Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability

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**Comments**

Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability

*Rachel Engle*

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I. INTRODUCTION

International arbitration1 has become a dominant mechanism for resolving disputes among business entities.2 Internationally, arbitration has gained acceptance for its flexibility and its adaptability to a party’s needs.3 There are a number of other advantages to arbitration, including confidentiality and the parties’ ability to designate both the forum and the arbitrators to decide the dispute.4 Of the many justifications for its popularity, the ability of parties to choose the law to govern their contract is most significant.5 A party’s power to avoid being subject to another country’s laws provides a powerful incentive to contractually agree to arbitrate pursuant to an agreed upon law.6 However, the

1. Arbitration is the primary form of alternative dispute resolution. See JOSEPH M. LOOKOF SKY, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 559-62 1992). Arbitration is similar to a special forum selection clause that provides for the nature of resolving a dispute in a private context outside the realm of litigation in a national court. Id. at 562.

2. See Andreas F. Lowenfeld, Introduction: Why Arbitrate?, in PRACTITIONER’S GUIDE TO INTERNATIONAL ARBITRATION AND MEDIATION (forthcoming) (manuscript at 1, copy on file with The Transnational Lawyer) (noting that one major New York law firm reported 90 percent of its international transactions contained arbitration clauses); see also Introduction to INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY?, at ix (Richard B. Lillich and Charles N. Brower, eds. 1994) [hereinafter INTERNATIONAL ARBITRATION IN THE 21ST CENTURY] (demonstrating that “in just twelve years (1979-1990) the International Chamber of Commerce International Court of Arbitration received the same number of arbitration cases, i.e., 3500, as it had received in the first 55 years of its existence (1923-1978”).

3. See Lowenfeld, supra note 2, §1.01; see also LOOKOF SKY, supra note 1, at 559-60.


   5. See Lowenfeld, supra note 2, §1.03 (stating that “arbitrators virtually always apply the law selected by parties to the contract at issue”).

   6. See id. §1.01 (suggesting that an arbitration agreement is like a forum selection clause that allows parties to avoid the risk of litigating in the other party’s country). In addition, this allows a party to avoid
parties' choice of law is not always respected, which gives rise to other inquiries: when should a party's choice of the governing law be overlooked, and how much freedom should arbitrators have in deciding choice of law issues?

Although many of these types of questions inhere in choice of law, even in domestic litigation, a unique layer of issues arise in the arbitral context. Arbitrators are often the only people who decide choice of law issues, and most national courts defer to the arbitrators' rulings on the subject. Because of the limited ability to appeal arbitration awards, an arbitrator's choice of the governing law in a dispute is unlikely to be reviewed by any appellate body. Additionally, under most national laws and international treaties, a mistake of law or a mistake of fact is insufficient to preclude enforcement of an arbitration award. Moreover, a refusal to recognize an arbitration award is discretionary, which further limits the ability of parties to challenge a choice of law decision.

litigation in its own country, receive a judgment, and avoid further litigation in another country to enforce the judgment. Id.

7. See John F. X. Peloso & Stuart M. Sarnoff, Whether Arbitrators Have a Duty to Apply the Law, N.Y. L.J., Apr. 18, 1996, at 3 (declaring that in view of strong policies favoring arbitration, "'arbitration awards are particularly insulated from judicial review,' and the scope of any such review is 'extremely narrow'" (quoting Container Prod. Inc. v. United St. Workers, 873 F.2d 818, 819 (5th Cir. 1989))).


9. See Daniel M. Kolkey & Richard Chernick, Drafting An Enforceable Arbitration Clause, in PRACTITIONER'S GUIDE TO INTERNATIONAL ARBITRATION AND MEDIATION, supra note 2 (manuscript at 23) (noting that an "award is usually subject to limited review in the jurisdiction where the arbitration is held"). Parties may expand or limit judicial review of their award in their contractual agreement. Id. In both Switzerland and Sweden, parties may exclude judicial review altogether if none of the parties have a domicile, habitual residence or place of business in that country. Id.

10. See Peloso & Sarnoff, supra note 7, at 3. "Limited judicial review is viewed by the courts as consistent with the goals of arbitration as a 'prompt, economical and adequate method of dispute resolution.'" Id.; see also Lillich & Brower, supra note 2, at xi (maintaining that "some degree of review of awards is absolutely necessary, in order both to keep arbitrators conscious that they are potentially fallible human beings and to rectify at least the grosser departures from grace that may occur").

11. A mistake of law would be either a misapplication of a law or misinterpretation of that law in addition to a faulty choice of law. See Steven L. Smith, Enforcement of International Arbitral Awards Under the New York Convention, in PRACTITIONER'S GUIDE TO INTERNATIONAL ARBITRATION AND MEDIATION, supra note 2 (manuscript at 32) (stating that parties have unsuccessfully argued that enforcement of an award should be denied because "an award was contrary to state or federal law [or because] an arbitrator misapplied foreign law"); see also United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987) (maintaining that a mistake of law or fact is insufficient to overturn an award as long as the arbitrator is not irrational in his award).

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept . . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision.

Id.

12. See Smith, supra note 11 (manuscript at 19-33) (explaining that under the Convention on Recognition and Enforcement of Arbitral Awards, ratified and adopted in 113 countries, there are limited ways to overturn an arbitration award and mistake of law is not one of them).

13. See id. at n.35; see also Convention on Recognition and Enforcement of Arbitral Awards, June 10,
The limited ability to challenge a choice of law decision places much significance on the arbitrators' determination of the applicable law. For example, in a recent dispute between Gibson Guitar Corporation and MEC Import Handelsgesellschaft, the arbitrators decided the parties' distribution agreement, in and of itself, constituted the law governing their contractual relationship and that choice could not be overridden by the national law of either of the contracting parties. After a final award in favor of MEC, Gibson filed a motion with the United States Sixth Circuit Court of Appeals, to vacate the United States District Court's decision upholding the award. Gibson objected to the law applied by the arbitrators. In affirming the District Court decision, the Sixth Circuit declared "the arbitrators' 'interpretation or application of the law involved a choice of law rather than a refusal to follow well settled law . . . ." Thus, the arbitrators' decision on the applicable law would be followed because it "did not rise to the level of 'manifest disregard of the law. . . .""

An arbitrator's choice of the governing law is unlikely to be either reviewed or overruled, which generates much commentary surrounding that decision. Because the arbitral tribunal is subject to the contract of the parties rather than to a particular country's laws, it is uncertain how much liberty arbitrators should have in deciding the choice of law. On one hand, the argument that arbitrators

15. Id.
16. Id.
17. Id.
18. Id.; see also ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWITZERLAND, U.S. AND WEST GERMAN LAW 253-54 (1989) (suggesting that the manifest disregard standard requires a showing that none of the reasons given for an arbitrator's decision have a rational justification). This standard of review focuses on "whether the award is rational rather than on whether it is correct as a matter of law." Id at 254.
19. See Albert Jan van den Berg, Annulment of Awards in International Arbitration, in INTERNATIONAL COMMERCIAL ARBITRATION IN THE 21ST CENTURY, supra note 2, at 135 ("[I]n most countries it is a basic principle that the merits of an arbitral award cannot be reviewed by a court").
21. See Croff, supra note 4, at 613, 630 (stating that the arbitrator's authority derives not from a sovereign nation but from the parties' agreement).
22. See id. at 630.
remain free to make the best selection of the governing law is compelling. On the other hand, this freedom fails to provide a mechanism to protect uniformity, certainty, or predictability in determining choice of law issues, which ultimately undermines a primary advantage of arbitration. The need for predictability and certainty is perhaps greatest in the area of contracts, where parties negotiate agreements with certain expectations in mind.

This Comment is designed to meet three goals: first, to canvass the multiple and overlapping approaches to determining the applicable governing law; second, to ascertain the relative popularity of each of these approaches, as determined by a survey of various published arbitration awards; and finally, to propose a basic structural approach for establishing certain and predictable choice of law in international arbitration. Part II provides an overview of the different laws applicable in any given dispute subject to an international arbitration. Part III explores the primary methods used by arbitrators to determine choice of law issues, suggesting advantages and disadvantages for each. This section also delineates the two primary situations when arbitrators may feel compelled to disregard the parties' choice of governing law. Part IV examines data compiled from published arbitration decisions between 1990 and 2000 and determines what methods arbitrators, in fact, employ most often when deciding what law to apply to a dispute. Finally, this Comment explains why party autonomy, as the most prevalent method employed by arbitrators in practice, remains the best solution for predictable and certain choice of law.

II. CHOICE OF LAW IN INTERNATIONAL ARBITRATION: AN OVERVIEW

It has long been recognized that parties to a contract are free to include or to exclude virtually any feature in their agreement, including a dispute resolution mechanism such as arbitration. Distinctive elements of arbitration, as a means of dispute resolution, include the ability to designate the governing laws, who will decide the dispute, and the manner in which the proceeding itself will occur. The ability to designate laws or rules to fit the parties' particular needs is, in fact,

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23. See Lowenfeld, supra note 2, ¶1.03(2) (advocating that arbitrators are "freer than courts... to make a sensible decision on the applicable law").

24. See Born, supra note 8, at 99-100 (arguing that diversity in methods of selecting the governing law is problematic because most international arbitration awards are confidential or do not provide reasons for the award). Additionally, published awards fail to "command stare decisis respect" like a court decision would further minimizing uniformity for choice of law issues. Id. at 100.

25. See, e.g., Guillard, supra note 4, at 2.

26. For a complete discussion on contract law and the freedom to contract for terms of any agreement, see, for example, E. ALLEN FARNSWORTH, CONTRACTS ¶7.1 (1999); EDWARD MURRAY, JR., MURRAY ON CONTRACTS (3d ed. 1990); AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, CONTRACTS, introduction (1981).
one of arbitration's touted advantages.\textsuperscript{27} Regardless of whether or not parties decide to include a choice of law clause\textsuperscript{28} in their contract, questions often arise regarding (1) the substantive law applicable to the merits of the dispute; (2) the substantive law applicable to the arbitration agreement; (3) the law applicable to the arbitration proceeding, including the procedural rules; and (4) the conflict of laws rules applied to select the law to be used for each of the above.\textsuperscript{29} Parties may choose a particular law to govern one or all of the above or not designate a choice at all.\textsuperscript{30} Where parties fail to choose, the arbitral tribunal decides how and what law to apply.\textsuperscript{31} In so doing, the arbitral tribunal may choose a different national law for each aspect of the dispute.\textsuperscript{32}

If parties designate the governing law in their contract,\textsuperscript{33} they may believe the matter is settled. But, such a seemingly simple choice may be much more complicated.\textsuperscript{34} There may be unforeseen applications of the chosen law or the chosen law may not be applied at all.\textsuperscript{35} For example, the conflict of laws rules of the designated country may require application of another country's law.\textsuperscript{36}

\begin{itemize}
  \item \textsuperscript{27}See, e.g., McClelland, \textit{supra} note 4, at 169; see also Gaillard, \textit{supra} note 4, at 2.
  \item \textsuperscript{28}A choice of law clause designates the law the parties wish to govern their contract. See Craig M. Gertz, \textit{The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depegage}, 12 J. INT’L L. BUS. 163, 165 (1991) (considering that an arbitrator might not limit the application of choice of a law clause to the substance of the contract). A choice of law provision is outcome-determinative because it may affect multiple aspects in a dispute. See id.
  \item \textsuperscript{29}See BORN, \textit{supra} note 8, at 98 (summarizing the methods arbitrators use to determine choice of law issues in these four contexts).
  \item \textsuperscript{30}See id. at 99.
  \item \textsuperscript{31}See id. (noting that it is often only the arbitral tribunal who makes the decision regarding the choice of law).
  \item \textsuperscript{32}See id. at 99 n.5 (explaining that such an application of different national laws to different aspects of a contractual or other legal relationship is known as “depegage”); see also William Patry, \textit{Choice of Law and International Copyright}, 45 AM. J. COMP. L. 383, 392 n.44 (2000) (defining “depegage” as the “application of more than one law to a case or different parts of a contract”).
  \item \textsuperscript{33}See Lowenfeld, \textit{supra} note 2, at 11 n.14 (finding that about one-half of contracts reviewed “contained a choice of law clause or a blank space allowing for the designated law to be filled in and half made no mention of the applicable law”). However, there did not appear to be any correlation between the use of a choice of law clause and use of an arbitration clause. See id.; see also Croff, \textit{supra} note 4, at 623 (adding that the lack of a choice of law provision is not always due to attorney carelessness but often choice of applicable law is left out of a contract because the parties could not compromise or agree which law to specify in their agreement). Rather than insist on a choice of law clause and risk terminating the contract negotiations altogether, parties will conclude the contract negotiations and leave the choice of applicable law to the arbitrator in the case a dispute arises. Id.; see also Emmanuel Gaillard and Peter Griffin, \textit{Transnational Rules in International Disputes}, N.Y. L.J., Aug. 3, 1995, at 3 (maintaining that in many cases, either party may refuse to accept the other party’s law as the governing law, leaving the choice up to the arbitrator).
  \item \textsuperscript{34}See McClelland, \textit{supra} note 4, at 178.
  \item \textsuperscript{35}See id.; see also Gaillard & Griffin, \textit{supra} note 33, at 7 (offering an example of an unforeseen application of a national law undermining the legal security for parties to an arbitration). For example, if a party to an arbitration disputed the arbitration agreement under the national law of Iran where article 139 of the Iranian Constitution requires parliamentary approval of arbitration agreements, the application of this rule to void the agreement would have a surprising result for the other party to the arbitration. Id.
  \item \textsuperscript{36}See McClelland, \textit{supra} note 4, at 178; see also discussion infra Part II.D (discussing the interaction of conflict of laws rules and foreign laws in an international arbitration).
\end{itemize}
Alternatively, the law selected by the parties may prove too foreign or difficult for proficient application in the forum's jurisdiction. Alternatively, the chosen law will result in an arbitrary trade practice or regulation and consequently, a result unanticipated by the parties. This ambiguity, regarding the applicable law, detracts from the efficiency of arbitration and undermines its advantages.

The question remains as to what methods the arbitral tribunal should use to determine the law applicable to the arbitration procedure, to the arbitrability of the dispute itself, and to govern the resolution of the dispute. To answer these questions, an arbitrator relies on the different layers of law applicable in any given dispute.

A. Substantive Law Applicable to the Merits of the Dispute

There are four layers of law applicable in a dispute subject to arbitration: the law governing the substantive contract or dispute, the law governing the agreement to arbitrate and the performance of arbitration, the law governing the conduct of the arbitration, and the conflict of laws rules applicable to the each of the above layers. Of these four layers, the law governing the contract, or the substantive law applicable to the merits of the dispute, is the most important layer for many parties. This aspect is defined as the "proper law of the contract" or rather, the law governing the interpretation of the actual contract. Often within, or accompanying, the parties' arbitration agreement, the parties will select the

37. See McClelland, supra note 4, at 178; see also Syrian State Trading Org. v. Ghanaian State Enterprise, 10 Y.B. COMM. ARB. 52 (1985) (reviewing the applicable law in a dispute between a Syrian and Ghanaian entity where damages were sought for breach of a wood products contract). After deciding that Ghana had the closest connection with the contract and declaring that Ghanaian law would be applicable in principle to the dispute, the arbitrator applied English law with the assumption that English law was no different from Ghanaian law. See id.; see also Tasmanian Party v. German Party, 22 Y.B. COMM. ARB. 57, 58 (1996) (determining the applicable law to be German law in a contracts dispute between a German and Tasmanian party). The arbitral tribunal declared that "where the contractual parties provide for merchants as arbitrators, it is unlikely to expect that these arbitrators will apply a foreign law, unless there is an express agreement thereon and the arbitrators have been chosen with [the application of foreign law] in mind." Id.

38. See McClelland, supra note 4, at 178 (suggesting an example of such an arbitrary trade practice would be setting up the number of days a buyer has to inspect goods in order to maintain the right of rejection); see also Gaillard, supra note 4 (explaining that even when parties select the applicable law, an unusual rule may surprise the parties in an arbitration).

39. See BORN, supra note 8, at 100 (recognizing that the complexity arising in choice of law in international arbitration does "not comport with the ideals of predictability, informality, and efficiency that arbitration promises").

40. See BORN, supra note 8, at 99, n.3 (citing Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru, 1 Lloyd's Rep. 116, 118(1988)).

41. James Miller & Partners, Ltd. V. Whitworth Street Estates (Manchester) Ltd., 1 Lloyd's Rep. 116, 118 (1970) (noting that the procedure of the arbitration could be governed by a law different than the law governing the interpretation of the contract).

42. See McClelland, supra note 4, at 177.
substantive law to govern their contract. This is usually contained in a choice of law clause. A choice of law clause is ordinarily interpreted to apply only to the substantive law of the contract unless the clause specifies otherwise. The inevitable consequence that follows when parties choose only the law to govern their contract is that the arbitrator must decide whether or not to apply the chosen law to other aspects of the dispute. The law governing the substantive merits of a dispute or contract interpretation exists separately from the law of the procedure, the law applied to the interpretation of the arbitration agreement and its enforceability, and conflict of laws rules.

B. Substantive Law Applicable to the Arbitration Agreement

The law applicable to the arbitration agreement itself is distinguishable from the law applicable to the underlying contract, as described above. Often, parties choose to include an arbitration agreement either within or accompanying their contract. An arbitration agreement is considered separate and autonomous from the parties' contract, even if it is included within that contract. For example, if a party challenges the validity of the underlying contract, the party is not necessarily challenging the validity of the arbitration agreement; ordinarily, the dispute may remain subject to arbitration. In fact, in most countries, the arbitral

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43. BORN, supra note 8, at 100; see also McClelland, supra note 4, at 177.
44. McClelland, supra note 4, at 177 (adding that this is a "common way for the parties to select the law that will govern disputes under their contract"); see also Kolkey & Chernick, supra note 9 (manuscript at 22-23) (providing the following sample of a choice of law clause in an arbitration agreement: "any dispute subject to this arbitration clause shall be governed by the substantive law of [the selected jurisdiction]").
45. See Kolkey & Chernick, supra note 9 (manuscript at 22). But see Volt Information Sciences v. Board of Trustees, 489 U.S. 468 (1989) (upholding a California Court of Appeals finding that the choice of law clause contained in the arbitration agreement included a designation of both California substantive and procedural law).
46. See Kolkey & Chernick, supra note 9 (manuscript at 22).
47. See id. (manuscript at 4) (defining an arbitration agreement as an agreement to submit to arbitration any disputes that may arise in the course of performing the contract). A sample arbitration agreement is as follows:

Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, or any dispute, controversy, or claim in respect of any defined legal relationship associated with this contract shall be finally settled pursuant to an arbitration before [one] [three] arbitrators pursuant to the [specify] rules in the city of _____.

Id.
48. See LOOKOFSKY, supra note 1, at 566 (explaining that under the doctrine of separability, the arbitration agreement is "an agreement independent of the other terms of the larger contract").
49. See ICC Rules, supra note 20, at Art. 8(4) (granting an arbitrator competence to continue the arbitration even where a party contests the legality of the contract). Art. 8(4) provides the following:

Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is [non]existent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be [non]existent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and
tribunal may determine its own arbitrability. The law applicable to the arbitration agreement determines the scope of the arbitration agreement, its validity, its enforceability, and its interpretation.

In theory, because the arbitration agreement is separate from the underlying agreement, a law different from that applied to adjudicating the merits of the dispute may resolve issues regarding the arbitration agreement's interpretation, scope, validity, and enforceability. For example, in an arbitration between a European seller and a buyer based in China and Canada, the buyer challenged the validity of the arbitration agreement and the arbitral tribunal's jurisdiction to hear the dispute. While the arbitrators ultimately decided the choice of governing law would be left to the tribunal, it was unnecessary to the adjudication to consider the propriety of exercising jurisdiction pursuant to a valid arbitration agreement. The arbitrators looked to the law of the forum country, Switzerland, to determine whether the arbitration agreement was valid. The arbitral tribunal concluded the arbitration agreement was valid under both Swiss case law and the general principles of Swiss contract law. Although the arbitrators did not decide what law would ultimately govern the contract as a whole, that law could be different from the Swiss law applied to the arbitration agreement. This illustrates the interaction between the multiple layers of law in an arbitration and the considerable discretion the arbitrator has in choosing the applicable law for each aspect of a dispute.

C. Substantive Law Applicable to the Arbitration Proceeding

In addition to the law applicable to the arbitration agreement, which may have procedural aspects, the parties may specifically designate the procedural law applicable to the arbitration proceeding. The law of the proceedings differs

pleas ....

Id. 50. See id.; see also Mathew B. Cobb, Article 16(1) of the UNCITRAL Model Law: The Related Doctrines of Kompetenz-Kompetenz and Separability, MEALEY'S INT'L ARB. REP., June 2001, available at LEXIS, News Library, International File (describing the doctrine of kompetenz kompetenz which in essence gives the arbitral tribunal jurisdiction to determine its own jurisdiction). According to U.S. interpretation of the doctrine, parties must specify "clear and unmistakeably" in their arbitration agreement if they want the courts to be able to decide the validity of the arbitration agreement. First Options v. Kaplan, 514 U.S. 938, 944 (1995).

51. See BORN, supra note 8, at 98.


53. See id.

54. See id. (looking to Swiss Private International Law, Art. 178 and 187(2)). The arbitrators characterized Article 178 as validating an arbitration agreement if it would be valid under the law specified by the parties, or the law governing the subject-matter of the dispute, or Swiss law. See id. Regardless of an agreement's validity under the law specified by the parties, if valid under Swiss law, the dispute was still arbitrable. See id.

55. See id.

56. See LOOKOFSKY, supra note 1, at 573 (noting that the arbitration agreement itself is "a piece of private procedural legislation"); see also Born, supra note 8, at 98.
from the substantive law of the dispute because it governs the procedure of the arbitration and not the merits of the dispute. Procedural matters concern the conduct and the validity of the arbitration process, which includes the use of deposition testimony, expert testimony, the scope of discovery, and other similar issues. The procedural law is often referred to as the "lex arbitri," or more simply, the "national or local law of the [country] where the arbitration takes place. Parties may choose the law of their contract, but the chosen law is generally not construed to include the procedural law of the arbitration. Many consider the lex arbitri controlling for arbitration procedure because, by holding the arbitration in a designated forum, the parties subject themselves to the procedural rules of that forum. However, others maintain that because of arbitration's international aspects, procedural rules for international arbitrations should be "decentralized." This means international arbitration should not be subject to the restraints of any one particular national law, but rather, to an international set of rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

D. Conflict of Laws Rules

Conflict of laws has a two-part definition. In one sense, the phrase signifies any "difference between the laws of different states or countries, in a case." In another sense, conflict of laws represents a body of rules "that undertakes to reconcile such differences or to decide what law is to govern" in a conflicting situation. In the international arena, these principles or rules are often termed "private international law" because they are, in essence, national rules within each country that determine the applicable law in situations where more than one

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57. See McClelland, supra note 4, at 174-76 (adding that "the law of the proceedings may not be that of the same jurisdiction whose law governs the interpretation of the underlying contract").
58. See Born, supra note 8, at 98.
59. Id.
60. Lookofsky, supra note 1, at 563, 567, 574 (calling lex arbitri the "umbrella of procedure and validity rules held over the arbitral process").
62. See, e.g., Theodore C. Theofrastous, Note, International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate, 31 CASE W. RES. J. INT'L L. 455, 456-57 (1999) ("Because every arbitral proceeding takes place somewhere, and is enforced somewhere, it is presumed that these proceedings and awards are governed by the laws of the states where those activities take place").
64. See Lookofsky, supra note 1, at 575-76; see also discussion infra Part III.A.3 (defining and discussing the applicability of the UNCITRAL Model Law in international commercial transactions).
65. BLACK'S LAW DICTIONARY 295 (7th ed. 1999).
66. See id. (calling conflict of laws "principles of choice of law").
law may apply. Because each country has different conflict of laws rules, the same dispute may ultimately result in the application of a different substantive law depending upon the forum’s rules. This leads to a lack of uniformity and the existence of unpredictability in the applicable law.

In the context of arbitration, the conflict of laws rules are the rules to be applied to each of the other three layers of law in any dispute. The problems in this area arise primarily over the difficulty in classifying arbitration. As a transnational or supranational system of adjudicating disputes, it is logical that arbitrators should not be constrained by national or local conflict of laws rules. In this way, arbitration should be denationalized and subject to either a supranational law or to the parties’ agreement. However, out of necessity, arbitration will always be held within some country’s forum. Because of this, it is argued the forum’s conflict of laws rules must be considered prior to turning to the party’s choice of substantive law. However, applying national conflict of laws rules to international arbitration can be problematic because national conflict of laws rules were not created for international transactions. Thus, national conflict of laws rules are not suited for international commerce. Moreover, national conflict of law rules create uncertainty in international commercial arbitration because of the potential for different results based upon the conflict of laws rules applied to the dispute.

67. See id. at 822 (noting chagrin for this terminology within the international legal community because the name private international law “misleadingly suggests a body of law somehow parallel to public international law, when in fact it is merely a part of each legal system’s private law”); see also Friedrich K. Juenger, Conflict of Laws, Comparative Law and Civil Law: The Lex Mercatoria and Private International Law, 60 LA. L. REV. 1133, 1133 (2000) (using private international law to “connote choice-of-law rules applied to international transactions”).

68. See McClelland, supra note 4, 178-79 (explaining the different conflict of laws approaches taken by the United States, England, and France).

69. See BORN, supra note 8, at 99.

70. See JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 14-18 (1978) (advocating that international arbitration is “international, non-national, or multinational” because of its organization, structure or procedure, and its facts). For example, because international arbitration involves parties from more than one nation and a private contractual agreement, it is considered international. See id.

71. See id. at 17, 61 (relating that because arbitration is an independent process, arbitrators are free to choose the governing law and directly apply it without recourse to a national system of law). This idea primarily rests on the “autonomous theory” of arbitration, which recognizes “unlimited party autonomy as the controlling force in arbitration.” Id. at 60.

72. See id. at 535 (adding that “an international arbitration tribunal is a non-national institution; it owes no allegiance to any sovereign state; it has no lex fori in the conventional sense”).

73. See Theofrastous, supra note 62, at 456-57.

74. See McClelland, supra note 4, at 178-79. “[T]here seems no way to free the parties’ choice of law from undergoing the scrutiny of the forum’s conflicts rules.” Id. (quoting Wilner, Determining the Law of Performance in International Commercial Arbitration: A Comparative Study, 19 RUTGERS L. REV. 646, 674 (1965)).

75. See McClelland, supra note 4, at 178-79; see also Juenger, supra note 67, at 1141 (acknowledging that while private international law has its rules in national origin, it “does have some supranational features”).
III. APPLICATIONS OF CHOICE OF LAW IN INTERNATIONAL ARBITRATION

In resolving any arbitration, the arbitrator will look first to the parties' agreement for a choice of law provision. However, even if the parties specify a law, the arbitrator may resort to another method of choosing the applicable law or may consider limitations on the parties' ability to choose that law. This section describes the traditional methods and theories used by arbitrators in ascertaining the substantive law to govern the merits of a dispute. Part A focuses on the party autonomy doctrine, or rather, the parties' freedom to select the law to govern their contract or dispute. Part B discusses internationally recognized defenses to the parties' freedom of choice in designating the applicable law. Part C explains the alternative approaches arbitrators may employ to choose a law other than the law designated by the parties.

A. When Parties Designate a Choice of Law in their Contractual Agreement

In an effort to combat uncertainty in arbitration, parties often include a choice of law clause in their agreement.76 After all, many parties elect to arbitrate because of this freedom of selection, in addition to the other advantages that arbitration offers.77 Even where parties have included such a choice in their agreement, the arbitrator must decide which law applies to each aspect of the arbitration. Often, the arbitrator will be guided by arbitration institutional rules or the parties' express choice of a national law or non-national standard in their agreement. This section addresses the different theories that aid arbitrators in determining choice of law issues when the parties have included a choice of law clause in their agreement.

1. The Party Autonomy Doctrine

Traditionally, arbitrators apply the parties' choice of law expressed in the agreement to the dispute.78 Under traditional conceptions of the party autonomy doctrine,79 particular deference is given to the parties' choice of law, regardless of

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76. See BORN, supra note 8, at 117 n.46 (stating that "in ICC arbitrations, the parties' contract reportedly contains choice of law clauses in approximately 75% of all cases").
77. See Lowenfeld, supra note 2 (manuscript at 9).
78. See BORN, supra note 8, at 100; see also Croff, supra note 4, at 615-620. Contra SAUSER-HALL, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 394 (1957) (advocating that parties do not have unlimited freedom on the choice of applicable law and that parties must submit to the conflict of laws system of the forum); see also F. A. Mann, Lex Facit Arbitrum, in LIBER AMICORUM FOR MARTIN DOMKE 161-62 (1967) (explaining that a national court and arbitrator play the same role in a jurisdictional system and as such, are both subject to a national law). Thus, parties do not have a choice of applicable law because the arbitrator must analyze the party autonomy theory under the conflict of laws rule of the arbitration site. See id.
79. See DICEY & MORRIS, THE CONFLICT OF LAWS 1188 (12th ed. 1993) (explaining that the party
whether conflict of laws rules contradict that choice. More modern compilations of the doctrine limit the parties’ freedom to choose the governing law.

The theory behind party autonomy suggests international arbitration is non-national and therefore, parties in a private contractual dispute should be free to select every element of their agreement, including the choice of law. If parties wish to avoid litigation in a foreign jurisdiction, they should be free to use international arbitration do so. Additionally, pure party autonomy gives more certainty to parties in international arbitration. However, the party autonomy doctrine is not entirely free from criticism. Frequently, scholars complain that “no Alternative Dispute Resolution mechanism should be given more power than the courts.” If parties may avoid mandatory national laws or national courts may not review awards concerning public policy or national laws, “arbitration is given primacy over the law.”

Currently, many countries recognize party autonomy by statute or through case law, but not without limitation. First, courts generally do not uphold a

autonomy doctrine was first developed in the nineteenth century and the early part of the twentieth century). Early definitions of the doctrine referred to the law which the parties were presumed to have submitted to or by which “the parties intended that the transaction should be governed or . . . to what general law it is just to presume that they have submitted themselves in the matter.” Id. (quoting Lloyd v. Guibert, 1 Q.B. 115, 120-21 (1865)).

80. See Croff, supra note 4, at 615 (noting two erroneous assumptions upon which the principle has been based).

First, it might be argued that all private international law systems accept without limitation the doctrine of party autonomy. Second, it can be maintained that even though there are some differences among countries in recognizing the parties’ freedom to choose the applicable law, those differences are not relevant because parties to international contracts do not push their choice beyond a standard common to all private international law systems . . . both assumptions are incorrect . . . .

Id.; see also Gaillard, supra note 4, at 2 (maintaining that parties may choose general principles of law to govern their dispute and if they do, the arbitrators are “bound to give effect to such a choice whether or not they consider the choice appropriate”).

81. See Juenger, supra note 67, at 1141 (suggesting that party autonomy “echoes the fundamental substantive principle of freedom of contract”).

82. See Sever, supra note 63, at 1689 (disputing, however, arbitration’s freedom from any judicial intervention). One rationale for party autonomy in international arbitration has been “that the smooth flow of commerce is facilitated by allowing sophisticated businesses to design their own, delocalized dispute resolution system.” Id. at 1696.

83. See, e.g., Theofrastous, supra note 62, at 457.

84. See Sever, supra note 63, at 1691 (“Regardless of where in the world it is undertaken, there are serious dangers in completely releasing the arbitral process from judicial oversight.”).

85. Id. at 1697.

86. Id. at 1694.

87. See Croff, supra note 4, at 615; see also Sever, supra note 63, at 1667-87 (describing how American, European, and South American statutes generally follow party autonomy for contractual agreements). In addition, English case law demonstrates respect for party autonomy although traditionally, its legislation reflected distrust for ADR generally. See id. at 1682-83. In France, article 1496 of the French Civil Code follows party autonomy but limits that choice to public policy provisions of French law. See id. at 1684.

88. See Croff, supra note 4, at 617-20 (presenting a mix of scholarly opinion regarding the limitations on this doctrine). Some scholars maintain that the parties’ choice must be limited by conflict of laws rules of the
party's choice of law if the purpose of the choice is to avoid provisions of the law that would apply absent the choice. Second, national laws or legal principles may limit the express choice of the parties. For example, in European civil law countries, while the trend is to respect the parties' choice of law, some countries have held that the parties' choice of law applies only when it is consistent with the conflict of laws rules of the forum or those of the site of the arbitration.

In other countries, such as England and the United States, laws or principles have developed limiting the parties' express choice of law. In England, courts uphold the party autonomy doctrine, but require the selected choice of law be "bona fide and legal." Where the parties' choice of law is eccentric or capricious, their choice of law is of no effect.

*lex fori* and others submit that the purely contractual nature of arbitration necessitates strict application of the parties' choice of law. See id.

89. Dicey & Morris, supra note 79, at 755-56. For example, suppose X & Co., an English firm having chartered an Estonian ship, issue through their agents, a Palestinian company, bills of lading for the carriage of oranges from Jaffa to England. Id. The bills of lading, which are issued at Jaffa contain a provision requiring that the bill of lading be construed in accordance with English law. Id. However, according to the Palestine Carriage of Goods by Sea Ordinance of 1926, every bill of lading issued in Palestine must contain a statement that it takes effect subject to the Hague rules and is deemed subject to those rules notwithstanding the omission of such a statement. Id. An exceptions clause contained in the bill of lading, which would have been valid in accordance with English domestic law but which is void under the Ordinance, is considered void as being contrary to the law of the place where the bills of lading were issued. Id. at 758, illustration 3.

90. See Croft, supra note 4, at 615-16.

91. See id.; see also Judd Epstein, Centennial World Congress on Comparative Law: The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation, 75 Tul. L. Rev. 913, 916-17 (2001) (discussing the different procedural aspects of arbitrations taking place in civil law and common law countries). For example, civil law countries tend to emphasize writings over oral testimony. Id. Common Law countries, often founded upon adversary proceedings, give more weight to credible witness testimony. Id.

92. See id.; see also McClelland, supra note 4, at 170 (advocating that local conflict of law rules, procedure, or public policy doctrines can work to preclude parties from arbitrating their dispute in accordance with their agreement). In particular, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention, of which both England and the United States are signatories, provides that public policy concerns may preclude enforcement of an arbitral award rendered in a foreign jurisdiction. Id.; see also New York Convention, supra note 13, at art. V(2) (providing that recognition and enforcement may be refused if it is found that the "recognition and enforcement of the award would be contrary to the public policy of that country"). This public policy provision can limit the parties' freedom to choose the law to govern the different aspects of their agreement. Id. It has been argued that public policy will be the "battleground on which the conflict over party autonomy for procedural law will be waged." McClelland, supra note 4, at 181 (quoting Smedresman, Conflict of Laws in International Commercial Arbitrations: A Survey of Recent Developments, 7 Cal. W. Int'l L.J. 263, 278 (1977)).

93. Vita Food Products Inc. v. Unus Shipping Co. Ltd., A.C. 277, 290 (P.C. 1939) ("Where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal and provided there is no reason for avoiding the choice on the ground of public policy."). Although it is unclear what exactly constitutes a "bona fide and legal" choice, it is not necessary that the parties or their contract have any connection to England in order to make a valid choice of English law. See id.; see also Dicey & Morris, supra note 79, at 1213.

94. See Croft, supra note 4, at 616.

95. See Croft, supra note 4, at 616.
In the United States, the Restatement of the Law, Conflict of Laws, accepts the general principle of party autonomy, but limits that choice. For example, a party may not forego contractual requirements or declare the capacity to contract in their agreement if the same result could not be obtained under the law of the country with the closest relation to the contract. The Restatement also adopts a public policy exception to the parties' choice of law. If the parties' choice of law would result in a violation of the public policy of a state with a "materially greater interest," the parties' choice may be derogated. Although many countries have developed some limitations on pure party autonomy, international arbitration has still seen "a global trend toward unfettered arbitral autonomy."

2. The Non-National Standard

The broadest scope of party autonomy allows the parties to select a non-national standard to govern their contract in addition to or in lieu of a country's national law. Non-national standards may be found in any of the following: international law, international customs or usages, transnational law.

96. See id. (maintaining that under the law of the United States, parties do not have unlimited freedom to choose the applicable law); see also AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, CONFLICT OF LAWS §§186-187 (2d ed. 1971) [hereinafter AMERICAN LAW INSTITUTE] (stating that while "issues in contract are determined by the law chosen by the parties," such a choice must be in accordance with section 187). Section 187 provides the following:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue, unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id.

97. See Croff, supra note 4, at 616. The Restatement adopts a jurisdiction type of test for analyzing whether the parties' choice of governing law is proper. See AMERICAN LAW INSTITUTE, supra note 96, at §187; see also discussion infra Part III.B.4 (discussing the jurisdiction theory which in essence determines which country has the closest relation with the contract based on jurisdictional factors).

98. See AMERICAN LAW INSTITUTE, supra note 96, at §187(b)(2).

99. Sever, supra note 63, at 1690 (questioning that freedom generally in the context of judicial intervention with arbitration awards and process).

100. See Croff, supra note 4, at 623, 634 (defining a non-national standard as a "set of rules that do not have their origin in any national law"). "These are rules of private law truly international, designed to regulate an international contract." Id. at 634.

101. See Note, General Principles of Law in International Commercial Arbitration, 101 HARV. L. REV. 1816, 1834 n.3 (1988) (distinguishing international law, as applicable to "agreements or relations between governments", from "transnational," which means "between parties of different nationalities"). In the context of arbitration, international law usually refers to private international law as opposed to public international law. See id. at 1834 n.4.

supranational law, lex mercatoria, international conventions, and perceived "general principles" of law. One of the most controversial of all these non-national standards is lex mercatoria. It is defined as "a set of rules developed to regulate international trade in the merchants' community." The disagreement over lex mercatoria centers on the fact that it is not codified in any national body of law and consequently, some argue that it does not really exist. The difficulty arises because parties want to subject their dispute to a non-national standard, like lex mercatoria, precisely because of its separation from any national laws.

Where parties or arbitrators choose to refer to non-national standards, numerous variations exist. One such variation finds an international consensus on conflict of laws rules from various non-national sources. In addition, parties may utilize the conflicts rules contained in international agreements in order to ascertain the applicable law. Another approach purports to frame an appropriate conflict of laws rule by adopting the similarities of the conflicts laws of each country with significant contacts to the parties' dispute. These non-national standards are generally not mandatory bodies of law and require specific reference by the parties in their agreement to be effective. However, an

scholars' differing definitions of transnational law and lex mercatoria). One suggestion depicts transnational law as a "law which is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems . . . ." Id. at 660.

103. See Lawrence W. Newman & Micheal Burrows, General Principles of Commercial Law, N.Y.L.J., Sept. 29, 1995, at 3 (explaining that one of the oldest sources of general principles of commercial law is "lex mercatoria," or "the law merchant," first codified as a whole body of law in the UNIDROIT Principles of International Commercial Contracts).

104. See Gaillard, supra note 4, at 4 (defining general principles of law as "a method to be used to determine the rules applicable to the international commercial relationship at issue").

105. See, e.g., BORN, supra note 8, at 105; see also Ted Janger, The Public Choice of Choice of Law in Software Transactions: Jurisdictional Competition and the Dim Prospects for Uniformity, 26 BROOK. J. INT'L. L. 187, 188 (2000); see also Newman & Burrows, supra note 69, at 3; see also Croff, supra note 5, at 623 (declaring that despite these different labels, in the application of non-national sources, an arbitrator ends up with lex mercatoria); see also Gaillard, supra note 4, at 2 (explaining that parties may choose to have general principles to govern their dispute).

106. Croff, supra note 4, at 623.

107. See, e.g., Georges R. Delaume, Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria, 63 TUL. L. REV. 575, 610 (1989) (arguing that lex mercatoria is nothing more than an elusive and mythical system which leads to uncertainty for parties); see also Keith Hight, The Enigma of The Lex Mercatoria, 63 TUL. L. REV. 613, 627 (1989) (maintaining that the lex mercatoria is "not at all a precise body of law or principles, with clearly definable limits and parameters" and thus, "is probably a myth").

108. See generally Croff, supra note 4, at 634-38; see also Emmanuel Gaillard, Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules, 10 ICSID Rev.-Foreign Investment L. J. 208, 210-11 (1995).

109. BORN, supra note 8, at 101

110. Id.; see also Gaillard and Griffin, supra note 33, at 14 (determining that a method for identifying transnational rules to apply to a dispute requires a demonstration that a consensus exists or is developing on the particular legal issue).

111. See BORN, supra note 8, at 101.

112. See id.

113. See Newman and Burrows, supra note 103, at 31 ("Since the UNIDROIT principles do not exist as a mandatory body of rules, their specific application to a dispute is limited to situations where the parties
The arbitrator may independently refer to international treaties or other non-national sources to provide a general conflict of laws rule to be used to determine the governing substantive law.\textsuperscript{114}

However, while, in theory, international treaties may be applicable to an international arbitration, most fail to specifically address conflict of laws rules that may be applicable.\textsuperscript{115} The 1961 European Convention on International Commercial Arbitration remains the major exception.\textsuperscript{116} According to Article VII of the Convention, parties are free to select any law to govern the substance of their dispute; if they fail to do so, an arbitrator may select the governing law in accordance with the “proper law under the rule of conflict that the arbitrators deem applicable.”\textsuperscript{117} The International Convention for the Settlement of Investment Disputes\textsuperscript{118} is another exception, providing for international law and the law of the host state to apply.\textsuperscript{119} In addition, some treaties or conventions outline rules governing specialized subjects\textsuperscript{120} and provide guidance for determining choice of law rules or substantive rules of decision in those areas.\textsuperscript{121} Where the dispute falls under the auspices of a specialized treaty, arbitrators generally apply that treaty to determine the applicable law, particularly if the

\textsuperscript{114} See BORN, supra note 8, at 101-05. But see Gaillard, supra note 4, at 2 (arguing that arbitrators should not resort to general principles of law if the parties have chosen a particular national law to govern their dispute except for those general principles of the applicable national law).

\textsuperscript{115} See BORN, supra note 8, at 101-05.


\textsuperscript{117} European Convention, supra note 116, at art. VII, para. 1.


\textsuperscript{119} Id. at Art. 42 (providing that in the absence of an agreement by the parties, the arbitral “[t]ribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”) (emphasis added).


\textsuperscript{121} See Convention on the Law Applicable to Contracts for the International Sale of Goods, Hague Conference on Private International Law, Dec. 22, 1986, art. 7, available at http://www.hcch.net/conv/text318.html (copy on file with The Transnational Lawyer); see also Convention on the Law Applicable to Contractual Obligations, EEC 80/934, art. 3, 1980 O.J. (L 266), available at http://www.europa.eu.int/eur-lex/en/lif/datL/1980/en48OA0934.html (copy on file with The Transnational Lawyer) (providing that “a contract shall be governed by the law chosen by the parties” and the “choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”). Although the latter Convention excludes arbitration agreements from its coverage, the Convention would apply to the underlying contractual dispute that is the subject of the arbitration. See Born, supra note 8, at 101.

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parties chose that treaty to govern their contract. 122

3. Arbitration Institutional Rules

Arbitration Institutional rules also follow the basic construct of party autonomy. In an arbitration agreement, parties may specify that the arbitration take place in accordance with rules of an international or domestic arbitration institution. 123 Nearly all of the various rules permit the parties’ choice of governing law to apply. 124 While these rules do not select the actual law to govern a dispute, they outline the methods an arbitrator may utilize to determine a choice of law where the parties have not already done so. 125 In the absence of a choice of law clause in an agreement, the arbitrator will decide the applicable law, usually by whatever methods the arbitrator deems appropriate. 126 Although subjecting a dispute to these rules is not a choice of law per se, these rules delineate guidelines to aid an arbitrator in making that determination. 127 It should be noted that these rules generally defer to the arbitrator, who determines the applicable law, leaving the method of selection open to the arbitrator. 128

One set of rules, however, explicitly permits the arbitrator to refer to non-national standards, like lex mercatoria, to resolve a dispute. 129 In 1976, the United

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122. See BORN, supra note 8, at 101.
123. See LOOKOFFSKY, supra note 1, at 571-72 (specifying that parties must expressly refer their dispute to the institution’s rules in order to incorporate those rules). When the parties do so, they agree to “arbitrate under the auspices of a particular institution.” Id. An agreement to arbitrate under an institutional regime provides a sort of procedural framework in resolving the dispute. See id. Institutional arbitration is distinguished from ad hoc arbitration which lets the parties set up a procedural framework for their particular case. See id.
124. See id.
125. See ICC Rules, supra note 20, at Art. 17(1) (specifying that “in the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate”); see also UNCITRAL Model Law, supra note 20, at Art. 28(2) (stating that “failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable”); see also London Court of International Arbitration, Arbitration Rules, Recommended Clauses & Costs, Art. 16.1, available at http://www.lcia-arbitration.com/lcia/rulecost/English.htm (copy on file with The Transnational Lawyer) (relating that arbitrators have authority to determine “what are the rules of law governing or applicable to any contract, or arbitration agreement or issue between the parties, subject to any mandatory limitations of any applicable law”); see also American Arbitration Association, International Arbitration Rules, Art. 28, available at http://www.adr.org/index2.1.jsp?JSPssid=112999&JSPsrc=upload\LIVESITE\Rules_Procedure\National\International\focusArea\International\AAA\175-1000.htm (last visited) (copy on file with The Transnational Lawyer) (requiring the arbitral tribunal to “apply the substantive law or laws designated by the parties as applicable to the dispute” and failing that, to apply “such law or laws as it determines to be appropriate”).
126. See id.
127. However, as one arbitrator recently noted “if [the] defendant imagined that by stipulating for dispute resolution by the International Chamber of Commerce, the effect of the choice of law clause would be modified, [defendant] was mistaken.” ICC Final Award in Case No. 7453 of 1994, 22 Y.B. COMM. ARB. 107 (1997).
128. See discussion infra Part III.B. (discussing the alternative methods arbitrators use to determine the applicable law).
129. UNCITRAL Model Law, supra note 20, at Art. 28 (4) (providing that “in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the
Nations Commission on International Trade Law (UNCITRAL) created rules and a Model Law for optional use in arbitration. The UNCITRAL Model Law’s rules regarding the arbitrator’s ability to choose a law, when the parties have not already done so, is substantially the same as other arbitration institutional rules. However, it is different than the prevailing institutional rules regarding the parties freedom to choose. According to Article 28 (1), the parties choice of law provision is applicable to the substance of the dispute and shall be construed, “unless otherwise expressed, as directly referring to the substantive law of the State and not to its conflict of laws rules.” Other arbitration institutional rules are ambiguous as to whether the parties’ choice designates the substantive law or whether the choice encompasses the conflict of laws system to be used. Even so, under most arbitration institutional rules, the arbitral tribunal has the ultimate discretion to decide what law is applicable when the parties have not already expressed a choice.

B. The Trump Card: When the Parties’ Choice Will Not Be Followed

Although the arbitrator has discretion to follow or disregard the parties’ express choice in their arbitration agreement, there are two primary situations when the arbitrator may feel compelled to ignore that choice. The first situation is when a choice of governing law implicates a contrary public policy. The second situation arises when the parties’ choice of governing law is in conflict with a mandatory national law. There is much controversy surrounding these two areas. Some maintain that the parties’ choice must always be followed in order to retain consistency and predictability in international commercial arbitration. Other scholars insist the parties’ choice should be overlooked when dealing with a mandatory national law or an international public policy. 

130. See Lew, supra note 70, at 18.
131. UNCITRAL Model Law, supra note 20, at Art. 28(2); see also ICC Rules, supra note 20, at 17(1).
132. UNCITRAL Model Law, supra note 20, at Art. 28(1).
133. See supra note 125 and accompanying text.
134. See, e.g., Philip J. McConnaughay, Reviving the “Public Law Taboo” in International Conflict of Laws, 35 Stan. J. Int’l L. 255, 310 (2001) (arguing that the “erosion of public law constraints on contractual choice of law . . . has created a serious risk of underregulation of international commerce”). Allowing parties to opt out of mandatory national laws or regulatory schemes protecting vital public interests is “potentially injurious to the public good if not appropriately constrained.” Id.; see also Kenneth-Michael Curtin, Redefining Public Policy in International Arbitration of Mandatory National Laws, Def. Couns. J., April, 1997, at 271 (advocating that “if arbitration is allowed to become a technique to avoid mandatory laws and important state interests, then arbitration will lose its national backing and with that its importance as a neutral and certain form of dispute resolution”); see also Nathalie Voser, Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration, 7 Am. Rev. Int’l Arb. 319, 356 (1996) (affirming that arbitrators can and should apply mandatory rules, “even if they are not part of the chosen law or the proper law of the contract” because “the parties have an interest in an award which is not challengeable and can be enforced”). Additionally, if the trust of national courts and nations that an arbitrator will in fact apply mandatory rules is derogated, then it will restrict the legitimacy of arbitration and reduce the advantages and
1. The Public Policy Defense

In arbitration, public policy plays an important role because it may provide a basis for refusing to recognize or to enforce an arbitration award. Article V(2)(b) of the Convention on Recognition and Enforcement of Arbitral Awards, allows a court to refuse enforcement of an arbitration award if it is contrary to the public policy of the enforcing jurisdiction. For choice of law, this becomes an issue because, while an award may not be refused enforcement for either a faulty choice of law or misapplication of that law, a parties’ choice of law that is contrary to public policy will permit that refusal.

The application of public policy for arbitration is grouped into three categories: domestic, international, and transnational. Domestic public policy limitations are the “outside limit to the parties’ freedom of contract.” Domestic public policy usually applies only in a purely domestic arbitration because the arbitration is connected to only that particular nation. International public policy involves a nation’s domestic public policy that will be applied in an international context. Since an international arbitration implicates more than one nation’s public policy, the public policy of all interested nations should be considered under this definition. The third type of public policy that might arise in international arbitration is transnational public policy, which is said to only be an issue when the arbitration “is both international in nature and subject to the lex mercatoria.” This type of public policy signifies an international consensus regarding a specific policy. Although in practice, arbitrators fail to make these categorizations, national courts reviewing an award often distinguish the type of effectiveness of arbitration overall. See id.

135. See Curtin, supra note 134, at 271 (adding that parties may have “little control over the public policy exception to the recognition of an arbitral agreement” under the New York Convention).
136. See supra note 13 and accompanying text (explaining the history of this convention).
137. See id.; see also New York Convention, supra note 13, at art. V(2)(b) (providing that “recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought find that: (b) the recognition or enforcement of the award would be contrary to the public policy of that country”).
138. See Curtin, supra note 134, at 11 (suggesting that “every arbitration of a mandatory national law implicates” one of these three categories of public policy); see also Hrvoje Sikiric, Arbitration and Public Policy: Arbitration Proceedings and Public Policy, 7 CROAT. ARBIT. Y.B. 85, 87 (1994) (proposing that the content of international public policy is more restricted than the content of internal or domestic public policy).
139. Curtin, supra note 134, at 11.
140. Id. (noting that the standard of review for refusing enforcement based on domestic public policy is “whether the enforcement would violate local standards of morality and justice”).
141. See id. (claiming that a national court should consider the international dimensions of the arbitration when referring to its own public policy).
142. See id. at 12 (concluding that “international public policy is a type of balancing of interests test”).
143. Id. (expounding that transnational public policy is “a hybrid between international public policy and the lex mercatoria” and consequently, is subject to “the same deficiencies as the lex mercatoria—uncertainty about its operation, scope, and even its very existence”).
144. See id.
public policy in determining whether to uphold the award.¹⁴⁵

Prior to arriving at the enforcement and the recognition of an award, the arbitrators often consider public policy.¹⁴⁶ For example, in an award between a French seller and an American buyer, the contract provided the law of New York would govern.¹⁴⁷ The arbitrator followed the New York Uniform Commercial Code to resolve all aspects of the dispute, except for a counterclaim for punitive damages.¹⁴⁸ The arbitral tribunal acknowledged that punitive damages were contrary to Swiss public policy.¹⁴⁹ Therefore, the public policy had to be "respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a dispute according to a law that may allow punitive or exemplary damages."¹⁵⁰ As a result, the arbitrators refused to award punitive damages.¹⁵¹

2. Mandatory National Laws

Mandatory national laws are particularly controversial because their application seems to contradict the very nature of arbitration. Arbitration, as a private means of settling disputes, is often considered transnational or outside the jurisdiction of any one country.¹⁵² Thus, the idea that one country's laws can upset the parties' choice of law governing a private contractual relationship is problematic.¹⁵³

A primary example of when a mandatory national law trumped the parties' choice of governing law arose in a recent arbitration between an American construction company and a Turkish construction company. The contract provided for Swiss law to govern the joint venture between the two companies.¹⁵⁴ When a dispute arose, the Turkish construction company argued that a mandatory

¹⁴⁵. See Sikiric, supra note 138, at 87 (completing a comparative analysis of the practice of state courts regarding the enforcement and recognition of awards that implicate procedural public policy).
¹⁴⁶. See ICC Preliminary Award in Case No. 8420 of 1996, 25 Y.B. COMM. ARB. 328, 334-35 (2000) (suggesting that public policy must be addressed in order to ensure the award will be enforceable once it is rendered); see also ICC Rules, supra note 20, at Art. 35 (stating that an arbitrator "shall make every effort to make sure that the award is enforceable at law").
¹⁴⁸. See id. at 62.
¹⁴⁹. See id.
¹⁵⁰. Id.
¹⁵¹. See id.
¹⁵². See Voser, supra note 134, at 329-31 (noting one basic distinction between national courts and arbitral tribunals is that "arbitral tribunals are not organs of a specific state"). In addition, a "state's provisions and restrictions on arbitration held in its territory have considerably been reduced in the past decades." Id. However, the lex arbitri may expressly require application of its own mandatory rules or even those of a foreign state. See id.
¹⁵³. See id. at 342 (acknowledging that "when there is a choice-of-law clause, the application of mandatory rules is therefore much more delicate" than when the arbitrator chooses the applicable law).
Turkish law, regarding tax benefits and export incentives, settled the dispute. The arbitral tribunal looked to Swiss Private International Law (PILA), international conventions, publications of legal scholars, and Swiss case law, to determine if a mandatory national law had to be followed. Relying on language in article 19 of PILA, the tribunal concluded "it is the arbitrator's duty to see how to harmonize the agreement, lex causae and the Turkish law." Thus, the arbitrators could not rely solely on the parties' choice of Swiss law and neglect to consult mandatory rules of Turkey in order to "find a reasonable solution." Consequently, the arbitral tribunal conducted an analysis of the Turkish contacts with the dispute, because a "sufficient and close connection, genuine and not merely vague, must exist with the system of law from which the mandatory provision originated." Here, there was a clear connection with Turkey and a compelling interest for the Turkish Construction Company who could be subject to fines if it failed to follow the mandatory law. Finally, the "quality of the mandatory rules have to be determined according to the law containing such rules and without any regard to the proper law of the contract." The arbitral tribunal ultimately concluded the Turkish law was mandatory and should be accounted for.

The decision of this arbitral tribunal to consider a mandatory Turkish law, even when the parties' choice of law clause designated Swiss law as controlling the contract, is significant because it suggests that, in some situations, arbitrators feel compelled to follow a law contrary to the parties' express agreement. This presents a danger for those engaged in private contractual arrangements. Parties to a contract specifying arbitration need to have some certainty to the effect that their agreement will be followed, particularly in light of the difficulty in knowing every aspect of the laws for every country. Consider the case of a multinational corporation who contracts with corporations in many different countries. The

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155. See id.
156. See id. at 346.
157. Id. at 348.
158. Id.
159. Id. at 347-48 (looking to Swiss conflict of laws scholars and other existing conflict of laws systems to confirm the Swiss law).
160. See id. (stating that the "qualities of connections with Turkey" were sufficient to fulfill the requirements of article 19). The defendant's possible heavy penalties and severe fines represented a "legitimate and manifestly preponderant interest." Id. at 348-49.
161. Id. at 349.
162. See id.
163. See Gaillard, supra note 4, at 2 (maintaining that especially in long-term contracts, "parties will normally seek to avoid compounding the complexity of their situation with the possibility of legal surprises such as changes in the applicable law").
164. See id. (adding that "predictability is the principle requirement for international long-term contracts as far as choice-of-law issues are concerned"). Gaillard advocates that general principles of law are particularly well suited to govern international long-term contracts and such a choice in the parties' agreement may "lead to a more predictable result than the choice of a national law." Id. at 4.
multinational corporation may seek arbitration as a means of avoiding the other country's legal system, but also, it may seek arbitration in order to avoid being subject to provisions of unknown foreign law. Ultimately, however, the fact that arbitrators have discretion to determine the applicable law, and may feel compelled to consider public policy and mandatory national laws, in derogation of parties’ express choice of law provision, instills both instability and uncertainty in international arbitration.

C. When the Arbitrator Supplements or Does Not Follow the Parties’ Choice

The method of selecting the governing law is often left up to the arbitrator in his discretion, therefore, the arbitrator may supplement that choice or choose not to follow the law designated by the parties. In determining which law to apply, the arbitrator may use whatever means deemed necessary. There are numerous methods through which the arbitrator may determine the applicable law. This section addresses the most prevalent methods employed by arbitrators to either supplement the parties’ choice or apply a different law altogether.

1. The Law of the Situs of the Arbitration

Traditionally, when parties did not designate a governing law, arbitrators applied the conflict of laws rules of the situs, or more accurately, the country where the arbitration occurred. Occasionally, even when the parties have designated the governing law, the arbitrator will still turn to the law of the situs of the arbitration and, particularly, to its conflict of laws rules. In the United States, the traditional rule required the arbitrator to apply the substantive law of the state where the arbitration was located. The theory behind this doctrine assumes the parties implicitly consented to the laws of the forum merely by designating that country to host the arbitration proceeding. This doctrine was widely accepted, but support for the law of the situs doctrine has since waned partially because of criticism that it is both practically and theoretically impossible.

Two examples are illustrative. Two companies from Germany and France respectively submit to arbitration pursuant to their contract. In order to facilitate

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165. See Lew, supra note 70, at 223 (outlining the many different methods arbitrators use to determine the choice of the substantive law to apply in a dispute). Because an international arbitral tribunal is not subject to any mandatory conflict of laws rules, they are often required "to resolve a conflict of laws problem in a vacuum" giving an arbitrator more freedom to decide these issues. Id.

166. See Born, supra note 8, at 103 (comparing the traditional European rule which only applied the arbitration site's conflict of laws rules with the historic United States' rule that applied the substantive laws of the arbitration situs); see also Croff, supra note 4, at 625.

167. See American Law Institute, supra note 96, at § 218, comment b.

168. See id.; see also Born, supra note 8, at 103-04.

169. See Born, supra note 8, at 104; see also Croff, supra note 4, at 625.
the arbitration, the arbitrators hold a hearing with the witnesses located in Germany and a second hearing with the witnesses located in France. The question becomes which law should govern the arbitration. Assuming the arbitrator wants to apply lex arbitri, it is difficult, if not impossible, to identify the situs for the arbitration because hearings were held in both France and Germany.

In another example, a Japanese corporation contracts with an American firm, providing for arbitration to occur in Stockholm. The contract is negotiated and signed in Japan, but it is performed in the United States. Neither the parties nor the contract has any connection or relation to Stockholm. In fact, the city was chosen as a neutral forum, because it is located halfway between the two countries. In such a case, is it fair to apply the law of Sweden simply because the two parties chose a Swedish forum? It is likely the parties did not know anything about Swedish law nor did they intend to have it applied to the merits of their dispute. Therefore, the implication arises that an implied choice of law based on the choice of forum alone may be unjust.

2. The Cumulative Approach

In response to the growing discontent with the traditional situs rule because of its often arbitrary application, arbitrators began to apply a cumulative approach. This approach takes into account both the conflict of laws rules and the substantive law of all the countries with a connection to the dispute. In doing so, the arbitrators apply the conflict of laws rules of all the private international law systems connected with the dispute to ascertain a “common”

170. See Croff, supra note 4, at 626 (providing a similar example).
171. See id. (mentioning that the Institute of International law has suggested the conflict of laws rules of the country where the first hearing was held should apply in this type of situation). Croff criticizes this approach, claiming that “one can easily see how this solution is arbitrary and scarcely convincing.” Id.
172. Stockholm has long been a favored arbitration site for East-West disputes. See, e.g., James H. Carter, Selecting the Site for Arbitration, in PRACTITIONER'S GUIDE TO INTERNATIONAL ARBITRATION AND MEDIATION, supra note 2 (manuscript at 17).
173. See Gaillard & Griffin, supra note 33, at 2 (noting that “[p]arties typically choose a situs precisely because they wish it to be neutral”).
174. For several similar examples illustrating the inappropriateness of this approach in certain situations, see Croff, supra note 4, at 626-27.
175. Id.; see also Gaillard & Griffin, supra note 33, at 2-3 (suggesting it is unrealistic to assume that parties also chose the conflict rules of the place where the arbitration takes place when they chose the situs of the arbitration).
176. See BORN, supra note 8, at 104-05 (noting the cumulative approach is one main alternative to applying the situs rule).
177. See Award in ICC Case No. 2930 of 1982, 9 Y.B. COMM. ARB. 105, 106 (1982) (looking to the Convention on the Law Applicable to the International Sale of Goods in addition to the private international law provisions of Switzerland, France, and Yugoslavia to determine the proper governing law). The arbitral tribunal found Yugoslavia had the closest connection with the contract involved in the dispute and thus, its law should be applied. See id. at 107.
rule. It should be noted that under this approach, the arbitrator often ends up applying a particular national law. It is argued that this approach searches for an "international (in the sense of widely-accepted) solution" to choice of law problems. The use of a "widely-accepted solution" to determine the applicable law makes this method particularly effective in practice because both parties are often satisfied with the choice. However, the cumulative approach has been criticized for two reasons. First, this approach may not be the best solution because it is inapplicable to situations where the conflict of laws rules of all the connected countries point to a different substantive law. Second, the cumulative approach gives wide discretion to an arbitrator to determine which countries are applicable.

3. The Jurisdiction Theory

Conceptually, not far from the principles of the cumulative theory lay the jurisdiction theory. The jurisdiction theory simulates a traditional conflict of laws analysis by either choosing the law of the country that would have been able to assert jurisdiction absent the arbitration agreement or by choosing the law of the jurisdiction with the most contacts with the dispute. Under one version of this theory, an arbitrator determines which country associated with all the parties could assert jurisdiction and then either directly applies that country's substantive law or follows its conflict of laws rules. This theory is often criticized because

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178. See LeW, supra note 70, at 335-41 (illustrating that a "common" conflict rule is often simply where the same result would occur no matter which potential law was applied to a given dispute); see also BORN, supra note 8, at 104-05 (advocating that in practice, the approach often finds that all relevant conflicts rules would select the same national law ending up with a "false conflict").

179. See Croff, supra note 4, at 629.

180. See id. at 630.

181. See id. at 629 (acknowledging the effectiveness of this method stems partly from the fact that enforcement of the award is much more likely because the choice of law is connected to all the conflicts systems related to the dispute).

182. See id. at 630 (noting that the arbitrator could dispense with a conflicts of laws analysis altogether in the case of a "false conflict"). A "false conflict" would arise where either different conflict of laws systems would lead to the application of the same national law and also, where the substantive laws connected with the dispute end up with the same legal result. Id. at n.53. Croff argues that in the case of a "false conflict," the search for the applicable law becomes unnecessary. Id. at 632.

183. See id. at 630 (suggesting that the conflict of laws rules deemed applicable may be different). For example, one arbitrator may feel the conflict of laws system of the forum is applicable based on its jurisdiction over the arbitration proceeding. Id. Another arbitrator may find the jurisdictional bases insufficient connection to the dispute to be relevant or applicable. Id.

184. The author has grouped these two approaches under the heading of "jurisdiction" because both perform a contacts type of analysis.

185. See BORN, supra note 8, at 105 (suggesting another alternative to this approach is arbitrators applying the law of the state where enforcement of the arbitration award is likely); see also Croff, supra note 4, at 624 (explaining that this theory was first promulgated by Dionisio Anzilotti who believed that the country that could assert jurisdiction was "in reality dispossessed of its jurisdictional authority by the arbitration clause and therefore it may reaffirm its control over arbitration" in this manner).
it first requires an arbitrator to figure out which country could assert jurisdiction, which is usually accomplished by recourse to a conflict of laws rule.\textsuperscript{186} Thus, this approach fails to eliminate the difficulty in determining which conflict of laws rules to utilize.\textsuperscript{187} It also frustrates certainty and convenience in international arbitration because arbitrators may apply different conflict of laws rules, thus different outcomes result in each case.\textsuperscript{188} Additionally, commentators from third world countries object to this approach because of the reference to “jurisdiction,” which relies on “developed-world capitalist expressions which may have no or a different meaning in third world countries.”\textsuperscript{189} Although arbitration may be a sort of adjudicatory procedure, it is not truly comparable with a municipal court and thus, its scope is not identical to the jurisdiction of a national court.\textsuperscript{190}

Another version of this theory is referred to as the “proper law of the contract.”\textsuperscript{191} Under this version, the arbitrators consider all the elements of a dispute and decide the country most connected to the dispute.\textsuperscript{192} This country determines the applicable law.\textsuperscript{193} Problems with this approach arise because of the inherent subjectivity, on the part of the arbitrators, in deciding the weight of each connecting factor.\textsuperscript{194} However, proponents of this approach suggest using this method will “better fulfill the expectations of the parties and the exigencies of international commerce” because it permits the arbitrator to select the most appropriate law, through wisdom and experience, as opposed to being bound by a rigid conflict of laws system.\textsuperscript{195}

\begin{itemize}
\item \textsuperscript{186} See Croff, supra note 4, at 624.
\item \textsuperscript{187} See id.
\item \textsuperscript{188} See id. (declaring that as a result of these problems, “this position was abandoned years ago and it is the only one that has not formed the basis of any known arbitral award”).
\item \textsuperscript{189} See SAMUEL, supra note 18, at 69-70 (pointing out that the meaning of jurisdiction as a concept is constantly changing). This theory itself, stems from the “jurisdictional theory” of arbitration which places the arbitrator in the seat of a private judge and an arbitral award on the same footing as a judgment. \textit{Id.} at 50-53.
\item \textsuperscript{190} See id. at 67-68, 71. \textit{But see UNCITRAL Chamber Decision of January 11, 1995, 22 Y.B. COMM. ARB. 231 (1997) (acknowledging that “the arbitration process, although apart from judicial process and notwithstanding that it is international in character, is nevertheless subject to a modicum of judicial control on the part of those courts where it takes place . . .”).}
\item \textsuperscript{191} Croff, supra note 4, at 632-33; see also LEW, supra note 70, at 341-42.
\item \textsuperscript{192} See LEW, supra note 70, at 341-42 (defining this version alternatively as the “localisation test” or the “centre of gravity test”); see also Croff, supra note 4, at 633 (explaining that this theory was first developed by the English scholar, Westlake, in response to traditional solutions); see also DICEY & MORRIS, supra note 79, at 769 (developing the “proper law of the contract” under English law). When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection. \textit{See id.; see also AMERICAN LAW INSTITUTE, supra note 96, at §188 (“The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which . . . has the most significant relationship to the transaction and the parties . . .”).}
\item \textsuperscript{193} See LEW, supra note 70, at 341-42.
\item \textsuperscript{194} See id. (adding that the weight given to particular connecting factors is not predetermined as in many private international law systems but rather depends upon the arbitrator and consequently, differs from award to award).
\item \textsuperscript{195} See Croff, supra note 4, at 633 (noting that often this approach is used without referring to a choice...
4. An International Conflict of Laws System

Another method of choosing the applicable law consists of an international conflict of laws system. This is a system compiled solely by the arbitrator. Using this approach, an arbitrator compares several bodies of private international law and synthesizes them into a set of general principles of conflict of laws. Whether the bodies of private international law need to be connected with the dispute is left within the arbitrator’s discretion. In comparing these bodies of law, the arbitrator looks only to the method of choosing a law and not to the substance of those laws. This approach differs from the cumulative method, which completes a comparative analysis of the substantive laws of different legal systems and does not necessarily include their conflict of laws systems. Additionally, when using this approach, the arbitrator creates a unique conflict of laws system to apply to the particular dispute. Although the end result may net a single national substantive law to be applied, the international conflict of laws system used does not necessarily represent a common rule or a common conflicts system. Despite the desirability of this approach, in practice, arbitrators appear less comfortable with creating their own conflict of laws system than they do in applying the other methods detailed here, such as the law of the situs, the cumulative theory, and the jurisdiction theories.

IV. PROBLEMS WITH TRADITIONAL APPROACHES: AN EMPIRICAL LOOK

Because of the many different methods of determining the law to govern a contract, many argue that choice of law in international arbitration remains unstable and uncertain. This section presents the methodology and results of a comparative analysis of various published arbitration awards. In particular, this
analysis ascertains and concludes that, in practice, there is more predictability and uniformity in determining choice of law in international arbitration than previously believed.

A. Design and Methodology

The aim of this comparative survey is to determine how often arbitrators follow party autonomy, and in what manner, by evaluating different published arbitration awards. Such a task is subject to error because it requires one individual’s subjective determination of the methods arbitrators were, in fact, applying in their written awards. The actual arbitrators themselves were not consulted regarding the methods they used. There are other difficulties to surmount in undertaking an analysis such as this. Primary is the fact that many arbitration awards are unpublished or confidential. However, to mitigate errors that inevitably flow from such subjective analyses, this analysis seeks to clearly define the requirements of each category and explain the results.

Based on the definitions of each method explained in Part III, each award was categorized according to its usage of certain key vocabulary in determining the choice of law. Awards that applied a law directly, with no analysis whatsoever, were separated into two groups. If the parties had chosen a specific law to govern and that law was applied, then the award was grouped within the pure party autonomy section. If the parties had selected the governing law, but the arbitrators supplemented that choice with another method, the award was categorized as party autonomy with the method used.

B. Results

The results outlined below represent only a handful of published awards. However, the mere fact that more often than not arbitrators employ certain methods to determine choice of law suggests some movement towards uniformity and predictability in international arbitration.

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205. See SAMUEL, supra note 18, at 73 (stating that “reliable empirical data as yet do not exist on which to base observations relating to arbitral practice”); see also Epstein, supra note 91, at 918 (“The deserved popularity of international commercial arbitration no doubt owes much to its flexibility, confidentiality, ability to nominate law and fact-finding procedures, and the near universal availability of foreign enforcement through the New York Convention.”) (emphasis added).

206. For example, usage of the words “party autonomy” would place an award within the party autonomy doctrine. If the award continued on to use vocabulary like “contacts” and “connecting factors,” then it was categorized according to party autonomy with a jurisdictional contacts analysis.
1. Where Parties Have Designated the Governing Law

Where parties choose the governing law in their arbitration agreement, the results are fairly straightforward. In general, party autonomy prevails, although occasionally, with slight deviations. Often the parties' choice was supplemented with another method used to confirm or to test that choice. For example, in an arbitration where the parties included a choice of law clause in their arbitration agreement, the arbitrators looked to international materials to confirm the interpretation of the chosen country's Constitution. Specifically, the arbitrators used the Vienna Convention on the Law of Treaties and the Geneva Convention to ensure that the Constitution of the parties' chosen law conformed to international law. Ultimately, the arbitral tribunal found that the rules outlined in the Constitution of the chosen country "correspond[ed] to rules relating to the conclusion of international treaties" and thus, was valid.

In another arbitration between a French contractor and French subcontractor, the arbitral tribunal declared that the parties' choice of law was "controlling and must be enforced." However, the arbitrators additionally performed a jurisdictional contacts test before applying the law designated in the contract. Despite concluding another country had more contacts with the dispute, the tribunal adhered to the parties' intent and applied French law.

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207. See ICC Interim Award in Case No. 7263 of 1994, 22 Y.B. COMM. ARB. 92, 97-98 (1994) (following an arbitration clause that explicitly provided that "questions of law shall be determined by the said Board with reference to the laws of Country X or rules and regulations of the International Chamber of Commerce").

208. See id.

209. Id.

210. See ICC Award in Case No. 7528 of 1993, 22 Y.B. COMM. ARB. 125, 128 (1993) (submitting that the arbitrators were "following the rule of party autonomy which prevails in major legal systems").

211. See id.

212. See id. (finding that Pakistan had more contacts with the dispute than France, although both parties were French citizens).
Chart 1 represents the percentage of cases where arbitrators either followed the parties' choice with no other analysis, pure party autonomy, or the remaining percentage of awards, when arbitrators supplemented the parties' choice. Based on these results, parties can remain reasonably sure that when a choice of law clause is included in their agreement, that choice will be respected. Of the awards where arbitrators supplemented the parties' choice, only two percent utilized that method to arrive at a law not designated by the parties. In the remaining awards, arbitrators supplemented the parties' choice, but did not derogate from the choice of law provision. Therefore, parties have some security in predictable choice of law. Where the parties designate the substantive law in their arbitration agreement, arbitrators generally apply it, though they may resort to alternative methods to test or confirm that choice.

1. Where Public Policy and Mandatory National Laws Play a Part

Where an arbitrator considers public policy or mandatory national laws despite a contrary choice of law provision in the arbitration agreement, the arbitrator often does so because the defendant party is seeking to use it as a defense. In a few rare cases, arbitrators considered the applicability of a third country’s mandatory laws without any reference to it by the parties.

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213. See, e.g., Award of May 20, 1992 in case no. ARB/84/3, International Centre for Settlement of Investment Disputes, XIX Y.B. COMM. ARB. 51, 64 (refusing to follow defendant party’s argument that violations of mandatory provisions of Egyptian law made the contract annulable).

214. See, e.g., ICC Final Award in Case No. 6752 of 1991, reprinted in ICC AWARDS FROM 1991-1995, supra note 147, at 195 (addressing the Belgian Act of 1961 despite the failure of either party to argue the law during the arbitration).
In general, these results show an increasing trend by arbitrators to address public policy or mandatory national laws as a limitation on the parties' express choice. However, few awards permitted those limitations to prevail over the parties' express choice of law. In fact, public policy and a mandatory national law other than the substantive law chosen by the parties to govern their agreement, will only trump a parties' choice of law provision in very rare circumstances. The general trend dictates against the application of a mandatory national law, if it was invoked to either avoid the arbitration, i.e. to question the validity of the arbitration agreement, or to void the contract on grounds of illegality. Although Chart 2 represents an increasing trend by arbitrators to consider public policy and mandatory national laws contrary to the parties' agreement, comparison with Chart 3 gives a more complete assessment of the true situation.

Chart 3 illustrates that while more arbitration awards consider limitations to party autonomy, only a few of these awards permit public policy or a mandatory national law to triumph over the parties' choice. In the remaining percent, the arbitral tribunal addressed the application of public policy and mandatory national laws to contravene the agreement, but concluded it either did not qualify or it did not outweigh the parties' choice.

215. See ICC Partial Award in Case No. 6474 of 1992, XXV Y.B. COMM. ARB. 279, 297-301 (2000) (declaring that defendant party “could not rely on a provision in its own law in order to contest capacity” or arbitrability in an international arbitration).

216. See ICC Final Award in Case No. 6363 of 1991, reprinted in ICC AWARDS FROM 1991-1995, supra note 147, at 108, 127 (“As a general matter, a party seeking to escape from an agreement based on its alleged violation of law may not knowingly enter the agreement, benefit from it, and then denounce it, on its alleged illegality when it is convenient.”).
The multiple methods left to the arbitral tribunal, in determining the applicable law in an international arbitration, create uncertainty. This uncertainty undermines the predictability traditionally offered by international arbitration. Although many commentators consistently maintain the need for more predictability in choice of law, difficulties follow in formulating uniform rules in a contractual procedural framework, such as international arbitration. Parties to an arbitration agreement often select arbitration precisely for its freedom to choose the process to adjudicate their disputes, including the ability to designate the applicable law. Unfortunately, because arbitration is often at the whim of the contractual relationship, there can be no true uniformity.

However, these results show that under the pure party autonomy model, parties can remain reasonably sure that their choice of law will be respected, comporting with both their expectations and those of international commerce. Although pure party autonomy would not be uniform in the sense that the same law will always be applied, the result will be predictability, which is often what the parties seek in entering into arbitration agreements with a choice of law clause.

217. See Born, supra note 8, at 115.

The freedom [that international arbitral tribunals possess in selecting the governing law] has been useful in some cases. However, it has also led to some unpredictability. With the growing use of international arbitration, this uncertainty has become a matter of concern to parties. They see no attraction in unpredictable conflict of laws rules. They need some degree of certainty as to the law applicable, when drafting their contracts, when seeking a friendly settlement of their dispute, and when resorting to arbitration.

Id. at 115-116.

218. See, e.g., Born, supra note 8, at 97; see also Croff, supra note 4, at 613; see also Martin A. Feigenbaum, Casenote, Development Bank of Philippines v. Chemtex Fibers, Inc.: A Vote in Favor of International Comity and Commercial Predictability, 21 INT'L LAW 873, 880 (1987).

219. See Born, supra note 8, at 97 (suggesting that parties choose arbitration to ensure "certainty and predictability concerning their legal rights").

220. See Scherk v. Alberto-Culver Company, 417 U.S. 506, 516-17 (1974) (asserting that there will always be some uncertainty when more than one country's substantive laws or conflict of laws rules may be applied).

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. [Absent such agreements, one enters] the dicey atmosphere of . . . a legal no-man's-land [which] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Id.

221. See Born, supra note 8, at 97 ("Private parties desire a single, neutral, procedural framework and a stable substantive legal regime.").
Even though parties have the protection that arbitrators will rarely select a law other than the law they have chosen to govern the contract, there can be some danger to arbitrators using other methods to supplement or to confirm the parties’ choice. This arises because it is the arbitrator, not the parties, who will decide if another method of choosing the applicable law validates the parties’ choice. This implicates the inherent subjectivity of arbitrators and highlights the possibility for different results because of that subjectivity.

Public Policy and Mandatory National Laws appear to have limits. These limits, in effect, decrease the applicability of public policy or mandatory national laws to contravene the parties’ express choice. For example, where a party’s choice of governing law will not implicate either public policy or some other country’s mandatory national law, both are irrelevant. Or, when a party asserts public policy or a mandatory national law as a defense to the arbitration, the arbitral tribunal will not usually follow it. Thus, in practice, public policy and mandatory national laws are not substantial barriers to party autonomy.

V. CONCLUSION

International arbitration represents the future of alternative dispute resolution because it offers many advantages to parties, including the ability to designate the governing law and avoid being subject to a foreign jurisdiction’s law. Ultimately, however, the parties do not always make the final decision as to what law will apply to their dispute. The decision is left to the arbitral tribunal by arbitration practice, national laws, and all international arbitration institutional rules. In recent years, particularly since the adoption of the New York Convention, arbitration has been given new life because arbitration awards are almost always enforced and rarely reviewed. Consequently, the wide latitude given to arbitrators in making the final decision regarding what law to apply is problematic if that freedom results in an application of a law other than the parties’ designated choice.222

Public policy and mandatory national laws have arisen as a defense to strictly adhering to the parties’ choice of law provision. In practice, however, while pure party autonomy is not followed all the time, the parties’ reasonable expectations as to the applicable law are met because arbitrators rarely derogate from the parties’ choice. When the arbitral tribunal considers public policy or a mandatory national law in contravention of the parties’ agreement, these limitations very rarely trump party autonomy. Since international arbitration is not purely domestic, parties enter arbitration agreements seeking to limit potential liability to discrete and tangible amounts. Parties to private contractual agreements have expectations that are better safeguarded when arbitrators apply pure party

222. See BORN, supra note 8, at n.2 (suggesting that “many business decisions are taken only after a reasonably careful analysis of legal risks and opportunities” which “inevitably rest on expectations about applicable laws”).

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autonomy rather than inject an element of instability and uncertainty by applying a different method and hence, a different law. Thus, the current practice conforms to current expectations and we are not so far from predictable choice of law after all.