International arbitration is not only international

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Parties to international arbitration are sometimes under the impression that they may draft arbitration agreements and prepare arbitration proceedings without taking national laws into consideration. National laws may seem to be irrelevant if international arbitration is considered to be an autonomous system that depends on the will of the parties and on some international instruments that are uniformly applied all over the world. This, however, is an oversimplification.

To a large extent, arbitration’s autonomy is confirmed by international instruments – primarily, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If parties decide to submit a dispute to arbitration, according to article II of the Convention, the courts of the nearly 150 states which have ratified the Convention must decline jurisdiction on that dispute. If the arbitral tribunal chosen by the parties renders an award based on the instructions given by the parties and applies the law chosen by the parties, according to article V of the Convention, the courts of all those states have to enforce that award, subject to a few exceptions. This is certainly enhancing the impression that arbitration is an autonomous system, where national laws are allowed to have an impact only to the extent that they have been chosen by the parties.

In addition, the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration has been adopted in more than sixty countries and is widely used as a reference elsewhere. The Model Law was intended as a source of

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1 For an updated overview of the status of ratifications see the Convention’s official site at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

2 Of the countries analysed in Part III of this book, the following have adopted the Model Law: Austria, Denmark, Germany, Norway and Russia. For an updated overview of the countries that have adopted the Model Law see www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
harmonisation in international arbitration. To this end, and to ensure continuity, it was deliberately aligned with the New York Convention. This contributes greatly to the harmonisation of national arbitration laws, thus enhancing the impression that arbitration law is standardised and that there is no need to pay attention to the peculiarities of national laws.

On this basis, sometimes arbitration is deemed to be detached from national laws. According to an opinion that was quite influential, especially some decades ago, arbitration is international, and as such it does not even have a forum. In particular, no importance should be attached to the legal system of the place of arbitration; this opinion assumed that the mere circumstance that an international arbitration happens to have its seat in a certain state should not create any link with the legal system of that state. The choice of place of arbitration, according to this opinion, is based on considerations of practical convenience, such as the relative vicinity to the states of both parties, the possibility of having convenient flight connections or the availability of modern and efficient meeting facilities.

This chapter will show that the place of arbitration has a significant impact that may affect the validity and enforceability of the arbitral award, and that, therefore, the venue should be chosen first of all out of legal considerations (Section 1 below).

Also, this chapter will show that not only the law of the place of arbitration, but also other national laws may have an impact on arbitration, and that this is quite irrespective of whether the parties have chosen them to apply or have even decided that they shall not apply: the law of the place of enforcement (Section 2 below) and, to a certain extent, the law applicable to the substance of the dispute (Section 3 below).

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1 International arbitration and the state law of the place of arbitration

The law of the place of arbitration (also known as the *lex arbitri*) affects various aspects of an arbitral proceeding: the validity of the arbitration agreement, the procedure of the arbitration and the validity of the arbitral award.

### 1.1 The relevance of the *lex arbitri* to the validity of the arbitration agreement

The jurisdiction of an arbitral tribunal on a certain dispute and the consequent exclusion of jurisdiction by courts of law on the same dispute are based, for international arbitration, on the already mentioned New York Convention. In article II the Convention provides 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 may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.’ Article II does not make reference to any national law for the validity of the arbitration agreement, and seems, therefore, to be a provision that contains all applicable criteria for validity.

However, article V(1)(a) of the New York Convention, regulating the enforcement of an arbitral award, states that enforcement may be refused if ‘[t]he ... agreement referred to in article II ... 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.’ The latter – the *lex arbitri* – is more commonly used: it is rare to see an arbitration clause specifying which law governs the arbitration, and the general choice of law made by the parties to govern the contractual relationship does not extend to the arbitration agreement, not even if this latter takes the form of a clause in the contract that contains the choice of law. Coordination of article II and article V of the Convention may create some challenges, as will be seen immediately below.

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5 As a result of the separability doctrine that receives large support internationally. See, for references to literature and case law, Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009), vol. 1, pp. 312–408.
1.1.1 The formal validity of the arbitration agreement

A large number of contracts contain arbitration clauses entered into electronically, by reference to other documents or even tacitly. This raises questions, particularly in relation to the requirement laid down in the New York Convention that arbitration agreements should be ‘in writing’.

The UNCITRAL has recently recommended that the New York Convention be interpreted broadly so that arbitration agreements entered into by electronic means of communication may be considered to comply with the writing requirement.\(^6\) Also, the UNCITRAL Model Law on International Commercial Arbitration, originally issued in 1985, has been amended in 2006 so as to exclude any doubt regarding the admissibility of arbitration agreements entered into electronically – emphasising, however, that the clarification resulting from the amendment did not modify the Model Law, but simply confirmed the liberal interpretation that was already adopted by various courts.\(^7\)

National laws may vary considerably in the formal requirements they lay down for arbitration agreements. Thus, article 807 of the Italian Code of Civil Procedure, article 178(1) of the Swiss Private International Law Act, article 1031 of the German Code of Civil Procedure and section 5 of the English Arbitration Act all require the arbitration agreement to be in writing, albeit with small differences in the specification of how to meet this requirement: under German law, for example, it is sufficient that the arbitration agreement was contained in a document sent by one party to the other, if such a party had not raised objections in good time; under English law, the criteria are also met by agreements that are made other than in writing, so long as they refer to terms that are in writing, and agreements that have been recorded in writing only by one party. Some countries, however, have abolished the writing requirement altogether: article 1 of the Swedish Arbitration Act and article 3–10 of the Norwegian Arbitration Act recognise any arbitration agreement,


\(^7\) See A/CN.9/WG.II/WP.118, para.11.
without laying down any particular form for that agreement, provided that the parties have reached a consensus.

A similar proposal has been adopted for the UNCITRAL Model Law on International Commercial Arbitration in 2006, but only as one of two options that the states adopting the Model Law may choose.\(^8\) As a consequence, states that adopt the UNCITRAL Model Law on International Commercial Arbitration will, in the future, have to choose between one option requiring that the arbitration agreement be in writing, which clarifies that electronic communication meets that requirement, and one where there are no formal requirements at all.

The abandoning of formal requirements for the arbitration clause raises various questions. In particular, is an arbitral award enforceable under the New York Convention if it has been rendered on the basis of an arbitration clause that, while valid under the applicable national law, is not in writing as required by article II of the New York Convention? Traditionally, despite the reference to national law contained in article V of the Convention, it was widely considered that the formal requirements of article II of the New York Convention prevail over any formal requirements also laid down by applicable national law in the phase of enforcement.\(^9\) This is because the New York Convention was traditionally thought to embody an approach more favourable to arbitration than is found in national laws. However, now that some national laws and the amended UNCITRAL Model Law on International Commercial Arbitration have become more arbitration-friendly than the New York Convention in respect of formal requirements for the arbitration agreement, it may rightly be asked whether that view should change and national arbitration laws be given preference. This would be more in line with the wording of article V(1)(a) and with the spirit of the Convention.\(^10\)

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\(^8\) Article 7 has two versions in the Model Law as amended in 2006.

\(^9\) For a survey of the various approaches taken by courts of different states, see the UNCITRAL Secretariat note A/CN.9/WG.II/WP.139, available at http://daccess-ods.un.org/TMP/9440393.44787598.html, paras. 12–15. Only the Italian Supreme Court seems to have held that different parameters were applied at the two stages with article II not applying at the enforcement stage: Supreme Court decision No. 637, 20 Jan. 1995, Rivista dell’Arbitrato (1995) at 449 and Yearbook Commercial Arbitration XXI (1996) at 602f.

\(^10\) Article VII of the New York Convention permits applying national laws that are more arbitration-friendly than the Convention itself. For a more extensive analysis see Cordero-Moss, ‘Form of Arbitration Agreements’.
1.1.2 The legal capacity of the parties to the arbitration agreement

According to article V(1)(a) of the New York Convention, one of the grounds for refusing recognition or enforcement of an award is that one of the parties of the arbitration agreement was under some incapacity under its own law. The UNCITRAL Model Law has used this article of the New York Convention as a basis for its own rules on annulment of awards and on the possibility of being able to refuse recognition or enforcement; respectively, articles 34(2)(a)(i) and 36(1)(a)(i). Similar references to the law of each of the parties may be found in the arbitration law of countries that have not adopted the Model Law. Thus, two recent court decisions rendered in countries that have not adopted the Model Law, one of the Swedish Court of Appeal and one of the English Supreme Court, have established the ineffectiveness of international arbitral awards on the basis that the arbitration agreement was not binding on one of the parties in accordance with the law applicable to that party. These decisions are a reminder that the law chosen by the parties to govern the contract does not cover all aspects of the legal relationship between the parties, and that other laws may become applicable in spite of the parties’ choice. The general attitude among practitioners sometimes seems, on the contrary, to rely fully and solely on the law chosen by the parties and to disregard any other laws – on the basis that an international arbitral tribunal will be obliged to follow the will of the parties. Decisions like those mentioned here, therefore, may come as a surprise, although they simply give proper effect to the applicable sources of law.

1.1.3 The scope of the arbitration agreement

In the past, drafters of arbitration agreements devoted particular attention to the wording used in defining the scope of the arbitration agreement


12 Dallah Real Estate & Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46. This decision was not based on the lack of legal capacity of one of the parties, but on the relevance that that party’s law has to the criteria for being deemed bound by an agreement. For a more extensive analysis and a comparison between the Swedish and the English decision, see Giuditta Cordero-Moss, ‘Legal Capacity, Arbitration and Private International Law’, in K. Boele-Woelki et al. (eds.), Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr (The Hague: Eleven International Publishing, 2010).
agreement. This seems to have been a reaction particularly to some English court decisions that placed considerable emphasis on the language of the arbitration clause and drew (out of words that actually were not intended to restrict the scope of the arbitration agreement) unexpected conclusions on which disputes could be deemed to have been referred to arbitration. To cite one example, a court found that a clause relating to arbitration of any disputes ‘arising under’ a certain contract covers only those disputes in terms of the rights and obligations created by the contract itself, whereas a clause referring to disputes ‘in relation to’ the contract or ‘connected with’ the contract has a wider scope.\footnote{Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd [1988] 2 Lloyd’s Rep 63.} This led to more and more detailed formulations aiming at clarifying that the arbitration agreement covers all possible disputes between the parties. These fine verbal distinctions have now been abandoned by English courts: in the words of the House of Lords, these distinctions ‘reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman [...] obviously regarded the expressions “arising under this charter” [...] and “arisen out of this charter” [...] as mutually interchangeable. [...]The time has come to draw a line under the authorities to date and make a fresh start.’\footnote{Fiona Trust & Holding Corporation and others v. Privalov and others [2008] 1 Lloyd’s L Rep 254 at 257.} The House of Lords affirmed that the parties ‘are unlikely to trouble themselves too much about [the clause’s] precise language or to wish to explore the way it has been interpreted in the numerous authorities, not all of which speak with one voice. [...]If the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly’.\footnote{Ibid., at 259.}

In spite of the new approach by the English courts, the London Court of International Arbitration still determines the scope of its model arbitration clause by reference to ‘any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination’.\footnote{Available at www.lcia.org/Dispute_R esolution_Services/LCIA_Recommended_Clauses.aspx.} This detailed formulation has spread even beyond the area of English law: the model arbitration clause
recommended by the Arbitration Institute of the Swedish Chamber of Commerce refers to ‘any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof’. Similarly, the model clause of the Swiss rules refers to ‘Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof’, and the model clause of the UNCITRAL Arbitration Rules to ‘Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof’. Along the same lines, although somewhat more succinctly, the model clause of the International Chamber of Commerce refers to ‘All disputes arising out of or in connection with the present contract’.

A detailed arbitration clause is meant to counteract restrictive interpretations that may be imposed by the applicable arbitration law. A simple clause may probably have the same effect in many jurisdictions, including those considered above. What a detailed arbitration clause may not achieve, however, no matter how clear and precise it is, is to extend the scope of what the applicable arbitration law considers to be arbitrable. The matter of arbitrability will be analysed in Section 1.3.1 below.

1.2 The relevance of the lex arbitri to the procedure of the arbitral proceeding

Generally, arbitration is governed by the arbitration law of the place where the tribunal has its venue (territoriality principle). The territoriality principle is affirmed, for example, in article 46 of the Swedish Arbitration Act, article 176 of the Swiss Private International Law Act, section 2 of the English Arbitration Act and article 1(2) of the UNCITRAL Model Law. The territoriality principle applies only to the law governing the arbitration procedure and does not extend to also cover the law governing the merits of the dispute (more on the law governing the merits of the dispute in Section 3 below).

17 Available at http://sccinstitute.se/engelska-16.aspx.
20 Available at www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt.
Some states have opened up for the parties to choose the law governing the arbitration procedure. Therefore, in these states the parties may derogate the territoriality principle: see, for example, article 182(1) of the Swiss Private International Law Act and article 1494 of the French Civil Procedure Code. That the parties have chosen a certain law to govern their contract, however, is not sufficient to make the chosen law applicable also to the procedure. If the parties wish the arbitral proceeding to be regulated by a law different from the law of the place where the arbitral tribunal is seated, they should make specific reference to the arbitration procedure (assuming that the arbitration law of the place of arbitration permits them to make such a choice).

It has been authoritatively commented that ‘the choice of a foreign procedural law is extremely unusual (and often ill-advised), as well as subject to doubts as to its validity’. In England, a High Court decision commented that, in theory, it would be possible to submit arbitration to a procedural law different from the law of the state where the arbitral tribunal has its venue, but the result would be highly unsatisfactory or absurd.

Irrespective of whether the parties have chosen to submit their dispute to an ad hoc or an institutional arbitration, the arbitral proceeding will thus generally be subject to the arbitration law of the state where the arbitral tribunal has its venue. If the parties have provided for procedural rules (in an ad hoc arbitration, directly in the agreement or by reference to the UNCITRAL Arbitration Rules; in an institutional arbitration, via the choice of the institution), the rules provided by the parties will apply to their proceeding and will prevail over the rules contained in the national arbitration law, if the latter permits to be derogated from by agreement of the parties. In the case of mandatory provisions of the national arbitration law, however, the arbitration law will override the arbitration rules chosen by the parties. Examples of mandatory provisions are the rules on arbitrability and on due process, such as the necessity of giving both parties the chance to be heard. In addition, the law of the place of arbitration contains rules on the powers of the arbitrators to issue interim measures, to summon witnesses and to

request assistance from the local courts in such operations. Also, this law contains rules on the role of courts; for example, in the case of a challenge to the impartiality of the arbitral tribunal.

Arbitration laws are, usually, quite liberal in their regulation of arbitration. The parties desire to have as much flexibility as possible in the organisation of a mechanism for dispute resolution that is chosen precisely because it leaves ample room for private determination. If state law started to regulate arbitration in detail, this method of dispute resolution would probably lose much of its appeal to commercial parties. However, if there were no regulation at all, the parties might fear that fundamental principles of due process might be neglected. Therefore, a successful arbitration law is an instrument that manages to ensure a high degree of flexibility, though providing certain rules to protect the principle of due process.

1.3 The relevance of the lex arbitri to the challenge of an arbitral award

The assumption that the legal system of the seat of arbitration (lex arbitri) has no link with the arbitration itself is not correct in other respects. The losing party may, in most jurisdictions, challenge, before national courts, the validity of an arbitral award that has been rendered in that state. This means that the courts of the state of arbitration have the chance of controlling the validity of the award; and this is definitely an important link between international arbitration and the forum. The judicial control on the arbitral award in the phase of the challenge is regulated by national arbitration law. This means that courts apply their own law when they determine whether the award is valid or not.

In some states, awards rendered in disputes without any contact with that state enjoy a certain detachment from the system of the forum. Swiss\(^{23}\) and Belgian\(^{24}\) law permit the parties to enter into an exclusion agreement, thus excluding the court’s jurisdiction to challenge the validity of the award. Also, Swedish\(^{25}\) law permits the parties to exclude the control by Swedish courts, but only in respect of the so-called relative invalidity grounds, i.e. grounds that have to be invoked by one of the parties. Exclusion agreements are not allowed by Swedish law in respect

\(^{23}\) Article 192 of the Swiss Private International Law Act.
\(^{24}\) Article 1717(4) of the Belgian Judicial Code.
\(^{25}\) Article 51 of the Swedish Arbitration Act.
of absolute invalidity grounds, upon which the judge can act on his or her own motion. In most other states, as well as under the UNCITRAL Model Law, the control jurisdiction of the courts cannot be excluded.

The list of grounds upon which a court may declare an award invalid varies, as mentioned, from state to state. In some states, as in England, the judge has relatively wide powers. Among others, an English judge may verify the arbitral tribunal’s application of law, although the possibility of setting aside an award for error in law has been significantly restricted in the English Arbitration Act of 1996. In most other European states, the list of invalidity grounds can broadly be said to coincide with the list contained in article 34 of the UNCITRAL Model Law which, in turn, coincides with the list of grounds upon which an award may be refused enforcement under the New York Convention. These grounds may be summarised as referring to invalidity or irregularity in the following areas: the arbitration agreement (which is governed primarily by the law of the place of arbitration, as seen in Section 1.1 above); the composition of the arbitral tribunal (which may be considered as part of the arbitral procedure and is therefore governed by the agreement between the parties, the procedural rules chosen by the parties as well as by the law of the place of arbitration, as seen in Section 1.2 above); the procedure of the arbitration (also governed by the agreement between the parties, the procedural rules chosen by the parties as well as by the law of the place of arbitration, as seen in Section 1.2 above); and the scope of power exercised by the tribunal (which is determined primarily by the agreement of the parties, but also by the procedural rules chosen by the parties and by the law at the place of arbitration). In addition, the award can be declared invalid if there is a contrast with that state’s rule on arbitrability or with that state’s public policy (ordre public), as will be seen more in detail in Sections 1.3.1 and 1.3.2 below.

1.3.1 Arbitrability

There are various rules of state law that restrict the parties’ ability to submit to arbitration disputes between them. One of the main effects of

26 Section 69 of the English Arbitration Act.
submitting a dispute to arbitration is, as is well known, that the parties exclude the jurisdiction of courts of law on the same dispute. The other important effect of arbitration is that the winning party can present the award for enforcement to any court in a state where the losing party has assets. Arbitration enjoys such a significant recognition as long as the disputed matters concern areas that national legal systems consider suitable for self-regulation by private parties. As soon as matters of public policy or of special economic or social interest are touched on, however, it can seem less appropriate for a state to waive jurisdiction or to lend its courts’ authority to enforce private awards. In such areas with important policy implications, states wish to preserve the jurisdiction of their own courts of law: this preference is based on the assumption that an arbitral tribunal would not be able or willing to apply the law as accurately as a judicial court would.

In the past, a clear trend could be observed towards reducing the areas in which disputes are not deemed arbitrable. In the past decades, for example, the US legal system has undergone a clear shift from an expressed suspicion against arbitration, to an arbitration-friendly attitude; the same evolution can be observed in other legal systems, such as, for example, the Swedish system. Notwithstanding this trend in favour of arbitrability, however, various areas of law are still deemed to be exclusively in the hands of the courts of law. The areas where arbitrability is excluded vary from state to state: as a general rule, arbitration is usually permitted in all matters that fall within the boundaries of private law. This would exclude from the scope of arbitration matters such as taxation, import and export regulations, concession of rights by administrative authorities, bankruptcy or the protection of intellectual property. These matters are mostly regulated by mandatory rules from which the parties cannot derogate. Disputes concerning aspects of commercial transactions falling within the scope of the

28. The first Supreme Court judgment recognising the arbitrability of matters that previously were deemed to be for the exclusive competence of courts of law, was Scherk v. Alberto-Culver, 417 US 506 (1974). See, for further references, Paul Carrington and Paul Haagen, ‘Contract and Jurisdiction’ Supreme Court Review, 8(1997), 331, 362f., and Jean Sternlight, ‘Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration’, Washington University Law Quarterly, 74(1996), 637, 652.

29. See, for example, the evolution regarding the validity of arbitration clauses entered into in the framework of general conditions of contract, as appears from the comparison of three Swedish Supreme Court decisions rendered in 1949, 1969 and 1980: Lars Heuman, Current Issues in Swedish Arbitration (Stockholm: Juristforlaget, 1990), pp. 22ff.
freedom to contract, however, should be arbitrable, even if the solution of the dispute assumes that the tribunal takes into consideration these mandatory rules. As long as the tribunal is requested to decide upon the private-law consequences of these rules’ existence and is not required to apply or enforce any of these rules, there should be no obstacles to arbitrability.

Recently, the arbitrability exception is being used more frequently, particularly in disputes involving mandatory regulation protecting the weaker party, when this regulation belongs to the system of the court where the dispute would be heard if it had not been for the arbitration clause.30

Since the arbitrability rule may have a different scope according to the law it belongs to, it is necessary to find out which law determines whether the subject of the dispute is arbitrable or not. As already mentioned, under the New York Convention and the UNCITRAL Model Law, a court always applies its own rules on arbitrability. Hence, the arbitrability of the dispute will be evaluated under the law of the seat of the tribunal if a court of that country is judging the validity of the award, and under the law of the place of enforcement if a court of another country is asked to enforce the award.

This may lead to a situation where a court applies its own rule on arbitrability in a dispute that has no connection with that legal system apart from it being the seat of the tribunal or where the presence of assets permits enforcement. In this context, it may be useful to remember the rationale of the arbitrability rule: the arbitrability rule is meant to preserve the jurisdiction of the courts of law in certain areas of law that are deemed to deserve a particularly accurate application of the law. This particularly affects areas of law with public policy implications, where the public interest is deemed to prevail over the freedom of the parties to regulate their own interests. The legal system does not consider private mechanisms of dispute resolution as sufficiently reliable in this context and wishes to maintain the jurisdiction of its own national courts of law. This rationale does not necessarily apply when the dispute has no connection with that court’s legal system, because in the absence of an arbitration agreement the court would not have jurisdiction over the dispute.

30 See Accentuate Ltd v. Asigra Inc [2009] EWHC 2655 (QB), regarding a distribution agreement. See also, in Belgium, Cass., 16.11.06; in Germany, OLG München, 17.5.06; in England, High Court 30.10.09.
If a dispute has no connection with the legal system of the arbitral seat, therefore, the arbitrability rule should be applicable to set aside an award or refuse enforcement only if the annulment of the award is necessary to avoid an unacceptable result reached by the arbitral tribunal. In itself, the fact that the arbitral tribunal has resolved a dispute that is not arbitrable under the law of the arbitral seat or of the place of enforcement would not be unacceptable: the courts would have neither the interest nor the competence to apply their own law to that dispute. What would be unacceptable is a decision made in a specific case; for example, because it has given effect to an agreement that violated a UN embargo. In short, what should be an annulment ground or ground to refuse enforcement in this situation is not the fact that the tribunal has exercised jurisdiction on the dispute, but the fact that the result of the decision conflicts with the fundamental principles of the court’s law. In situations where the dispute does not have any links with the legal system of the arbitral seat, therefore, the arbitrability clause would overlap with the public policy rule, which will be discussed below. The evaluation of the award’s validity or enforceability, in other words, cannot be made in advance, automatically applying an abstract measure of arbitrability. The evaluation of the award’s validity or enforceability has to be made on the basis of the specific decision rendered in the particular case, and by measuring the actual decision against fundamental principles of the court’s law.

1.3.2 Public policy

The rule of public policy has the purpose of permitting the judge not to give effect to an award that would contradict the fundamental principles of the judge’s social system. It is, in the context of international arbitration, universally interpreted in a very narrow manner.


In particular, it does not have the same function as ensuring full compliance with rules and principles of the judge’s legal system; public policy is usually defined by reference not to the legal system, but to basic notions of morality and justice, features essential to the moral, political or economic order of the country or to fundamental notions of morality and justice. In a similar vein, the European Court of Justice found, regarding the applicability of the public policy exception contained in the then applicable Brussels Convention on Jurisdiction and Enforcement of Judgments, that a court cannot refuse enforcement of a judgment ‘solely on the ground that it considers that national or Community law was misapplied in that decision’. The European Court of Justice found that the fact that an alleged error in applying the law concerns rules of Community law does not alter the conditions for being able to rely on the clause on public policy. In particular, a court cannot review the accuracy of the findings of law made in the judgment when the enforcement of that judgment is being sought. Moreover, the judgment must be at variance, to an unacceptable degree, with the legal order of the enforcing state in as much as it infringes a fundamental principle, and the infringement must constitute a manifest breach of a rule of law regarded as essential or of a right recognised as being fundamental. This European Court of Justice decision was not rendered under the New York Convention, but there is no reason why the reasoning made in respect of public policy as a ground for refusing recognition and enforcement of judgments under the Brussels Convention (or its successor, the Brussels I Regulation) should not also apply to public policy as a ground for refusing recognition and enforcement of international arbitration awards.

Commercial Arbitration Committee, ‘International Law Association Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (paper presented at the International Law Association Conference, London, 2000). This is often defined as the ‘pro-enforcement bias’ of the New York Convention, which, in turn, is considered to constitute a principle of public policy: see Redfern et al., Redfern and Hunter on International Arbitration, para. 11.105.

Redfern et al., Redfern and Hunter on International Arbitration, paras. 11.109, 11.111 and 11.112.


Ibid., p. 366.


Ibid., para. 32.

Ibid., para. 29.

Ibid., para. 30.
enforcement of awards under the New York Convention or as a ground to set aside an award under the UNCITRAL Model Law.

We have established that it is not the national rules that must be applied through the public policy clause, but it is their inspiring principles that have to be given effect to. It remains to attempt to define what inspiring principles can be deemed to be those of public policy. Not every principle inspiring a mandatory rule can be considered a public policy principle. Not even every principle inspiring an overriding mandatory rule (i.e. one of those mandatory rules that is deemed to be so important that it requires to be applied even in international situations and without taking into consideration the general choice of law rules, also known as *lois de police*) can be considered as a public policy principle. It is only the fundamental principles – those that constitute the basis of the society – that can be deemed as public policy. But how can these principles be identified?

There is no absolute rule to determine public policy: what is fundamental may vary from state to state, and, even within the same state, the conceptions develop, and what was deemed public policy a decade earlier, may not be deemed so any more.

Court decisions in the various states annulling an award or refusing to enforce it because the award is in contrast with the court’s public policy are reported in the ICCA Yearbook, Commercial Arbitration, also available at www.kluwerarbitration.com. A survey of these decisions, from the first volume in the mid-seventies to the present time, shows that such decisions are not numerous. A decision that originated a wide debate in legal literature was rendered by the EU Court of Justice in the *Eco Swiss* case: here the Court affirmed that European rules of competition law

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41 The example of swap agreements and other financial derivate instruments is quite descriptive: this kind of contract developed into a recognised financial activity in the course of the 1980s, and is not considered as being against fundamental principles. However, up to as late as the 1980s, courts in Germany and in Austria were considering them against the basic moral principles of the system that forbid gambling (so-called *Differenzeinwand*). See, for example, the decision of the Austrian Supreme Court no. 3 Ob 30/83 of 1983, and of the German Supreme Court (*Bundesgerichtshof*) of 15 June 1987. The *Bundesgerichtshof* did not consider these agreements as violating any fundamental principles of the German legal system; see, for example, the decision dated 26.2.1991, XI ZR 349/89.

42 *Eco Swiss China Time Ltd* v. *Benetton International N.V.* C-126/97.
must be considered to belong to public policy. The wide debate that followed this decision related, among other things, to the scope and effects of the Court’s findings. In judicial practice, at least two approaches have been taken to the question of the courts’ power regarding arbitral awards: the so-called maximalist and minimalist approaches. According to the former approach, the court has the power to make, in addition to the evaluation made by the arbitral tribunal, an independent evaluation of the application of the competition law in order to ensure accurate application of competition law. This approach is criticised and is deemed not to express the mainstream position on the subject. The minimalist approach is held to prevail in court practice both in the USA and in Europe, and legal literature affirms that the courts shall not make a full review of the arbitral tribunal’s application of competition law but shall accept the arbitral tribunal’s evaluation. The European Court of Justice has defined European competition law as part of public policy does not mean that any violation of every European competition rule will be a breach of public policy. It is only the most serious violations that qualify, and the breach must be concrete and effective, so that it truly jeopardises the goals of competition policy.

Another situation where arbitral awards are traditionally deemed to conflict with public policy is where the award gives effect to an agreement that violates applicable rules on bribery. Arbitral awards rendered in commercial disputes may run the risk of conflicting with public policy where contracts are also legal under the law chosen by the parties, but violate, in certain areas, the law that would be applicable if the parties had not made a choice of law. If the violated rules were meant to protect third-parties’ interests or to ensure the proper functioning of systems such as banking and financing, an award giving effect to those agreements may have implications in terms of public policy.

43 For an overview and a summary of the debate so far, see Radicati Di Brozolo, ‘Arbitration and Competition Law’.
44 Ibid., p. 10.
45 Baxter Int’l v. Abbott Laboratories, 315 F. 3rd 829 (7th Cir. 2003) and American Central Eastern Texas Gas Co. v Union Pacific Resources Group, 2004 U.S. App. LEXIS 1216 (5th Cir. 2004).
47 Ibid., pp. 6 and 11.
Many commercial agreements have implications that may affect the interests of third parties: for example, an agreement creating a security interest on the assets of one party for the benefit of the other party has implications for the other creditors of that party, who may not count on those assets in the case of the insolvency of the debtor. In order to give full effect to the security interest, legal systems have various rules, such as imposing public registration of the security so that the potential creditors are aware of the patrimonial situation of the debtor. Let us assume that the parties created a security interest under a law of their choice that does not require public registration, and that the contract contained an arbitration clause. If a dispute arises and the secured creditor obtains an award in its favour, it will try to enforce it in the country where the assets are located and where the law actually requires registration. The enforcement court will thus be expected to enforce an award giving effect to a contract that violates rules ensuring the proper functioning of the economic system. Will that award be considered as violating public policy?

Another example is a shareholders’ agreement with provisions that violate the applicable company law on the competence of corporate bodies, for example, with the purpose of favouring a group of shareholders against the interests of the minority shareholders. Assuming that an arbitral award gives effect to the agreement of the parties, thus violating the applicable company law, will the award be valid and enforceable in the country to which the applicable company law belongs?

The nature of the public policy principle prevents us making general assertions as to the quality of public policy for a whole area of the law: while some rules of property law or company law may protect interests that are deemed to be so fundamental that their disregard may contradict public policy, it will depend on the circumstances of the case as to what extent the result of a specific violation actually contrasts with such fundamental principles. On a general basis, however, it seems legitimate to affirm that the policy upon which various rules of property and company law are based may be deemed so strong, that a serious breach of those rules may represent a violation of public policy. 49

49 This matter is the object of research in a project that I run at the University of Oslo on Arbitration and Party Autonomy (‘APA’, www.jus.uio.no/ifp/english/research/projects/choice-of-law/). For a more extensive analysis see Giuditta Cordero-Moss, ‘International Arbitration and the Quest for the Applicable Law’, Global Jurist (Advances), 8(2008), 1.
Thus, an award disregarding the applicable company law to give effect to the parties’ agreement may run the risk of being ineffective if it is challenged or sought to be enforced before the courts of the place to which the disregarded company law belongs. The same applies to fields such as insolvency and, as seen above, competition law.

1.4 The relevance of the lex arbitri to the enforcement of an arbitral award

The lex arbitri is also relevant in the context of the enforcement of an award. We have already seen above that the law of the place of arbitration determines the validity of the arbitration agreement, and that an invalid arbitration agreement renders the award unenforceable under article V.1 (a) of the New York Convention. Moreover, the law of the place of arbitration determines the regularity of the arbitral procedure and the criteria for the composition of the arbitral tribunal, which are also criteria for the enforceability of an award under article V.1(d) of the New York Convention.

In addition, in article V.1.(e), the New York Convention considers it as a sufficient ground to refuse enforcement of an award if the award has been set aside by a competent authority in the state where the award was made. The New York Convention, however, does not specify on what grounds an award may be set aside; this is for the arbitration law of the court of challenge to determine. Therefore, even if enforcement is uniformly regulated by the New York Convention, reference to the annulment of an award opens a channel between the enforcement of an award and the unharmonised grounds for annulment of the lex arbitri. Usually,

50 See, for example, the decision of 31 December 2006 by the Federal Commercial Court of West Siberia regarding an arbitral award on a shareholder agreement between, among others, OAO Telecoiminvest, Sonera Holding B.V., Telia International AB, Avenue Ltd, Santel Ltd, Janao Properties Ltd and IPOC International Growth Fund Ltd. The Court affirmed that the parties to a shareholders’ agreement may not choose a foreign law (in that case, Swedish law) to govern the status of a legal entity, its legal capacity, the function of its corporate bodies or the relationship to and within its shareholders. These matters are, according to the court, governed by mandatory rules of the law of the place of registration (in that case, Russian law). Violation of these Russian rules was defined as a violation of Russian public policy.


52 Eco Swiss China Time Ltd v. Benetton International N.V. C-126/97.
article V.1.(e) is applied so that an award that has been annulled in its state of origin is considered without any legal effect; however, French courts enforce awards that have been set aside,\(^{53}\) and there are also some precedents – albeit not undisputed – in other countries, such as the USA.\(^{54}\) Recently, a Dutch court\(^{55}\) decided to enforce an award despite its annulment in the country of origin: Russia. This decision, however, cannot directly be compared to an enforcement decision in a usual commercial case, based as it was on considerations of impartiality and independence of the Russian courts in a case involving the interests of the Russian state. The award had been rendered in a dispute on investment protection regarding breaches by the Russian Federation of its public international law obligations following what the arbitral tribunal had found was an unlawful treatment of the oil company Yukos.

Disregarding an annulment made in the award’s country of origin is, however, the exception rather than the rule, and it is certainly not uncontroversial.\(^{56}\)

2 International arbitration and the state law of the place(s) of enforcement

If the losing party refuses to carry out the award, the winning party will have to seek enforcement through the courts of a state where the losing party has some assets. The enforcement of foreign arbitral awards is uniformly regulated by the New York Convention, which provides a simple and arbitration-friendly procedure. The only reasons that a court may invoke to refuse enforcement of an arbitral award are listed in article V of the New York Convention. These grounds correspond to those contained in the UNCITRAL Model Law in respect of a challenge of the validity (article 34) as well as in respect of enforcement (article 36). Therefore, the enforcement of an arbitral award can be refused in the case of invalidity or of irregularities relating to the arbitration agreement, the composition of the arbitral tribunal and the arbitral procedure, as

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\(^{53}\) The most well-known example is *Hilmarton*, reported in *Yearbook Commercial Arbitration*, vol. XX, 663–5 and vol. XXII, 696–8. See also the *Chromalloy* decision, reported in *Yearbook Commercial Arbitration*, volume XXXI, 629ff.

\(^{54}\) For references, see Born, *International Commercial Arbitration*, vol. 2, pp. 2677–2691.

\(^{55}\) Decision of the Amsterdam Court of Appeal of 28 April 2009.

\(^{56}\) For an overview of literature on this matter see Born, *International Commercial Arbitration*, vol. 2, pp. 2672ff.
well as excess of power, conflict with the arbitrability rule of the state of enforcement or with the public policy of the state of enforcement. In addition, as seen above, an award may be refused enforcement if it has been set aside in the state of origin.

The law of the place of enforcement, hence, becomes relevant in a rather restricted respect: when the subject matter of the dispute may not be subject to arbitration according to the law of the court and when the award conflicts with fundamental principles of the court’s system and, therefore, can be considered as violating the court’s public policy.

What is worth noticing in respect of the invalidity grounds of arbitrability and public policy, is that they refer to the criteria set in the legal system of the court that is at any time competent. By contrast, the other grounds for invalidity relate to the rules of a specified law: the invalidity of the arbitration agreement is determined by the law of the place of arbitration; the legal capacity of the parties is determined by the law of each of the parties; and the regularity of the procedure is determined by the law of the place of arbitration. This means that those particular laws will be applicable irrespective of which court is competent; thus, the validity of the arbitration agreement, the legal capacity of the parties and the regularity of the procedure will be governed by the same law both in the case where the award is challenged before the courts of the place of arbitration, and where the award is sought to be enforced before the courts of another country. The rules on arbitrability and on public policy, however, relate to the law of the court that is dealing at any time with the award. This means that the award will be evaluated according to the criteria for arbitrability and public policy of the place of arbitration if it is challenged before the courts of that place, and according to the criteria of the place of enforcement if it is sought to be enforced before the courts of another state.

Sometimes legal doctrine uses the term ‘international public policy’, and sometimes it uses the term ‘truly international public policy’. The former term does not designate a category of public policy different from the one just explained above, but is simply a different use of the terminology; the latter term, on the contrary, refers to a different concept. We can briefly analyse the two terms.

International public policy is usually deemed to refer to those principles in a legal system that are so fundamental that they should be respected even if the context of the dispute is international. In other words, the principles should have such an importance for that legal system that they should be considered as basic, irrespective of the existence of a close link between the legal system and the disputed
matter. The judge who is to determine the validity or enforceability of an award cannot be expected to run counter to these principles, not even if the award has no link with the judge’s legal system. This concept of international public policy does not differ considerably from the restrictive concept that has been described in Section 1.3.2 above, according to which it is only fundamental principles, and not rules (not even overriding mandatory rules) that constitute public policy. Then why is one category defined as ‘international’, whereas the other one is not? This is primarily a question of terminology. In some systems the term public policy is used in a domestic context and is deemed to have a wider scope than the one that we explained in the above section. It is deemed to extend to also cover the overriding mandatory rules of that legal system.

The extensive concept of public policy is also known as ‘positive ordre public’. This is because public policy, in the extensive sense, has a wider function than that of excluding interference in the basic principles of the legal system (which is the function of public policy in the narrow sense). The wider public policy also has the function of ensuring the application of the legal system’s overriding mandatory rules: positive public policy, therefore, is a vehicle for actively applying certain rules of the judge’s legal system. Since this is in contrast with the policies underlying the recognition and enforcement of foreign awards, positive public policy has to be restricted when operating within an international concept. The extensive concept is restricted by adding the qualification of ‘international’. The meaning of international is not, in this context, that the public policy stems from international sources: the meaning of international is that the (national) public policy is limited to those principles that are fundamental and that the judge cannot disregard even if the disputed matter has an international character.

If the concept of public policy is used with the narrow scope described in Section 1.3.2 above, it is not necessary to add the qualification ‘international’ to restrict it. The narrow concept, also known as negative public policy, enjoys wider recognition in international legal doctrine, judicial practice and legislation. It is defined as negative because its function is to prevent recognition or enforcement of an award (or application of a foreign law) if the result of such recognition, enforcement or application would violate fundamental principles of the judge’s legal system.

While the discrepancy between ‘public policy’ in its restrictive sense and ‘international public policy’ turns out to be simply a question of terminology with no significant difference in substance, the term ‘truly international public policy’ designates a different concept.

In this case, the qualification as ‘international’ does not refer to the context of the disputed matter, but to the sources from which the public policy stems. The idea is that truly international public policy does not originate from one single legal system; only if a principle is recognised as fundamental in a plurality of legal systems can it be considered to be the expression of a policy that is truly international. Truly international public policy is a concept primarily recognised in some academic circles, where it is considered to be more adequate in terms of international transactions and international arbitration than national public policy, even in its restrictive sense.

However, the usefulness of this concept may be questioned. The concept aims at avoiding that a legal system uses its own fundamental principles to declare a foreign award invalid or to refuse its enforcement (or to restrict application of the governing foreign law) if such principles are particular to that specific legal system and do not enjoy recognition internationally. In such a situation, the peculiarity of that legal system undermines the ideals of international uniformity that inspire international commercial law and international arbitration. The aim of the theory underlying truly international public policy, therefore, is to disregard the fundamental principles that are proper only to one legal system, even if they represent the basic values upon which that society is based. Instead, that legal system should look at what basic principles are recognised on a more international level and prefer those principles to its own. It seems too ambitious to me, however, to expect that a state court waives application of its own fundamental principles in the name of an ideal of harmonisation in international commerce. As long as the validity of an arbitral award is regulated by national arbitration laws, and the enforceability of an award is regulated by the New York Convention, the standard of reference will be the fundamental principles of the lex fori (though in the narrow ‘negative’ sense described above).

58 For further references see Cordero-Moss, *International Commercial Arbitration: Party Autonomy*, fn 774 and accompanying text.
59 See, confirming the position taken here, the Recommendation 1(b), particularly para. 11, Recommendation 1(c), particularly para. 20ff., Recommendations 2(a) and 2(b), particularly para. 43 in the Committee, ‘International Law Association Final Report on Public
In conclusion, the definition of public policy is relative; it may vary from state to state and, within the same state, with the lapse of time. What remains solid is that the exception of public policy has to be applied restrictively; in particular, the simple violation of a rule is in itself not sufficient to trigger applicability of the public policy clause, not even if the violated rule is mandatory or an overriding mandatory rule. Public policy can be considered as violated mainly if the result of that violation conflicts with the most fundamental principles of the society.

3  International arbitration and the law applicable to the substance of the dispute

The law applicable to the substance of the dispute is often chosen by the parties in the contract. To a large extent, the parties’ choice excludes applicability of any other law. This does not mean, however, that the chosen law is the only one that has to be taken into consideration under all circumstances. In order to understand the restrictions to party autonomy in arbitration, it is necessary to look at the sources that regulate this matter.

3.1 Party autonomy as the main rule

An arbitral tribunal must comply with the series of rules that are applicable to it: (i) the arbitration agreement; (ii) the relevant arbitration rules (in the case of institutional arbitration, these are issued by the institution in the frame of which the process is organised; in the case of ad hoc arbitration, the parties may adopt the UNCITRAL Arbitration Rules that are written for the purpose of providing a legal framework for ad hoc arbitration, may agree on specific rules in an agreement between them, or may leave it to the arbitral tribunal to determine the procedural rules); (iii) the rules in the applicable arbitration law (usually, as seen above, the law of the place of arbitration); and (iv) the New York Convention. These sources stand with each other in a formal hierarchy:

the arbitration agreement between the parties is at the lowest level of the hierarchy; the chosen arbitration rules are incorporated into the arbitration agreement and can therefore be regarded as taking the same hierarchical position as the arbitration agreement; the applicable arbitration law has a higher rank and, to the extent that it has mandatory provisions, it prevails over the arbitration agreement and the institutional arbitration rules; and the New York Convention can be considered to have the highest position prevailing over all the other mentioned sources, to the extent that it has mandatory provisions. The analysis below will show that, regarding the choice of the law applicable to the merits of the dispute, the effects of the parties’ agreement on the applicable law are considerably enhanced by being confirmed by all applicable sources, even those with a formally higher rank. There are, however, some limitations.

3.1.1 The arbitration agreement
The arbitration agreement is the primary source of jurisdiction for the arbitral tribunal. Without the arbitration agreement, or beyond the scope of the arbitration agreement, an arbitral tribunal does not have jurisdiction.\(^\text{60}\) Arbitration agreements often contain a choice of law clause. This shall be understood as instructions to the tribunal in respect of the law applicable to the substance of the dispute. These instructions may be considered as a delimitation of the tribunal’s authority.\(^\text{61}\) If an arbitral tribunal disregards these instructions, it exceeds its authority and renders an award that may be set aside or refused enforcement by the courts. However, under some circumstances, an arbitral tribunal does not exceed its power even if it does not follow the choice of law made by the parties (more on this in Section 3.1.3 below).

\(^\text{60}\) I am not considering in this context jurisdiction on investment disputes between states and foreign investors, in which the power of the arbitral tribunal may be based on public international law sources, on investment legislation of the host country etc.

\(^\text{61}\) See Redfern et al., Redfern and Hunter on International Arbitration, para. 3.96f. See also the International Commercial Arbitration Committee, 'International Law Association Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration' (paper presented at the International Law Association Conference, Rio de Janeiro, 2008), formulating, under the heading Conclusions and Recommendations (page 19), the following general principle: ‘First, the principal task of arbitrators in a commercial case is to decide the dispute within the mandate defined by the arbitration clause. Arbitration is a creature of contract. The parties can agree to its scope. That agreement is binding on the arbitrators.’
3.1.2 Arbitration rules

In the case of institutional arbitration, arbitration rules issued by the institution chosen by the parties are applicable to the arbitral proceeding as a supplement to the arbitration agreement. By choosing arbitration in the framework of a certain institution, the parties have submitted to that institution’s rules, and those rules become binding on the parties as well as on the tribunal. In the case of ad hoc arbitration, the parties may have chosen the UNCITRAL Arbitration Rules or they may have regulated the arbitral procedure in their agreement. In such cases, these rules will be applicable as a supplement to the arbitration agreement.

Both institutional arbitration rules and the UNCITRAL Arbitration Rules contain provisions relating to the law applicable to the merits of the dispute, and they all state that the arbitral tribunal shall apply the law chosen by the parties to the merits of the dispute.

3.1.3 Arbitration law and the New York Convention

As mentioned above, the territoriality principle applies in respect of the arbitral procedure. This does not mean that the law of the place of arbitration shall be applied to the merits of the dispute, but that law may contain rules on how the arbitral tribunal shall choose the law that is to apply to the merits of the dispute.

Arbitration laws usually provide that the arbitral tribunal shall apply the law chosen by the parties. Furthermore, they usually also provide that an arbitral award may be set aside if the arbitral tribunal has exceeded its authority, and the relevance of this provision will be discussed immediately below in respect of a similar provision contained in the New York Convention.

The New York Convention does not contain any rules directly regulating the choice of law applicable to the substance of the dispute. However, it contains a provision that indirectly affects this matter. According to article V(1)(c), one of the defences that may be brought

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62 See, for example, article 22(3) of the London Court of International Arbitration Rules, article 17 of the International Chamber of Commerce Rules, article 22 of the Stockholm Chamber of Commerce Rules and article 33 of the Swiss Rules.
63 See article 35
64 See, for example, article 28 of the UNCITRAL Model Law and section 46 of the English Arbitration Act and article 187 of the Swiss Private International Law Act.
65 See, for example, article 34(2)(a)(iii) of the UNCITRAL Model Law, article 34(2) of the Swedish Arbitration Act and section 68(2)(b) of the English Arbitration Act. And article 190(2)(c) of the Swiss Private International Law Act.
against enforcement of an award is the eventuality that the tribunal has exceeded its power: ‘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 [. . .].’

The wording of the New York Convention’s exception of excess of power expressly covers the object of the dispute. It does not contain an express rule for the eventuality that the award, despite deciding on an issue submitted by the parties to arbitration, applies a law different from the law chosen by the parties.

As a general rule, the enforcement of an arbitral award may not be used as a basis for the courts to review the arbitral tribunal’s decision, including its application of the law. This is confirmed by the circumstance that article V of the New York Convention contains an exhaustive list of grounds for refusing enforcement and that there is a strong consensus on the necessity to interpret this list restrictively. Nothing in article V’s wording suggests that the courts have the authority to review the merits of the arbitral decision, either in respect of the evaluation of the facts or in respect of the application of the law. This applies both to errors in the application of the substantive law and to errors in the choice of which law to apply. Therefore, application by the arbitral tribunal of a law that should not have been applied is not, as a general rule, a ground for invalidity or unenforceability of the award.

Whether the tribunal had the authority to apply a certain law, however, is a matter that may be considered as relating to the power of the tribunal. The tribunal’s power is conferred by the parties, and under article V(1)(c) of the New York Convention an award exceeding this power may be refused enforcement. An analysis of the reported cases concerning the New York Convention, or the corresponding provisions in the UNCITRAL Model Law on International Commercial Arbitration, shows that the defence of excess of power is seldom accepted for the purpose of sanctioning the arbitral tribunal’s application of the law. To the extent that the question has been given attention, it seems

66 See Redfern et al., Redfern and Hunter on International Arbitration, para. 11.5.
69 See Nicola Christine Port and Scott Ethan Bowers, ‘Article V(1)(c)’, in Herbert Kronke and Patricia Nacimiento (eds.), Recognition and Enforcement of Foreign Arbitral
that it has mainly been answered negatively, both in practice and in theory.\footnote{In theory see, for example, Emmanuel Gaillard and John Savage (eds.), \textit{Fouchard, Gaillard and Goldman on International Commercial Arbitration} (Kluwer Arbitration, 2004), para. 1700. In practice, see US District Court, Southern District of California, 7.12.1998 Civ. No. 98–1165-B, 29 Federal Supplement, Second Series (S.D.Cal.1998) pp. 1168–1174, excluding that a decision rendered \textit{ex bono et aequo} exceeded the arbitral tribunal’s power. From the reasons of the decision, however, it appears that the court based its reasoning on the conclusion that the parties had actually empowered the tribunal to decide \textit{ex bono et aequo} (therefore it is not surprising that the court did not see any excess of power). Also, a German decision decided similarly, even mentioning, in an \textit{obiter dictum}, that the arbitral tribunal’s choice of law may not be reviewed by the court. However, in this case the court also based its conclusion on the fact that the parties had empowered the tribunal to decide \textit{ex bono et aequo} (Landesgericht Hamburg, 18.9.1997, available at ICCA Yearbook Commercial Arbitration, vol. XXV, 512).} However, even if it is not very practical, it cannot be excluded that an award may be refused enforcement on the ground that the arbitral tribunal has gone beyond its powers in connection with the application of the law. This, however, assumes that the arbitral tribunal directly and openly disregards or contradicts the parties’ instructions.\footnote{Giuditta Cordero Moss, ‘Can an arbitral tribunal disregard the choice of law made by the parties?’, \textit{Stockholm International Arbitration Review}, 1(2005), 1, 6ff.} The matters submitted to arbitration depend closely on the criteria that they have to be measured against. The dispute is to be solved on the basis of certain rules that have been agreed upon by the parties, if the tribunal applies a different law, and assuming that the two laws regulate the question in different ways, it could be considered as if the tribunal had applied a different contract: the assumptions for resolving the dispute would not be the same as those agreed upon by the parties. Therefore, the decision would be on matters different from those submitted by the parties and this would fall within the scope of article V(1)(c).\footnote{For a similar reasoning see Redfern \textit{et al}., \textit{Redfern and Hunter on International Arbitration}, para. 3.91 as well as the International Commercial Arbitration Committee, ‘International Law Association Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration’, p. 19.} Thus, it is possible to assert that a court may refuse enforcement of an arbitral award under article V(1)(c) of the New York Convention if the arbitral tribunal manifestly and expressly disregards the parties’ choice of law.

Indirectly, article V(1)(c) of the New York Convention may thus be deemed to confirm that the arbitral tribunal shall comply with the instructions that the parties have given in the arbitration agreement. If the parties’ instructions are not followed, there is a risk that the resulting award will be unenforceable.

3.2 Restrictions to the applicability of the law chosen by the parties

The foregoing section showed that arbitration is mostly based on the will of the parties and that the applicable sources of law confirm the central role of the parties’ will. The tribunal is bound to follow the parties’ instructions, because it does not have any powers outside of the parties’ agreement. Therefore, tribunals are generally, and correctly, very reluctant to deviate from the instructions of the parties.

However, the primacy of the parties’ agreement needs to be coordinated with applicable rules on validity and enforceability of the arbitral award. It is possible that the parties’ instructions contradict certain requirements for the award’s validity in the applicable arbitration law or certain requirements for the award’s enforceability in the New York Convention. In this situation, if the arbitral tribunal follows the will of the parties, it may face the prospect of rendering an award that is invalid or cannot be enforced. To avoid these undesirable results, the arbitral tribunal may be tempted to disregard the parties’ instructions, including their choice of law. This, however, may be done only under limited circumstances and according to restrictive criteria in order to avoid exposing the award to the risk of being annulled or refused enforcement based on the arbitral tribunal exceeding the scope of the power that the parties had conferred on it. The ground for invalidity of an award and the corresponding exception to enforceability that may indirectly restrict applicability of the parties’ choice of law by the arbitral tribunal may be found in article 34(2)(b)(ii) of the UNCITRAL Model Law and article V(2)(b) of the New York Convention, and it is based on the already mentioned rule on public policy.

If application of the law chosen by the parties leads the arbitral tribunal to render an award that may conflict with the public policy of the country where the award was rendered or is sought to be enforced, the award runs the risk of being, respectively, invalid or unenforceable. Consequently, the arbitral tribunal might be inclined to restrict the

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73 See, for a more extensive reasoning, Giuditta Cordero-Moss, ‘Arbitration and Private International Law’ International Arbitration Law Review, 11(2008), 153. For a similar reasoning see Redfern et al., Redfern and Hunter on International Arbitration, para. 3.102, adding also, as the only additional basis to restrict the parties’ choice, that the parties’ choice must have been made bona fide. See also the International Commercial Arbitration Committee, ‘International Law Association Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration’, p. 21, affirming that the only restriction to parties’ choice is the public policy exception.
choice of law made by the parties, thus avoiding rendering an invalid or unenforceable award. Does the arbitral tribunal in this case run the risk of exceeding its power? In other words: is the arbitral tribunal forced to choose between two grounds for invalidity or unenforceability of the award, i.e. excess of power or conflict with public policy? In my opinion there is room to argue that an arbitral tribunal is not affected by the choice of the parties, to the extent necessary to comply with article V(2)(b) of the New York Convention and the corresponding provision in the applicable arbitration law.74 Useful guidance in respect of how to supplement the choice made by the parties is to be found in private international law, as will be seen below.

3.3 What is the relevance of private international law?

That courts do not have the power to review the award in respect of the application of the law does not mean that arbitral tribunals should not seek to apply the law accurately. In respect of the choice of the applicable law, however, accuracy has to be measured against parameters that are different from those applicable by courts. This is because the sources applicable to arbitration all confirm that the arbitral tribunal shall apply the law chosen by the parties, as seen in Section 3.1 above. Other rules of choice of law are mentioned, if at all, only to a restricted extent in the sources applicable to arbitration.75 Therefore, in respect of choice of the applicable law, accuracy of application of the law does not extend to a duty to apply private international law.76 This does not mean, however, that private international law is totally irrelevant to arbitration.

74 For a more extensive analysis see Cordero-Moss, ‘Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?’

75 For the eventuality that the parties have not made a choice of the applicable law, arbitral tribunals are supposed to choose the law that is applicable according to the conflict rules that the tribunal considers applicable (see, for example, article 28(2) of the UNCITRAL Model Law and section 46(3) of the English Arbitration Act), or the law that has the closest connection with the disputed matter (see, for example, article 187 of the Swiss Private International Law Act) or the law that the tribunal deems applicable (see, for example, article 1496 of the French Civil Procedure Code).

76 See the Committee, ‘International Law Association Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration’, pp. 4, 12. That arbitrators are not bound to apply the principles of private international law that are applicable to courts is considered to be an uncontested point by Gaillard, Fouchard, Gaillard and Goldman on International Commercial Arbitration, p. 849. At the same time, arbitrators are said to be under no public duty to enforce state laws: see International Commercial Arbitration Committee, ‘International Law Association Report Ascertaining the
In private international law, party autonomy is usually the main choice of law rule for determining which law governs a contract.\textsuperscript{77} Party autonomy, however, is not the main choice of law for areas beyond contract law.\textsuperscript{78} For contracts that have implications for, by way of example, property, company or insolvency law, the choice made by the parties does not extend to these aspects of the relationship. The applicable law will be determined on the basis of other rules of private international law.

Moreover, private international law usually provides that the choice of law made by the parties may be overridden under some exceptional circumstances.\textsuperscript{79} Overriding mandatory rules are rules that the judge (or, under certain circumstances, the arbitral tribunal) is entitled to apply irrespective of the choice of law made by the parties, also known as \textit{lois de police}. It must be emphasised that not all mandatory rules are so important that they have the power to override other choice of law rules, as expressly clarified in Recital No. 37 of the Rome I Regulation.

Although these restrictions to party autonomy do not, as a general rule, have relevance to arbitration, they may give guidance to the arbitral tribunal when the arbitral tribunal has to restrict the parties' choice of law in order to avoid conflict with the applicable public policy. Within the framework provided by the applicable rules on validity and enforceability of awards, therefore, private international law may become relevant to arbitration and may be used as guidance by the arbitral tribunal in determining the extent to which the parties' choice of law may be restricted. Indeed, it is desirable in this context to apply private international law principles, because they enhance predictability in such a crucial area, namely the choice of the applicable law.\textsuperscript{80}

In particular, private international law contains rules on the scope of party autonomy and on restrictions to party autonomy by overriding mandatory rules. These criteria permit the determination as to what

\textsuperscript{77} This is the main rule, for example, in the EU Rome I Regulation No. 593/2008, article 3.

\textsuperscript{78} Thus the EU Rome I Regulation states in article 1(2) that areas such as company law, property law and insolvency fall outside of its scope of application. For a more extensive analysis of the choice of law rules in these areas, see Cordero-Moss, ‘Arbitration and Private International Law’.

\textsuperscript{79} See, for example, article 9 of the EU Rome I Regulation.

extent rules different from those chosen by the parties may be applied – provided, however, that they are relevant to the validity or enforceability of the award.

### 3.4 Which private international law is applicable?

In respect of courts of law, it is generally recognised that judges always apply the private international law of their own country to designate the applicable substantive law. In respect of international commercial arbitration there is no corresponding automatic and absolute reference to the private international law of the place where the arbitral tribunal has its venue. The international character of international arbitration has led various legislatures and arbitral institutions to loosen the link between the place of arbitration and the applicable private international law.

The ICC Rules of Arbitration, in particular, were described as a landmark when they, in 1998, deleted any reference to private international law, and are followed now by other arbitration rules. Under article 17 of the ICC Rules of Arbitration, if the parties have not made a choice, the arbitral tribunal may freely choose the applicable law directly and without applying any conflict rules (the so-called voie directe). If they choose to submit a dispute to arbitration under the ICC Rules, the parties thus agree that the arbitral tribunal is not bound to apply any private international law.

Arbitration laws present a variety of solutions, ranging from the application of the private international law of the place of arbitration, to the application of the private international law that the arbitral tribunal deems most appropriate, the application of conflict rules

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82 The rules of the London Court of International Arbitration, of the Arbitration Institute of the Stockholm Chamber of Commerce and the revised UNCITRAL Arbitration Rules give the arbitral tribunal the authority to directly apply the substantive law that it deems appropriate, without going through the mediation of a choice of law rule.
83 This is the traditional approach that is still followed in some modern arbitration legislation; for example, article 31 of the Norwegian Arbitration Act.
84 This approach is followed, among others, by the UNCITRAL Model Law (article 28(2)) and the English Arbitration Act (article 46(3)), and it can result in the application of the private international law of the country where the arbitral tribunal has its venue, of another law that seems to be more appropriate, or even, of no specific law (often arbitrators compare the choice of law rules of all laws that might be relevant and apply a minimum common denominator).
specifically designed for arbitration and the *voie directe*. The *voie directe* is deemed to reflect the most modern approach. It is not advisable, however, to abandon in full the guidance that private international law gives. Therefore, it is not unusual that arbitral tribunals exercise their discretion so as to enhance predictability and look to widely applied principles of private international law or to the private international law of the place of arbitration, even though they are not bound to do so.

### 4. Conclusion

This chapter has shown that, while international arbitration undoubtedly is based on the will of the parties and international sources to a large extent provide a uniform legal framework, national laws still have a significant relevance. In particular, parties and arbitral tribunals may not disregard the peculiarities of the law of the places of arbitration and enforcement.

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85 For example, article 187 of the Swiss Arbitration Act contains a choice of law rule that designates as applicable the law of the country with which the subject matter of the dispute has the closest connection.

86 Article 1496 of the French Civil Procedure Code.

87 *Redfern et al., Redfern and Hunter on International Arbitration*, paras. 3.217, 3.218, 3.224.