The principle of the autonomy of the arbitral procedure has long been recognized in French law, and it is tending to become the rule in other jurisdictions as well. The UNCITRAL Model Law puts it differently, clearly confining the intervention of the courts to "certain functions of arbitration assistance and supervision" (Arts. 5 and 6). Even English law, which traditionally promoted resolution by the courts of any kind of difficulty arising during the arbitration, has substantially limited the cases where the courts can intervene during the course of arbitral proceedings.

The autonomy of the arbitral procedure also prohibits states from using their legislative powers to obstruct the normal course of arbitration proceedings. In the 1994 Stran Greek Refineries case, the European Court of Human Rights held invalid the purported rescission by the Greek legislator of a contract for the construction of a refinery, together with its arbitration clause, despite the fact that an arbitral award had already been made in proceedings brought by the Greek State itself. The Court held that:

"[The principle of the rule of law and the notion of fair trial enshrined in Article 6 of the European Convention on Human Rights] preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute."  

The involvement of the courts is only justified where urgent provisional or protective measures are required (Chapter III). That exception aside, it is up to the parties to proceed on their own unless the arbitration clause contained in the contract provides otherwise (Chapter I). The Court held that:

"If one sees references to the "law governing the arbitral procedure," or to "procedural law," as opposed to the "law governing the substance" or "the merits" of a dispute. It is important, however, to remember that in most modern legal systems the parties and the arbitrators are by no means obliged to have a particular national law govern any procedural issues which may arise in the course of the arbitration. As is often the case in practice, they may simply refer to private rules of arbitral procedure, prepared by an arbitral institution or used in ad hoc arbitration. They may also apply transnational rules derived from an analysis of comparative law or arbitral case law. If they wish, they can combine provisions of a number of different laws, or even refrain from choosing any procedural rules or law at all, leaving the arbitrators to resolve any procedural difficulties as and when they arise. The parties and, in the absence of agreement between them, the arbitrators thus have a great deal of freedom in this respect. Their freedom is explained by the fact that rules governing arbitral procedure, the determination of which is examined in Section II, have gradually become autonomous of those governing other aspects of the dispute, as we shall now see in Section I.

SECTION I
AUTONOMY OF THE LAW GOVERNING THE ARBITRAL PROCEDURE

It is nowadays generally accepted that the law governing the arbitral procedure will not necessarily be the same as that governing the merits of the dispute (§ 1), or indeed that of the seat of the arbitration (§ 2). The only rules that will prevail over those of the law which otherwise governs the procedure will be the mandatory procedural rules of the law of the jurisdiction where any action to set aside or enforce the award is heard (§ 3).
§ 1. - The Law Governing the Procedure and the Law Governing the Merits

1173. — "The law governing the arbitral procedure will not necessarily be that governing the merits of the dispute." That principle was clearly stated by the Paris Court of Appeals in 1974 in the Diefenbacher case and, in France, it has not been contested since. As a result, the parties can choose to submit their main contract and the arbitral procedure to two different laws. Further, where the parties have not chosen a procedural law, the arbitrators are not obliged to apply the law which the parties, or the arbitrators themselves, have chosen to govern the main contract. The same principle is found in other modern arbitration laws.

Arbitral case law also recognizes that there is not necessarily a link between the law governing the merits and the law governing the procedure.

1174. — Several reasons have been put forward to justify this principle.

1175. — First, it has been argued that the principle is a consequence of the autonomy of the arbitration agreement, as the arbitral procedure is an extension of that agreement. This argument is unconvincing, because the grounds on which the principle of the autonomy of a procedural law is based are entirely different to those which dictate the choice of a procedural law. In addition, this theory presupposes that the law governing the arbitral

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9 See supra paras. 388 et seq.

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10 For a discussion of this argument, see P. Fouchard, note following Ca Paris, Feb. 21, 1980, Götaverken, supra note 8, at 671.
11 On this argument, see especially E. Loquin, note following Cass. 1° civ., Mar. 18, 1980, Compagnie d'Armement Maritime, supra note 5, at 880.
The Role of the Law in the Procedure

II

A. National Legislation

1179. In French law, the rule whereby arbitral procedure was governed by the law of the seat was based not so much on the mechanical application of a subsidiary choice of law rule where the seat was the exclusive connecting factor, as on the identification of elements indicating the parties' implied intention as to the procedural law. The choice by the parties of the seat of arbitration supposedly revealed that implied intention.

The same position was also widely followed in other legal systems, including the 1929 Swedish Arbitration Act, and the 1969 Swiss Concordat, which contains numerous mandatory provisions applying to all arbitrations held in Switzerland. The same thinking inspired the resolution adopted in Siena in 1952 by the Institute of International Arbitration

In resolving procedural issues, the arbitrator was, by analogy with the courts, to apply the law of the "arbitral forum."

1180. Recent legislation has departed from this traditional rule. The French reform of 1981 makes no reference to the law of the seat in its provisions concerning the determination of the law governing the procedure. The Netherlands and Portuguese arbitration statues

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16 For a commentary, see THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION IN SWEDEN 45 (2d ed. 1984).

17 This text no longer applies to international arbitrations taking place in Switzerland unless the parties have specifically so provided. See supra para. 162.

18 ANN. INST. DR. INT., Year 1952, Pt. I, at 469, 535.

19 Art. 1494 of the New Code of Civil Procedure; for a commentary, see infra paras. 1203 et seq.


21 Art. 15 of Law No. 31/86 of August 29, 1986 on Voluntary Arbitration, see Dario Moro Vicente, L'évolution récente du droit de l'arbitrage au Portugal, 1991 REV. ARB. 419, 434, who emphasizes that local procedural rules must be respected, although that is not imposed by the law.

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22 Art. 182, para. 2; for a commentary, see LALIVE, POUDREY, REYMOND, supra note 6, at 351; ANDREAS BUCHER AND PIERRE-YVES TSCHANG, INTERNATIONAL ARBITRATION IN SWITZERLAND (1989). On the discussion in the Swiss parliament arising from the abandonment of the mandatory application of certain provisions of the law of the seat, see Marc Blessing, The New International Arbitration Law in Switzerland – A Significant Step Towards Liberalism, 5 INT'L ARB. 9, 47 (June 1988).


27 Art. 19, para. 2. For a commentary, see Klaus Lientz, Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified? The Answer of the UNCITRAL Model Law, 8 B. INT'L ARB. 5 (Sept. 1991); comp. with Philippe Fouchard, La Loi-type de la C.N.U.D.C.I. sur l'arbitrage commercial international, 114 J.D.I. 861 (1987), especially at 875 et seq. For the incorporation of this provision into German law since January 1, 1998, see Articule 1042 of the ZPO. On the 1999 Swedish Arbitration Act, see supra note 16.

to state that the forum of an international arbitrator consists of all legal systems willing, under certain conditions, to recognize an award made by that arbitrator.29

B. - INTERNATIONAL CONVENTIONS

1182. - The earliest international conventions clearly favored the application of the law of the seat to questions of procedure. The Protocol on Arbitration Clauses in Commercial Matters, signed in Geneva on September 24, 1923,27 provides in its Article 2 that:

[the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

Here, compliance with the provisions of the procedural law of the seat of the arbitration is a condition for the mutual recognition of awards.

The Convention on the Execution of Foreign Arbitral Awards signed in Geneva on September 26, 1927,28 provides that the recognition or enforcement of an award may be refused or suspended

[if the party against whom the award was made proves that, under the law governing the arbitration procedure, there is a ground...entitling him to contest the validity of the award in a court of law (Art. 3).

Although it does not impose compliance with the law of the seat, the Convention does thus require the parties to respect the mandatory provisions of a law chosen by applying a traditional choice of law rule which the Convention does not itself determine. However, the Convention does admit that laws other than that of the forum of an action to set aside or enforce an award can govern the arbitral procedure on a mandatory basis. This was the first sign of progress.

1183. - The 1958 New York Convention still attributes an important but subsidiary role to the law of the seat of the arbitration.29 Article V, paragraph 1(d) enables contracting states to refuse recognition or enforcement of an award where


27 This Convention no longer applies to relationships between states that are party to the 1958 New York Convention. See supra para. 241.

28 This Convention, like the 1923 Protocol, is no longer in force between states that are party to the 1958 New York Convention. See supra para. 244.

effect to an award solely on the grounds of a breach of the procedural law of the seat. A
court hearing a request for enforcement is by no means obliged to refuse enforcement
on such grounds, and it can therefore ignore a breach of the procedural rules of the law of
the seat. At the very least, the court should construe the waiver of the action to set aside as
an implicit decision not to have the law of the forum govern the procedure, pursuant to the
option granted to the parties by Article V, paragraph (1d) of the New York Convention.

contains the first modern expression of the currently accepted principles used to determine
the law applicable to arbitral procedure. It provides, in Article IV, paragraph 1 (b)(iii), that
the parties to an arbitration agreement shall be free “to lay down the procedure to be
followed by the arbitrators.” Where the parties have refrained from doing so, the Convention
provides in Article IV, paragraph 4(d) that the arbitrators themselves can determine the
procedural rules to be followed. Failing that, the Convention provides a fall-back whereby
the authority responsible under the Convention for organizing the arbitration can “establish
directly or by reference to the rules and statutes of a permanent arbitral institution the rules
of procedure to be followed by the arbitrator(s).” 34

The Convention thus provides that the parties and, absent agreement between the parties,
the arbitrators are free to determine how the arbitral proceedings are to be conducted,
without any reference to the law of the seat of the arbitration.

1185. — The 1965 Washington Convention, establishing ICSID, likewise took a modern
approach to the conduct of the arbitral proceedings. It confined itself to affirming the
autonomy of the parties to determine the rules governing the arbitral procedure, and
helpfully specifies that the parties’ autonomy enables them to exclude various provisions of
the ICSID Arbitration Rules, thus underlining the optional character of those rules. 35 In
the absence of any choice by the parties, the arbitrators are fully empowered to resolve
procedural difficulties as they see fit. To do so they may choose whether or not to apply any
particular law. However, a reference to the law of the seat would be meaningless in this
context, given the genuinely delocalized nature of ICSID arbitration which, unlike other
forms of arbitration, is based solely on an international treaty. 36

C. — ARBITRATION RULES

1186. — Arbitration rules have developed along similar lines.

1187. — The best illustration of this is to be found in the amendments to the ICC Rules
of Arbitration concerning the law applicable to the arbitral procedure.

The Rules which entered into force on June 1, 1955 stipulated that, for matters not
covered by the Rules and in the absence of an indication to the contrary by the parties, the
rules “of the law of the country in which the arbitrator holds the proceedings” would apply
(Art. 16). In the version which entered into force on June 1, 1975, Article 11 of the Rules,
which remained unchanged following the amendments of January 1, 1988, stated that:

[t]he rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which
the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the
arbitration.

One author observed that:

there has thus been a move away from the subsidiary and mandatory
application of the law of the ‘forum,’ in favor of a combination of the powers
of the parties and those of the arbitrator, without the need to refer to any
national law whatsoever, and that combination is adopted and confirmed by
Article 1494 of the French New Code of Civil Procedure. 37

The 1998 Rules slightly modified the formulation of the principle, with Article 15(1)
reading as follows:

[t]he proceedings before the Arbitral Tribunal shall be governed by these
Rules, and, where these Rules are silent, by any rules which the parties or,
failing them, the Arbitral Tribunal may settle on, whether or not a reference is
thereby made to the rules of procedure of a national law to be applied to the
arbitration.

The 1998 Rules simply add that certain fundamental tenets of procedural justice must be
respected by the arbitrators in every case, following the example of the UNCITRAL

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Arbitration Rules and the Swiss Private International Law Statute. Thus, Article 15(2) provides that "[i]n all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." 46

1188. — The 1976 UNCITRAL Arbitration Rules provide in Article 15, paragraph 1 that:

[subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

This is in keeping with the modern conception of the law of international arbitral procedure, and it influenced the authors of the 1985 UNCITRAL Model Law. The principles contained in the UNCITRAL Rules have thus had a much greater impact than other rules because, unlike recognition by statute, the recognition of party autonomy in arbitration rules which the parties themselves choose to apply is of limited relevance.

1189. — Article 16 of the 1997 AAA International Arbitration Rules also confers broad discretion on the arbitrators as to the conduct of the arbitral procedure without making any reference to the law of the place of arbitration. Similarly, the 1998 LCIA Rules give the parties and the arbitrators substantial freedom (Arts. 14.1 and 14.2) but, in a change from the 1985 Rules, specify that the law of the seat of the arbitration governs the procedure unless the parties agree otherwise (Art. 16.3). This new provision reflects an unfortunate resurgence of the traditional view that the seat of the arbitration is the equivalent of a court's forum, and that the law of the seat therefore has a role to play as the lex fori, albeit only in the absence of an agreement between the parties.

D. — ARBITRAL CASE LAW

1190. — International arbitral practice has also moved away from applying the law of the seat of the arbitration in the absence of a contrary intention of the parties. Instead it now allows the arbitrators complete freedom in choosing the applicable procedure, or in simply resolving procedural issues as and when they arise.

46 See infra para. 1188.
47 Art. 182, para. 3. See infra para. 1194.
48 On this issue, see Derains and Schwartz, supra note 6, at 208 et seq.
49 On this issue, see Karl-Heinz Böckstiegel, Die UNCITRAL-Verfahrensordnung für Wirtschafts-schiedsgerichtshöfe und das anwendbare nationale Recht, 28 REW 766 (1982).
50 See supra para. 1180.
in his procedure [the arbitrator] shall be guided as much as possible by the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations in 1958.\(^6\)

Likewise, in its 1977 award, the arbitral tribunal in the *Texaco v. Libya* case applied rules of international law and not the law of the seat.\(^7\)

These awards reflect the dominant trend now found in international arbitral case law.\(^8\)

### § 3. Procedural Law and the Law of the Country Where the Award Is Subject to Court Review

1193. — Irrespective of the law, or the rules of law, which govern the procedure, the mandatory provisions of laws of jurisdictions where the award is liable to be reviewed by the courts cannot be entirely ignored by the arbitrators. Those are, in fact, the only laws which limit the autonomy of the parties and the arbitral tribunal in the conduct of the arbitral proceedings.

1194. — The first constraint results from the public policy provisions of the country where an action may be brought to set the award aside. It is for this reason that the arbitrators must take into account the requirements of the law of the seat of the arbitration, and not because that law should necessarily govern the arbitral procedure as the *lex fori*. In most legal systems, an action to set aside will be brought before the courts of the country of the seat of the arbitration, and it is there that a breach of certain procedural rules may provide the basis for such an action. This can be seen in a number of national arbitration laws. For example, under Article 1693 of the Belgian Judicial Code, the parties are entitled to determine the rules of arbitral procedure, but only subject to the provisions of Article 1694, which is intended to guarantee the parties’ rights to a fair hearing and equal treatment throughout the arbitral proceedings.\(^9\) Similarly, Article 182, paragraph 3 of the Swiss Private International Law Statute specifies that “whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure.” Likewise, under Article 1036 of the Netherlands Code of Civil Procedure, the principle of freedom of choice in determining the rules of procedure applies “[subject to the provisions of this Title],” which concerns “arbitration in the Netherlands.” Some of those provisions, such as compliance with the requirements of due process and equal treatment of the parties, are mandatory (Art. 1039(1) and 2(2)). However, most of them, such as the right to present witnesses and experts, the submission of evidence, and the rules governing default by a party, apply only where the parties do not specify otherwise. Similarly, the 1996 English Arbitration Act uses general terms in Section 33, paragraph 1 regarding the arbitrators’ duties in the conduct of the procedure:

- The tribunal shall—
  - (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
  - (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

The fact that the French legislature considered it unnecessary to stipulate expressly that the principles of due process and equal treatment of the parties apply to all international arbitrations held in France should not be interpreted as meaning that those principles do not apply in every case, as a breach of those principles constitutes a ground for setting the award aside. Article 1502 4° of the French New Code of Civil Procedure includes a breach of the


\(^8\) See, e.g., ICC Award No. 2879 (1978): “where the arbitration rules are silent the arbitral tribunal will apply the rules it deems appropriate” (French buyer v. Yugoslavian seller, 106 J.D. 989 (1970), and observations by Y. Derain), ICC Award No. 5103 (1988). “[S]ubject to the provisions of this Title,” which concerns “arbitration in the Netherlands.”

principle of due process among the grounds for setting an award aside or refusing its enforcement, while Article 1502 § of the same code lists among such grounds the violation of international public policy, which certainly includes the principle of equal treatment of the parties.\[^{53}\]

1195. — Although they are under no obligation to do so, arbitrators wishing to ensure the international effectiveness of their award should comply with the principles which, if breached, would justify the refusal of enforcement in the main jurisdictions where, given the circumstances of the case, attempts may be made to enforce their award.\[^{54}\] In practice, those rules will often coincide with the rules of the country where an action may be brought to set the award aside, although that will not always be the case. Also, the law of the seat of the arbitration may allow the parties to exclude actions to set aside the award in certain circumstances, as in Belgium, Sweden and Switzerland.\[^{55}\] In such cases, the procedural public policy of the jurisdictions where enforcement is sought will be the only point of reference for arbitrators who wish to ensure that their award is internationally enforceable.\[^{56}\]

However, in the rare case of a conflict between the public policy rules of the seat of the arbitration, or those of the place where the award is liable to be enforced, and the arbitrators’ own conception of the requirements of genuinely international public policy, our view is that the arbitrators should allow the latter to prevail.\[^{57}\]

SECTION II
DETERMINING THE LAW GOVERNING THE ARBITRAL PROCEDURE

1196. — Before examining the criteria for determining the law governing the arbitral procedure (§ 2) and the consequences of the determination of that law (§ 3), we shall consider whether it is necessary or appropriate to determine that law in advance (§ 1).

\[^{53}\] See infra para. 1654.
\[^{54}\] In favor of the consideration by the arbitrators of the procedural principles of public policy the breach of which could justify the refusal of enforcement (to the extent that it is possible to identify the jurisdictions in which the award could be enforced), see also Derains, observations following ICC Award No. 2879 (1978), supra note 51.
\[^{55}\] See infra para. 1594.
\[^{56}\] See infra paras. 1652 et seq.
\[^{57}\] See the November 1984 Interim Award in ICC Case No. 4095, Parties from Brazil, Panama and U.S.A. v. Party from Brazil, XI Y B. Conf. Arb. 149 (1986). On awards recognized in one jurisdiction but set aside in another, see infra para. 1595.
to resolve each difficulty by reference to the same procedural law[64] makes it all the more appropriate for them to avoid limiting their options by making an early decision covering all incidents that may arise, and instead to pick and choose the means of resolving each incident as it happens.

The divergence of views on this issue is gradually losing its significance. This is because national legislation in this area is converging and is less often of mandatory application, at least in international arbitration. As a result, most national laws now only require compliance with a few fundamental principles.

§ 2. - Criteria for Determining the Law Applicable to the Arbitral Procedure

1199. - To the extent that they consider it appropriate, the parties (A) and, in the absence of a choice by the parties, the arbitrators (B) are free to determine the rules of law governing the arbitral procedure.

A. - Choice Made by the Parties

1200. - Subject only to the mandatory provisions of laws liable to conflict with the procedural law when an award is reviewed by the courts,[65] all modern arbitration legislation endorses the principle that the parties are free to choose the law or rules of law governing the arbitral procedure. That principle has long been recognized by the French courts,[66] and it is now found in Article 1494, paragraph I of the French New Code of Civil Procedure, which provides that:

[The arbitration agreement may, directly or by reference to arbitration rules, determine the procedure to be followed in the arbitral proceedings; it may also submit the proceedings to a specified procedural law.]

1201. - This provision is often considered a substantive rule of French international arbitration law which applies to all international arbitrations taking place in France.[67]

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[64] See infra para. 1202.
[65] See supra paras. 1193 et seq.
[66] See, e.g., Cass. req., July 17, 1899, Osipina v. Ribon, Siery, Pt. I, at 393 (1900); D.P., Pt. I, at 225 (1904), and P. Pic's note, 26 J.D.1 1624 (1899). For a more recent illustration, see, for example, CA Paris, Jan. 17, 1992, Guangzhou Ocean Shipping Co. v. Société Générale des Farines, 1992 Rev. Arb. 656, and observations by D. Bureau, CA Paris, June 17, 1997, Eiffage v. Butec, which specifies that, in such a case, the non-compliance by the arbitrators with the provisions of the procedural law thus chosen does not constitute a ground for setting aside or refusing to enforce the award (1997 Rev. Arb. 583, and observations by D. Bureau).
of reference” or a “law of reference.”76 They are also entitled to make no choice until such time as a particular procedural difficulty needs to be resolved. Alternatively, they can confine themselves to stating that they will determine, to the extent necessary, the rules governing the arbitral procedure. In this context, French international arbitration law clearly endorses the theory of a contract with no governing law (“contrat sans loi”), and allows the arbitrators to take “decisions” on a case-by-case basis, rather than lay down “rules” of general application.77

1204. — The extremely liberal position of French law with regard to the discretion available to both the parties and the arbitrators has been the subject of some criticism. Certain commentators have described it as “cosmopolitan liberalism” likely to increase “legal uncertainty in international commerce.”78 We believe that such concerns are unjustified. The absolute freedom conferred on the parties and the arbitrators full autonomy can therefore be considered a substantive rule allowing absolute discretion.79 However, full court control returns in the form of the application of procedural public policy in jurisdictions where actions lie to set aside or resist enforcement of the award.80 The rule which grants the parties and the arbitrators full autonomy can therefore be considered a substantive rule allowing absolute discretion.81 However, full court control returns in the form of the application of procedural public policy in jurisdictions where actions lie to set aside or resist enforcement of the award. The liberal approach adopted in French law is accordingly less radical than it may seem. Only the method has changed. In French and other modern laws, as well as in the more recent international conventions, this new-found liberalism is invariably allied to the requirement of compliance with principles essential to the proper administration of justice, including the principles of equal treatment of the parties, due process and, more generally, international procedural public policy.

Courts with jurisdiction over actions to set aside or resist enforcement of an award generally confine themselves to ensuring that there is compliance with such principles and with their understanding of international procedural public policy.82 International arbitrators, who by definition are independent of any legal system, will take those principles into account as part of their own conception of truly international public policy, and practical considerations based on the efficacy of the award ought not, in our opinion, prevail over the arbitrators’ own sense of the fundamental requirements of procedural justice.83

76 See supra para. 1202.
77 On these notions, see especially PIERRE MAYER, LA DISTINCTION ENTRE REGLES ET DECISIONS ET LE DROIT INTERNATIONAL PRIVE (1973).
78 See Bellet and Mezger, supra note 64, at 621.
79 See supra paras. 1193 et seq.
80 See JEAN-MICHEL JACQUET, PRINCIPE D' AUTONOMIE ET CONTRATS INTERNATIONAUX (1983).
81 See infra para. 1638.
82 On the potential conflict between the concern that the award be effective and the arbitrators’ conception of truly international public policy, see supra para. 1195 and the references cited therein.
83 On the freedom of the parties and the arbitrators to refrain from determining a procedural law, see supra para. 1197.
84 See, e.g., Art. 11(3) of the UNCITRAL Model Law and Art. 176, para. 1 of the Swiss Private International Law Statute.
85 Art. 1493, para. 2 of the New Code of Civil Procedure. See supra paras. 832 et seq.
86 On this issue, see supra para. 839 and, on the situation in other legal systems, see supra para. 916.
87 See E. Loquin, note following Cass. 1e civ., Mar. 18, 1980, Compagnie d'Armement Maritime, supra note 5.
refuse to hear actions against awards made in France in an international arbitration for which no procedural law had been chosen.\(^6\) Happily, the 1981 reform of French international arbitration law now dissociates these issues and ensures that the choice of a procedural law will have no impact on actions to set aside or enforce the award, which now depend exclusively on the location of the seat of the arbitration.\(^4\) Similarly, the reform of English arbitration law in 1996 reversed the previous case law of the House of Lords which had held the jurisdiction of the English courts to hear an action to set aside to be dependent upon the choice of English law as that governing the arbitral procedure.\(^6\) German law has evolved in a similar fashion. Prior to the December 1997 reform, the nationality of the award and, as a result, jurisdiction over actions to set aside were dependent on the law governing the arbitral procedure.\(^6\) This has also been changed by Article 1025, paragraph 1 of the ZPO, which provides that the new statute shall apply where the seat of the arbitration is in Germany.\(^6\)

1208. — The New York Convention, which governs the recognition and enforcement of “foreign awards,” also frames the issue in terms of the “nationality of the award,” raising a question as to whether that nationality depends solely on the seat of the arbitration, or whether it can also result from the choice of a procedural law. By stating that it applies not only to awards made in the territory of countries other than that where recognition and enforcement are sought, but also to “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought” (Art. I(1), in fine), the Convention provides no uniform answer to this question. Legal systems where, for the purpose of determining the jurisdiction of the courts to hear actions to set aside, the “nationality of the award” depends on the choice of a procedural law should logically adopt the same approach in applying the New York Convention.\(^7\) Prior to the 1981 reform, the French courts took that view,\(^8\) which was rightly criticized.\(^9\) By opting for the criterion of the seat of the arbitration, the 1981 reform definitively resolved the question. Similarly, prior to the December 1997 reform, German law based the nationality of the award for the purposes of the application of the New York Convention on the choice of procedural law, but that approach was reversed by the new arbitration statute.


\(^{6}\) See infra para. 1593.


\(^{6}\) See Article 2 of the Law Concerning the Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards v. March 15, 1961 (BGBl.II S. 121). See also J. Van Compemolle, L'arbitrage dans les relations commerciales internationales; questions de procédure, 1989 REV. DR. INT. DR. COMP. 101


\(^{7}\) See the references cited supra para. 1207.

\(^{8}\) See CA Paris, Feb. 21, 1980, Gösecken, supra note 8.

\(^{9}\) See P. Foucault, note following CA Paris, Feb. 21, 1980, Gösecken, supra note 8, at 672 et seq.; VAN DEN BERG, supra note 32, at 20 et seq.