.

It acts as a global harmonising measure, designed

- to ensure the efficient functioning of ICA,
- to be responsive to the needs of international business, and
- to provide the business community with greater certainty through the consistent application of its provisions across jurisdictions.

Those goals are ambitious.

On the paramount importance of responding to business needs, Quentin Loh (now a Supreme Court Judge in Singapore) wrote some years ago:

"We must never lose sight of the fact that businessmen do business across borders, across legal systems, languages and cultures. The development of international arbitration reflects their desire … not to be subject to the unfamiliar procedures of domestic courts and the principles of their legal systems that are inimical to their trade. One of their main objectives when drafting dispute resolution clauses is to stay clear of domestic courts and their national legal systems. It therefore behoves domestic legal systems to try and avoid imposing their norms and concepts when considering international arbitration issues and to instead be more open to considering how other legal systems, especially those that have also adopted the Model Law, deal with such issues."[164]

Singapore enacted its International Arbitration Act originally in 1994, expressly as:

"An Act to make provision for the conduct of international commercial arbitrations based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law and conciliation proceedings and to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for matters connected therewith."

In a series of articles between 2012 and 2014, Professors Frédéric Bachand and Fabien Gélinas of McGill University pointed out that the object of the UNCITRAL Model Law was not just harmonised legislation, but harmonised law. The difference is far from semantic. Harmonised legislation involves commonality of text. Harmonised law means that those laws are interpreted and applied in the same way across all jurisdictions. As Bachand wrote in one of his articles:

"Identical legislative provisions can be applied differently depending on the interpretive approaches being deployed, and therefore interpretive approaches are by no means uniform across legal traditions and jurisdictions, it is essential to the achievement of the ultimate objective being pursued that the process of interpreting transnational

[164] See, Loh (2013), *The UNCITRAL Model Law and the Pro-arbitration approach: Judicial Internationalism and International Interpretation – The Singapore* Experience, as Chapter 9, The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration, at p. [190].

normative instruments be … subjected to uniform rules and that those rules require judges to engage in … judicial internationalism."[165]

I will come back to judicial internationalism in just a moment. But before I do, it is important to emphasise that the judges do not go about their business in a void. Thus, to cite from another of the articles:

"Interpretative output of a particular jurisdiction is often dependent on how Counsel in the lower courts frame the issues, and what arguments and sources are submitted to the Judge."[166]

Thus, to reap the benefits of the UNCITRAL Model Law on International Commercial Arbitration, the weight of expectation is not shouldered by Judges alone, but also by the legal profession. And what is the forum for this discussion? Why – academic journals and, here, a research symposium. Moreover, the original watch-spring for any UNCITRAL-compliant Arbitration Law lies in policy choice to follow that route.

It is, therefore, vital to recognise that the grand endeavour, inherent in the Model Law, requires true cross-sectoral collaboration, combining the academic with the practical, the legal profession with the judiciary.

Having noted the breadth of the context in which it is rooted, let me return to judicial internationalism.

Let me begin by posing a question (which, as I've already said, I don't need to answer!):

Should the Court adopt the same approach to interpreting and applying an UNCITRAL Model Law-compliant Arbitration Law as it does to other, 'ordinary', domestic legislation?

The answer – and here comes the challenge for the legal profession and the judiciary alike – is "No".

The point was put beyond doubt in the 2006 amendments to the Model Law by the inclusion of Article 2A that has provided that "in the interpretation of this Law, regard is to be had to its international origin and the need to promote uniformity in its application".

Bachand and Gélinas, however, see that 2006 Amendment simply as having made express that which was always implicit. In their view, it is not that courts may depart from interpretative methods that they usually resort to, but rather that they must do so "because treating the Model Law in the same way as other statutes risks undermining the fundamental policy choice reflected in a state's decision to incorporate the Model Law successfully".

Indeed, the policy considerations can be traced back even further, to the drafting of the Model Law. As was pointed out in the judgment of the Bermuda Supreme Court in the matter of Re Montpelier Reinsurance Limited [2008] SC (Bda) 27 Com (24 April 2008):

"The Model Law must therefore be construed in a distinctive way from the approach that would be adopted when construing ordinary domestic legislation. It is essentially international legislation, the language of which largely reflects the

[165] See, Bachand and Gélinas (2013), *Judicial Internationalism and the Interpretation of the Model Law: Reflections on some aspects of Article 2A*, as Chapter 11, The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration, at p. [231].

[166] See, Bachand and Gélinas (2014), *Interpreting the Model Law: Methodology and the Singapore Experience*, as Chapter 14, Singapore International Arbitration: Law and Practice, Joseph and Foxton (eds.) LexisNexis (2014), at § [3.2], p.[552].

compromises and negotiations conducted by expert representatives from a wide array of national legal systems. Not only is the Model Law international in character, giving rise to the need for a distinctive interpretative approach, article 5 of the Model Law provides that supervising courts only have such powers as are conferred by the Model Law itself, depriving this Court of the popular common law resource of general jurisdiction."

A substantial challenge confronts the judiciary and the legal profession alike in the effective implementation of an UNCITRAL-compliant Arbitration Law. As Bachand and Gélinas wryly observed:

"[T]he harmonisation purpose of the Model Law would best be achieved if all judges thought like international judges."[167]

One might add: "… and if all Counsel thought like international jurists".

There are, however, some guiding principles for judges who are called on to make decisions about a law that is based on principles with which they are not necessarily familiar.

Bachand and Gélinas recommend that judges should adopt a two-stage approach, asking – first - if there is an international consensus view on the point? If there is, then that view should be regarded as determinative. On the other hand, if there is no consensus, it is suggested that the Judge should strive to identify what would be internationally acceptable. The judge has - it is suggested - several available tools which can be derived from the Vienna Convention on the Law of Treaties (though, of course, the Model Law is not a treaty).

One tool is to remember that the Model Law has been published in 6 official languages (including Arabic). Drawing on Article 33 of the Vienna Convention, it is suggested that the judge should look for the solution that is most consistent with all of the official languages. Beyond that, the judge should consult the travaux préparatoires for the Model Law (cf., Article 31, VCLT). A judge would also be well advised to cast a wide net in reviewing relevant case-law. In that regard, Bachand and Gélinas make the point that English law commentary on the Model Law should be treated with caution because the English Arbitration Act 1996 had regard to, but is not based on, the UNCITRAL Model Law. (As professors at McGill, a University in French-speaking Canada, there might just be a vested interest in what they say!)

All that sounds like a lot of work! There is, undeniably, considerable effort involved in walking the walk. That said, there are resources to help. Let me identify 3:

- the internet-accessible portal for Case Law on UNCITRAL Texts (CLOUT);
- other academic databases and resources (e.g., the McGill Model Arbitration Law Database, MALDB); and,
- the bibliography of recent writings relating to the work of UNCITRAL (the "UNCITRAL bibliography"), which UNCITRAL itself publishes.

[167] See, Bachand and Gélinas (2014), *Interpreting the Model Law: Methodology and the Singapore Experience*, as Chapter 14, Singapore International Arbitration: Law and Practice, Joseph and Foxton (eds.) LexisNexis (2014), at § [3.14], p. [559].

Conclusion

Let me, finally, draw the strands of my presentation together.

How can jurisdictions with an UNCITRAL-compliant Arbitration Law – especially jurisdictions with a newly-enacted UNCITRAL-compliant Arbitration Law – walk the walk as well as talk the talk of UNCITRAL compliance?

There are 5 constituencies that need to be considered:

- policy;
- judiciary;
- academia;
- legal profession;
- international business community.

In my view – and this is the culmination of what I have said so far – there is enormous value in cross-sectoral collaboration between all those constituencies, or "stakeholders", if you like.

The policy choice has already been made, but there is an enduring interest in the effective implementation of that choice. The judiciary and the legal profession are weighty components in the equation. The legal profession should shape the parties' arguments and submissions to promote and facilitate judicial internationalism. The judiciary should be both mindful of their obligation to apply an internationalist approach, and fearless in doing so. Where internationalism and domestic analysis diverge, judges must be courageous in following the internationalist path, even if that is counterintuitive from a domestic angle. The legal profession must be equally fearless and courageous in supporting the judiciary in pursuing the correct path.

Academia is in a unique position, both to provide a forum for discussion – as exemplified by this Research Symposium – and to coordinate mutually beneficial liaison, discussion and interchange among stakeholders. Academic institutions like the Royal University for Women, Bahrain, can – and should – take the lead.

The international business community is, of course, the consumer – the user – of the international commercial arbitration system. The business community is knowledgeable and sophisticated. The discussion must include the business community – at C-suite and General Counsel level.

Academic facilitation of the dynamic process that I have just described will make an invaluable contribution. That is my proposal – in the context of this 1st Research Symposium – for a topic to take forward.

PARTIES' CHOICE OF LAW GOVERNING THE ARBITRATION AGREEMENT: A CURSE OR A BLESSING?

Zlatan Meškić[168]

ABSTRACT

The law governing the arbitration agreement is a highly complex question. In order to avoid the Private International Law analysis and the uncertainty of its outcome, a special choice of law just for the arbitration clause is a preferable option. Although it will not solve all the problems related to the applicable law to the arbitration agreement. This paper gives an overview of the different difficult questions to be answered when determining the applicable law to the arbitration agreement, the interaction between the theories and principles of Private International Law and International Commercial Arbitration on this matter and to which extent a parties' choice of law governing the arbitration agreement is an advisable solution. Both substantive and procedural laws govern the arbitration agreement, thereby placing the arbitration agreement between the law chosen for the main contract and the law of the seat. The substantive and formal validity, interpretation, agency, capacity of the parties, arbitrability and scope, may all fall under different conflict rules and most of them are not on the international level. There are many more conflict rules and connecting factors which apply to various aspects of the arbitration agreement than just the law applicable to the main contract and the law of the seat. A choice of law to the arbitration agreement might apply to some of the aspects. This paper advises to choose the law of the seat as the applicable law to the arbitration agreement, unless there are special circumstances in the case.

I. Introduction

The question of the applicable law to the arbitration agreement is not an easy one to answer. The technique of determining the applicable law follows the principles and theory of PIL. The understanding of the arbitration agreement is shaped by principles and theory of arbitration. The complex nature of the arbitration agreement between the procedural and contract theories does not only inspire for broad scientific discussions. In practice, both substantive and procedural law will regulate certain aspects of the arbitration agreement. The parties usually choose the seat of arbitration and thereby the *lex arbitri* for the procedural framework of the arbitration proceedings and substantive law which will govern the main contract. The most obvious solution would be to apply the *lex arbitri* to procedural questions of the arbitration agreement and the law applicable to the main contract to substantive aspects of the arbitration agreement. This paper examines if such a solution would be in line with the will of the parties the applicable conflict rules. The main goal is to establish if it would be advisable for the parties to choose the applicable law to the arbitration agreement. The paper examines possible problems in the process of determination of the applicable law to the arbitration agreement and presents the choice of law as an advisable solution. This analysis follows the form and the narrative of the

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presentation delivered at the research symposium in preparation for the 26th Willem C. Vis moot, because the applicable law to the arbitration agreement was one of the questions integrated in the problem.

II. Applicable Law to the Arbitration Agreement – Between the Law of the Contract and the Law of the Seat

The topic of the applicable law to the arbitration agreement is not new. Already the New York Convention of 1958[169] contains a conflict rule on the applicable law to the arbitration agreement. Art V (1) of the New York Convention subjects the validity of the arbitration agreement under the law chosen by the parties, or failing any indication thereon, under the law of the country where the award was made. The two-step test of Art V (1) of the New York Convention, comprises of the parties' choice of law in the first step and the law of the seat in the second step. The same solution is taken over by the Art 34 (2) (a) (i) and Art 36 (1) (a) (i) UNCITRAL Model Law[170] and is consequently widespread in national arbitration laws. The European Convention on International Commercial Arbitration of 1961[171] adds to this two-step test in its Art VI a third step for the case that courts deciding on the validity of the arbitration agreement cannot determine the seat in the second step. In the third step, they shall apply the conflict rules applicable in the state of that court. The most important international legal sources have a harmonized view on the matter.

The national legal acts will usually not have a specific conflict rule for the law applicable to the arbitration agreements. In such cases the New York Convention and/or the European Convention apply. Notwithstanding the fact that their provisions on the applicable law to the arbitration agreement are designed to be applied in specific proceedings before courts and not before arbitral tribunals in a phase when they decide on the matter. It has already been widely accepted that there is no plausible reason to hold that a different law shall apply to the arbitration agreement at different stages of the proceedings. In case there is a specific conflict rule in the national law, national courts will be bound by it. One of the prominent examples is art 178 (2) of the Swiss PIL Act, under which "as to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law". This provision is interesting, because it does not only follow the principle "in favorem validitatis", but also adds the law applicable to the main contract to the usual connecting factors of the chosen law and the law of the seat.[172] It is quite different from the solution in the New York Convention, the European Arbitration Convention and the UNCITRAL Model Law, because it provides for the three connecting factors alternatively and not subsidiary. This is typical for conflict rule on the validity of legal acts, because their main

[169] 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (done at New York, 10 June 1958), ["New York Convention"] <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.
[170] Model Law on International Commercial Arbitration 1985 [UNCITRAL Model Law]) UN Doc A/40/17, Annex I; <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.
[171] Done at Geneva, April 21, 1961 ["European Arbitration Convention"] United Nations, Treaty Series, vol. 484, p. 364 No.
[172] Kurt Siehr, *Das Internationale Privatrecht der Schweiz* (Schulthess 2002), 715.

aim is to preserve the validity of such acts in cross-border transactions. It is therefore questionable, to what extent this provision is suitable to be applied to other aspects of the arbitration agreement, apart from the substantial validity. The Swiss provision was used as an inspiration for the newer Dutch solution in Art 10:166 of the Dutch Civil Code , which also considers the arbitration agreement to be valid if it is valid either under the chosen law, the law applicable to the main contract or the law of the seat[173]. The arbitral tribunal, in accordance with the relevant applicable rules of procedure will usually not be bound by the national conflict rules of the seat but will have a larger discretion to apply either the national conflict rule or the cited relevant international legal sources.

III. Different Aspects of the Arbitration Agreement – Between the Law of the Contract and the Law of the Seat?

The international and national legal sources usually do not contain a specific conflict rule for the applicable law to the arbitration agreements. When they do, it applies only to substantive validity or sometimes formal validity of the arbitration agreement. However, there are many more questions which may arise with regards to the arbitration agreement such as scope, interpretation, capacity of the parties to conclude the arbitration agreement, arbitrability of the matter, agency etc. For the form of the arbitration agreements, Art II (2) of the New York Convention contains a substantive maximum form requirement[174]. This means that there is no conflict rule, but a directly applicable substantive solution for the question of form. A conflict of law analysis based on national conflict rules makes only sense if the conditions under Art II (2) of the New York Convention are not fulfilled and the conflict rules refers to applicable law that preserves the formal validity of the agreement, following the most favorable treatment-principle under Art VII of the New York Convention, which on this matter leads to the principle "in favorem validitatis".[175] The question of capacity of the parties to conclude the arbitration agreement is left to the national laws of the parties, under Art V (1) (a) of the New York Convention. This referral to national law does not have any legal importance as the solution would be the same without it. It is up to the arbitral tribunal to find an appropriate solution, which is not easy, considering that for natural persons there is a division between civil law and common law countries between the "nationality" and "domicile" principle, and within the EU and the Hague conference the "habitual residence" principle for establishing the personal law of natural persons. For legal persons it is the well-known clash between the "real seat" and the place of "incorporation". Many national conflict rules will, however, contain an alternative relationship between connecting factors, following the principle "in favorem validitatis" again. The same principle that applies for substantive and formal validity of the arbitration agreement.

The questions of agency, arbitrability, scope and interpretation, as well as other issues that might arise in relation to the applicable law to the arbitration agreement are

[173] Vesna Lazić, in George A. Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards* (Springer 2017), 689, 700.
[174] Gary Born, *International Commercial Arbitration*, Volume I, 617.
[175] Rolf Trittmann/Inka Hanefeld, "Form of arbitration Agreement", in Karl Heinz Böckstiegel/Stefan Michaal Kröll/Patricia Nacimiento (eds.), *Arbitration in Germany* (Kluwer 2007), 126, 129.

not regulated on the international level.[176] In fact, with the exception of the formal validity of the arbitration agreement which is covered by a substantive provision of the New York Convention, there is neither an international instrument in the form of convention or model law, nor a dominant legal theory which would allow for a more harmonized approach in practice. Analogy and other methods of interpretation are used to broaden the scope of application of certain provisions in the search for some guidance at the international level. It may already at this stage be concluded that most aspects of the applicable law to the arbitration agreement are left for the principles of private international law, including its strengths and weaknesses. In most cases the theory and national codifications on PIL have not adopted separate rules for the arbitration agreement, but rather apply general conflict rules on contracts. Agency and authority to representation in general is a good example, because it is usually not separately regulated by any special conflict rule for arbitration proceedings, although the substantive law on this matter is usually different for court and arbitration proceedings. The matter of arbitrability is one of the rare issues in arbitration where national public policy has a strong influence, but there still needs to be a widely accepted conflict rule, which would refer to the law applicable to the extent it does not violate the public policy in question. The question of scope of the arbitration agreement is placed somewhere between the applicable methods of interpretation of the arbitration agreement and the issue of arbitrability. If the arbitrability of the issue is fulfilled the arbitration clause will be interpreted in order to establish its scope. In absence of special conflict rules for this matter, again either the scope of the conflict rules created for substantive validity of the arbitration agreement shall be broadened to also cover the methods of interpretation, or the general conflict rules on contracts become applicable.

The conclusion on the applicable law to different aspects of the arbitration agreement is not that the arbitral tribunals are not capable of finding the appropriate applicable law because of the lack of a widely accepted theory or practice. It is more that an anonymous international approach[177] independent of the seat of arbitration will not be achieved. And this should be one of the goals for the future development in arbitration. It becomes clear that the law applicable to the arbitration agreement is not just somewhere between the law applicable to the main contract or the seat, but rather depending on the aspect in question may be even the personal law of the party in question or some other law.

IV. Application of General Conflict Rules on Contract Law to Arbitration Agreements?

The PIL is perfectly capable of answering the question of the applicable law to the arbitration agreement. However, it may be a challenging task, because of the lack of specific conflict rules on this matter. The following analysis will address some problems in application of the general mechanisms of PIL to the question of the applicable law to the arbitration agreements and then turn to the specific conflict rules on contracts and their applicability to this matter.

[176] Dietmar Czernich, "The Law Applicable to the Arbitration Agreement", *Austrian Yearbook on International Arbitration 2015*, 73, 82.
[177] Sundra Rajoo, Law, Practice and Procedure of Arbitration, 2017, 829.

a) General Principles of PIL and the Applicable Law to Arbitration Agreements

The nature of the arbitration agreement is somewhere between procedural and substantive law. This conclusion is a result of a rather long and still developing theoretical discussion[178], but also has its important practical reflections. Namely, some aspects of the arbitration agreement are regulated by procedural law and some are regulated by substantive law. In UNCITRAL Model law countries the form of the arbitration agreement is regulated by the (procedural) arbitration law, the same applies to all countries who ratified the New York Convention. In addition, the arbitrability will in many cases be regulated by procedural law.[179] In austria even the interpretation of arbitration agreements is considered to be a question of procedural law and in Austria firstly procedural law is applied to the interpretation of the arbitration agreement and only if no result can be achieved, the applicable substantive law will be considered.[180] On the other hand, question of the consent to arbitrate, error, fraud etc will mostly be regulated by (substantive) contract law. This means that both substantive and procedural law of the applicable law determined by the conflict rules will be applicable to the arbitration agreement. Therefore, not only the *lex arbitri* will be the applicable law (to arbitration proceedings), but possibly also foreign procedural law may become applicable (to the arbitration agreement).

This fact that both substantive and procedural law might become applicable to the arbitration agreement causes several problems for the classic PIL. This is an important exception from the PIL rule applied before courts, that always the domestic procedural law applies (*lex fori*).[181] However, the PIL does have an answer to this problem with the instruments of characterization (classification) *lex causae*. In the first step the applicable conflict rule "in toto" (so called "open referral") refers to the applicable foreign law and in the second step the facts of the case are qualified once again, this time in accordance with the foreign substantive law which is applicable (*lex causae* characterization or classification)[182]. Theory of characterization in two steps („Stufenqualifikation") is today the prevailing theory of characterization in Austria[183], Switzerland[184], and it is also the

[178] Gašo Knežević & Vladimir Pavić, Arbitraža i ADR (Belgrade 2010), 45.
[179] Loukas A. Mistelis, "Arbitrability- International and Comparative Perspectives. Is Arbitrability a National or International Law Issue?", in Loukas A. Mistelis & Stavros L. Brekoulakis (eds.), *Arbitrability- International and Comparative Perspectives*, Kluwer 2009, 1, 9.
[180] This is the well-established practice by Austrian courts, last time confirmed in the decision of the Austrian Supreme Court of 17.01.2019, 5 Ob 63/18b; see numerous decisions confirming this standpoint under: <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJR_19860903_OGH0002_0010OB00545_8600000_001> accessed 11 June 2019
[181] Jan Kropholler, Internationales Privatrecht (4 edn Mohr Siebeck 2001), 553.
[182] Leo Scheucher, „Einige Bemerkungen zum Qualifikationsproblem", ZfRV 2 (1961), 232; Tibor Varadi, *Međunarodno privatno pravo* (Forum) 1990, 67-68; Maja Stanivuković & Mirko Živković, *Međunarodno privatno pravo – opšti deo* (Službeni glasnik 2008), 260; Dirk Looschelders, *Die Anpassung im internationalen Privatrecht: Zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinande harmonierenden Rechtsordnungen* (Müller 1995) 147.
[183] Fritz Schwind, *Internationales Privatrecht* (Manz 1990), 28-29; Leo Scheucher (n.13), 232; against this theory Michael Schwimann, *Internationales Privatrecht* (Manz 2001) 22, 25-26.
[184] A. Schnitzer, Handbuch des IPR, Bd. I, Basel 1957, 102 i dalje.

prevailing theory of ex-Yugoslav republics[185]. Even if another version of the *lex causae* qualification and not the qualification in two steps ("Stufenqualifikation") would be accepted, with regards to the applicable law to the arbitration agreement the outcome would be the same: both procedural and substantive law of the foreign law would become applicable.[186] In the literature the qualification *lex causae* is considered to be methodologically justified, because after the foreign law is determined to be applicable in accordance with the chosen conflict rule, it is logical that the provisions of that foreign law will be applied and interpreted in accordance with the legal order they belong to (meaning *lex causae*).[187] Therefore the applicable law to the arbitration agreement is the exception from the rule that procedural law is always applied *lex fori*.

But the question of the applicable law to the arbitration agreement is challenging even before the conflict rule refers to foreign law. Namely, the PIL rules require that within the search for the appropriate conflict rule in a first step the disputed question in identified and that in a second step the applicable conflict rule is determined. If there is more than one specific conflict rule within the same question, it means that the question asked is too broad. The question of the applicable law to the arbitration agreement is too broad, as different aspects discussed above, will fall under different conflict rules. The law determining which conflict rule is applicable is the domestic law (*lex fori*), meaning that the understanding of the substantive law of the court will be decisive for the determination which conflict rule is applicable.[188] In proceedings before arbitral tribunals domestic substantive law should not automatically be the substantive law of the law of the seat, but the substantive law of the state whose conflict rule is applied. This is called the principle of first characterization (classification), which in first step is conducted *lex fori*. Therefore, under the substantive law of the state whose conflict rule is determined to be applicable will determine if to the question at hand we need to apply the conflict rule for formal validity, substantive validity, interpretation, arbitrability, agency etc. The rule of classification *lex fori* will not be of help if the arbitral tribunal tries to decide between different conflict rules of different states to be applicable to a certain question and the substantive law of each of these states lead to a different result. So if the question arises e.g. about the substantive validity of the arbitration agreement, under the understanding of one state it might fall under the conflict rule for formal validity, whereas another state in connection to the case might consider it to be under the general conflict rules for contracts, possibly leading to different results.

Finally, the classic PIL as envisaged by *Savigny*[189], shall be blind towards the outcome of the conflict of law analysis. If we bring the possible outcome of the case into the discussion about the appropriate conflict rules to be applied, we are already far away from the classic PIL which only serves to determine the closest connection to the relevant question and not the most appropriate substantive result. The same arguments speak against the principle "in favorem validitatis", which seems to dominate the question of the applicable law to the substantive and formal validity of the arbitration agreement. The principle "in favorem validitatis" also seeks for the best possible outcome for the

[185] Zlatan Meškić & Slavko Đorđević, *Private International Law – Bosnia and Herzegovina* (Kluwer, 2018), 48.
[186] Stefan Kröll, ergänzung und Anpassung von Verträgen durch Schiedsgerichte (Beck, 1998), 18.
[187] Zlatan Meškić & Slavko Đorđević (n 185), 48.
[188] Zlatan Meškić & Slavko Đorđević (n 185), 47.
[189] Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, Bd. VIII, 1849.

agreement and not just the closest connection. Of course there have already been established various exceptions from the blind application of the principle of closest connection, and one of them is the principle to preserve the validity of any contract (*in favorem negotii*), however a general principle in favor of the arbitration agreement, apart from the question of formal validity, would go too far. Consequently, the PIL analysis bears several difficulties with regards to the application of general institutes of PIL to the determination of the applicable law to arbitration agreement. The principle of *lex fori* for procedural questions, the characterization (classification) *lex fori* in the first step and *lex causae* in the second step as well as the principle of closest connection without consideration of the substantive outcome are all to a certain extent in discrepancy with the manner conflict rules for the applicable law to the arbitration agreement are applied by arbitral tribunals.

b) Conflict Rules for Contract Law and the Applicable Law to the Arbitration Agreement

When it comes to the special conflict rules, the PIL conflict rules on contracts contain two or three connecting factors: 1. the choice of law; the characteristic performance; and 3. the closest connection.[190] Sometimes we can still find the old fashioned connecting factor of the law of contract conclusion. In case of a choice of law, which may be explicit or implicit, the other two subsidiary connecting factors remain inapplicable. In addition, a special conflict rule usually exists only for formal validity of contracts, following the principle of "in favorem negotii", while all other aspects of the arbitration agreement would fall under the law applicable to the substance of the contract. The question of the choice of law will be dealt with in the next subchapter. When there is no choice of law, the conflict rules for contracts provide for specific performance, usually the law of the domicile of the seller or service provider (not the buyer). When it comes to substantive questions of sales or service contracts the specific performance of the seller or service provider is considered to be the closest connection to the contract. However, when it comes to arbitration agreements, this is not true, at least not automatically. The specific performance when it comes to the arbitration agreement is rather connected to the arbitral proceedings than to the domicile of the seller/service provider or buyer.

Consequently, the specific performance as a connecting factor in not suitable to refer to the applicable law for the arbitration agreement. Considering that this is the main connecting factor in comparative law when it comes to the law applicable to contracts in the absence of a choice of law, it seems that the conflict rules for contracts in general are not suitable to be applicable to arbitration agreements. The two remaining connecting factors: the choice of law and the closest connection, do not need to be taken out of specific conflict rules on contracts, because they are considered to be general principles of both international arbitration and PIL. The specific conflict rules for contracts can therefore be only of importance to interpret specific elements of the choice of law for the arbitration agreements and in the absence of the choice of law, to find factors which refer to a closest connection to the arbitration agreement.

V. Choice of Law to the Arbitration Agreement

[190] See e.g. Brooke Adele Marshall, "Reconsidering the Proper Law of Contract", 13 *Melbourne Journal of International Law* 2012, 1, 23.

A choice of law to the arbitration agreement is allowed under any known legal act: the New York Convention, the European Arbitration Convention, the UNCITRAL Model Law and national PIL codification which contain explicit conflict rules on the applicable law to arbitration agreements, the conflict rules on contracts of PIL codification without explicit rules on arbitration agreements, but also relevant arbitration case law such as the famous *Sulamerica case*[191] of the English courts followed, or at least taken reference to, by various courts and arbitral tribunals.[192] It goes without saying that whenever a conflict rule does not require an explicit choice of law, that the choice of law may be conducted explicitly and implicitly.[193] Usually the parties will simply make a reference in their contract which includes an arbitration clause, that the law applicable to this contract shall be the law of certain state. Surprisingly, it is almost universally accepted that such choice of law is not considered to be an explicit choice of law for the arbitration agreement. The separability doctrine apparently has something to do with this conclusion. From a PIL perspective this is not visible at first sight, because it is understandable even without the separability doctrine that the parties are allowed to choose a separate law for each contract clause. Therefore, the separability doctrine does not really add any value to the discussion if a choice of the applicable law to the contract is also a chosen law for the arbitration clause contained in the contract. The only valid argument is that an explicit choice of law should explicitly mention the arbitration agreement and not just the contract. The formulation of the choice of law clause will be a decisive factor to establish if a choice of law is done also for the arbitration agreement and not just the contract. The HKIAC has therefore in the reform of its model clause included a clause for the choice of law "of the arbitration clause"[194].

The implicit choice of law should meet a rather high standard. The reason is that if we interpret the implicit choice of law too broad than we would always be able to conclude that there was a choice of law, even if there was never the actual intention of the parties to choose some applicable law. Typical examples of an implicit choice of law are a reference to certain provisions of a particular legal order or legal source, the use of a standard from or general contract conditions written in conformity with a certain legal order, without the explicit formulation that this shall be the applicable law to the contract or arbitration agreement. Further criteria might also be the choice of law for the main contract, because it determines which substantive law parties wanted to be applicable to other clauses of the contract than the arbitration clause or the choice of the seat, because it shows which procedural law the parties have chosen for the arbitration procedure.[195] As previously shown, for different aspects of the arbitration agreement there will be substantive law and for some other procedural law applicable. Therefore, the choice of the applicable law for the main contract or the choice of the seat may be a valid indication for a choice of law to the arbitration agreement. Nevertheless, the threshold to meet is rather high. The EU

[191] Sulamerica Cia Nacional De Seguros S.A. V. Enesa Engenharia S.A. [2012] EWCA Civ 638, available at: <https://www.trans-lex.org/311350/_/sulamerica-cia-nacional-de-seguros-sa-v-enesa-engenharia-sa-%5B2012%5D-ewca-civ-638/> accessed 11 June 2019

[192] See Redfern Hunter, International Arbitration (6th ed. Oxford 2015), 159.

[193] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer 2016), 177.

[194] <https://www.hkiac.org/arbitration/model-clauses> accessed 11 June 2019.

[195] See Mario Guliano and Paul Lagarde, *Report on the Convention on the law applicable to contractual obligations*, Official Journal of the EU C 282, 31.10.1980, p. 1–50.

Rome I Regulation requires under Art 3 (1) that "the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case". The requirement of the "clear demonstration" aims to raise the level of probability needed for the conclusion that parties did want to choose an applicable law. Namely, one of the main challenges for the arbitral tribunal is to establish if the parties have ever intended for a certain legal order to be applicable. This analysis should be strongly differentiated from the determination of the closest connection to the case. The law that the parties want to choose does not have to be in any connection to the case. The parties may want it to be applicable because of the quality of its solutions, neutrality, or because one of the parties or both (and their attorneys) are particularly familiar with the legal system. Some of these criteria are also decisive for the choice of the seat of arbitration, therefore the choice of the seat is by many authors and tribunals considered to be a strong indication for the choice of the applicable law to the arbitration agreement. There is a great dispute within the PIL scientist, if the choice of jurisdiction of the courts or seat of arbitration shall be a decisive factor or no factor at all when establishing the implicit choice of law (for the arbitration agreement or even for the contract). Art 4 of the Hague Principles on Choice of Law in International Commercial Contracts[196] explicitly state that "An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law". The official commentary of the provision clarifies that the choice of jurisdiction/seat may be used as one of the criteria for the determination of the choice of law to the contract, but it does not in itself amount to a choice of law.[197] The reason is very simple: if a choice of jurisdiction/seat would in itself amount to a choice of law, this would mean that a chosen court or arbitral tribunal would never apply foreign law. This does not (always) correspond to the will of the parties. The same provision can also be found in the art 7 (2) of the Mexico Convention[198], stating that a "selection of a certain forum by the parties does not necessarily entail selection of the applicable law". In any case, the arbitral tribunal should restrain from a presumed (objective) imputed choice of law, restrict itself to a real (subjective) intention of both parties.[199] It is not about the question which law the parties should have chosen to their contract, it is about the question if they actually have implicitly chosen that law. This is also the main criticism to the current arbitral practice, the discretion in determination of the applicable law seems to be confused with an analysis of the hypothetical instead of the actual will of the parties. Words are put in parties' mouth that they have expressed or even intended to express, neither expressly not impliedly.

When determining if the parties have impliedly chosen the law, it should be born in mind which connecting factor will be applicable in case the conclusion would be that there is no law chosen by the parties. Under the most conflict rules and practice presented above the next subsidiary connecting factor after the choice of law would be either the seat of arbitration or the closest connection. If the arbitral tribunal finds that the next conflict rule in line would refer to the law of the seat, it is doubtful if the choice of the seat should be considered in the analysis if the parties have implicitly chosen the law. Their choice of the

[196] Opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015).
[197] https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.
[198] The Inter-American Convention on the Law Applicable to International Contracts signed in Mexico on March 17, 1994.
[199] Alex Mills, *Party Autonomy in Private International Law* (Cambridge 2018), 358.

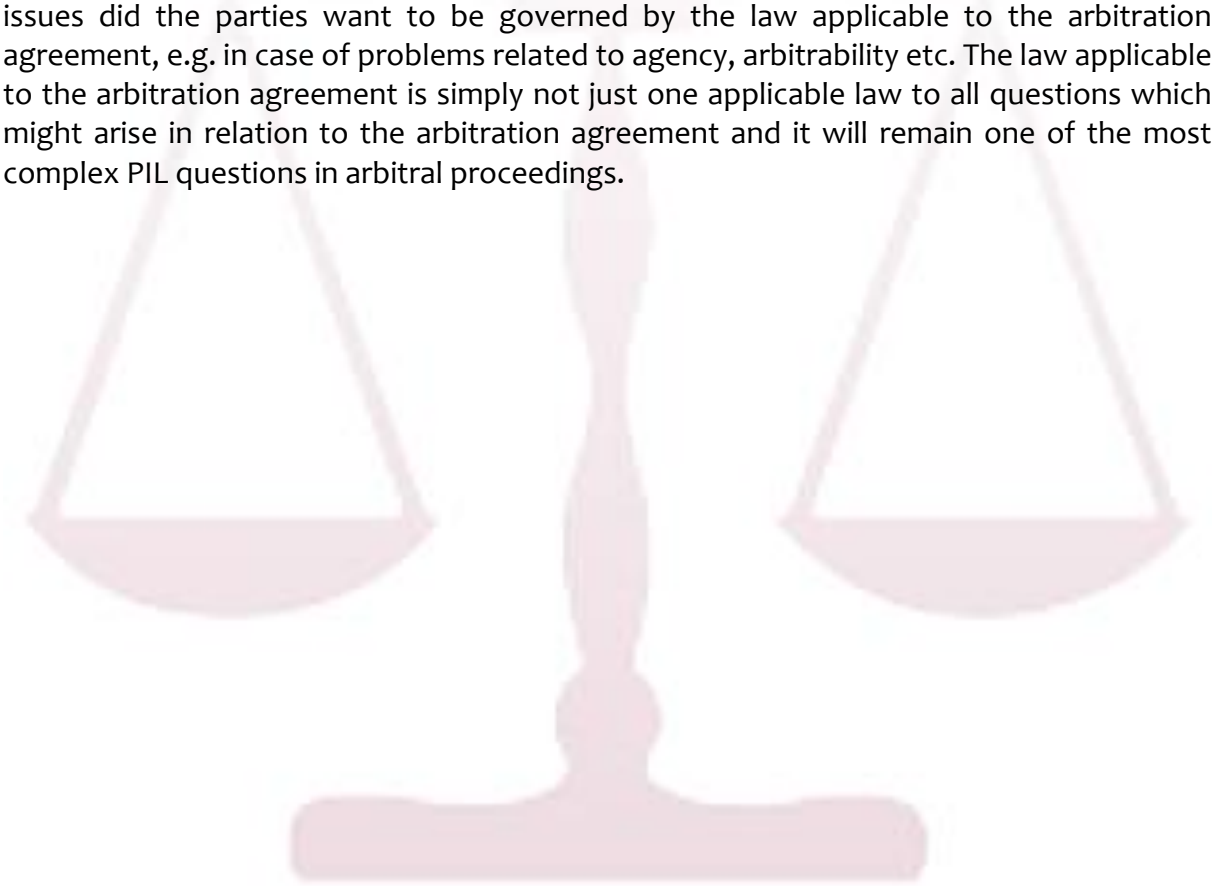
seat is in that case a subsidiary connecting factor that will apply only if there is no choice of law, so it cannot at the same time be an indication, or even the decisive indication, that the parties have chosen the law of the seat to apply to the arbitration agreement. In line with the Hague principles on choice of law or the Mexico Convention, the choice of the seat should in any case not be the sole indication for the implicit choice of law governing the arbitration agreement. If the subsidiary conflict rule refers to the closest connection, in that case it needs to be distinguished between the circumstances of the case that are indicators for the subjective will of the parties to implicitly choose the law and those of which are indicators to prove the objective closest connection to the arbitration agreement. For the implicit choice of law there need to be contract clauses which show in the direction of a certain legal order and circumstances outside of the contract may serve to support the arguments in favor of the choice of that law. If we take the domicile of one of the parties as one of the indicators, it cannot by itself serve as any indication for a choice of law if there is nothing in the contract to show that there was some intention of the parties towards that law. On the other hand, the principle of closest connection does not require or would even allow considering anything in the contract to refer to a certain legal order, but rather allows only to look only at objective circumstances such as the domicile of the parties or the place of the conclusion of the arbitration agreement. It is questionable if the choice of the applicable substantive law to the main contract or the choice of the seat for the procedure shall be considered to establish some close connection to the law applicable to a certain aspect of the arbitration agreement, considering that such choice of law may be guided by motifs such as neutrality of the law which is exactly the opposite of a close connection.[200] In general, the choice of law, regardless if it's conducted through a choice of law clause for the main contract or the choice of the seat, is in the theory of PIL considered to be one of the main exceptions to the principle of closest connection. Therefore, factors which may be considered as a very strong indication for a choice of law, will be a rather weak indication if favor of the closest connection and vice versa.

VI. Should the Parties Choose the Applicable Law to the Arbitration Agreement?

Yes, the parties should choose the applicable law to their arbitration agreement in order to avoid such a PIL legal analysis like it is conducted in this paper with a very uncertain outcome. Although before writing this paper or starting to deal with the problem for the 26th Vis moot, I was of the strong opinion that a specific choice of law clause for the applicable law to the arbitration agreement was very unusual and even unnecessary, the lack of clear provisions, case law, convincing arguments and the level of disagreement between among established authors in this field has led to the change of opinion. Parties would be best advised if there would include this simple sentence to their arbitration clause, that the law applicable to their arbitration agreement shall be the law of the seat of arbitration. In that case parties' choice of law governing the arbitration agreement is a blessing to answer the question from the title of this paper, because it makes the life of the arbitral tribunal much easier and provides for legal certainty. In addition, by choosing the law of the seat of arbitration, parties avoid problems related to arbitrability and form of the arbitration agreement, which will be in many cases considered to be at least mandatory rules if not "overriding mandatory rules" by the courts of the seat. Naturally,

[200] Jan Kropholler (n. 181), 291.

by choosing the law of the seat to apply to the arbitration agreement both substantive and procedural law of the seat will apply to the arbitration agreement and not just the *lex arbitri*. The parties may wish to choose the same law for the arbitration agreement as for the main contract, but they should have a good reason for that and make sure not to endanger the potential award, because of the mandatory rules of the *lex arbitri*. A choice of the third law to the arbitration agreement, that is neither the law of the seat nor the contract law for the main contract, may hardly ever be justified. In that case, parties' choice of law governing the arbitration agreement would rather be a curse, not for the determination of the applicable law to the arbitration agreement, but with regards to the unnecessary application of a third law to the arbitration agreement. To further answer the question on parties' choice of law governing the arbitration agreement as a curse, the mere possibility to implicitly choose the law may cause more difficulties for the arbitral tribunal to establish the intention of the parties, than actual solutions to this problematic area. Unfortunately, not even the explicit choice of law to the arbitration agreement would solve all of the problems, because it still leaves the arbitral tribunal with the question which issues did the parties want to be governed by the law applicable to the arbitration agreement, e.g. in case of problems related to agency, arbitrability etc. The law applicable to the arbitration agreement is simply not just one applicable law to all questions which might arise in relation to the arbitration agreement and it will remain one of the most complex PIL questions in arbitral proceedings.



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