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On

International Commercial Arbitration

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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.[6] 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.[7]

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:

> [t]he 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.[8]

1170. — 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 and the arbitral tribunal to determine, if need be, the law applicable to the arbitral procedure (Chapter I), and to decide how the arbitration is to be conducted (Chapter II), a process which culminates in the making of the award (Chapter IV).

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[6] *See, e.g.*, Christine Lécuyer-Thieffry and Patrick Thieffry, *L'évolution du cadre législatif de l'arbitrage international dans les années 1980*, 118 J.D.I. 947, 954 (1991); Sigvard Jarvin, *To What Extent Are Procedural Decisions of Arbitrators Subject to Court Review?*, *in* ICCA CONGRESS SERIES No. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 366 (A.J. van den Berg ed., 1999), and for a French version, 1998 REV. ARB. 611.

[7] *See* Secs. 1(c), 24, 42 *et seq.* and 66 *et seq.* of the 1996 Arbitration Act.

[8] European Court of Human Rights, Stran Greek Refineries and Stratis Andreadis v. Greece, Dec. 9, 1994, Series A, No. 301-B; for the French version, see 1996 REV. ARB. 283, and the commentary by Ali Bencheneb, *La contrariété à la Convention européenne des droits de l'homme d'une loi anéantissant une sentence arbitrale*, *id.* at 181; 122 J.D.I. 796 (1995), and observations by P. Tavernier.

CHAPTER I
THE LAW GOVERNING THE PROCEDURE

1171. — One often 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.[1] They may also apply transnational rules derived from an analysis of comparative law or arbitral case law.[2] 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.[3] 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

1172. — 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).

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[1] On these rules, see *supra* paras. 321 *et seq.*

[2] *See infra* para. 1203.

[3] *See infra* para. 1203.

§ 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[4] and, in France, it has not been contested since.[5] 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.[6]

Arbitral case law also recognizes that there is not necessarily a link between the law governing the merits and the law governing the procedure.[7]

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.[8] This argument is unconvincing, because the grounds on which the principle of the autonomy of the arbitration agreement[9] 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

[4] CA Paris, June 18, 1974, O.C.P.C. v. Wilhelm Diefenbacher K.G., and O.C.P.C. v. Diefenbacher, 1975 REV. ARB. 179, and J. Robert's note.

[5] *See, e.g.*, Cass. 1e civ., Mar. 18, 1980, Compagnie d'Armement Maritime (CAM) v. Compagnie Tunisienne de Navigation (COTUNAV), 1980 Bull. Civ. I, No. 87; 1980 REV. ARB. 476, and E. Mezger's note; 107 J.D.I. 874 (1980), and E. Loquin's note; Cass. 1e civ., May 10, 1988, Wasteels v. Ampafrance, 1989 REV. ARB. 51, and J.-L. Goutal's note.

[6] See, for example, on Swiss law, PIERRE LALIVE, JEAN-FRANÇOIS POUDRET, CLAUDE REYMOND, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 351 (1989). On the issue, see also YVES DERAINS AND ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 208 *et seq.* (1998).

[7] See, for example, the August 23, 1958 award by Messrs. Sauser-Hall, referee, Hassan and Habachy, arbitrators, in Saudi Arabia v. Arabian American Oil Co. (ARAMCO), 27 INT'L L. REP. 117 (1963); for a French translation, see 1963 REV. CRIT. DIP 272. *See also* Henri Batiffol, *La sentence Aramco et le droit international privé*, 1964 REV. CRIT. DIP 647; the May 26, 1965 Ruling of the Bulgarian Chamber of Commerce and Industry in Case No. 52/65, 1 Y.B. COM. ARB. 123 (1976); ICC Award No. 5029 (1986), by Mr. Malmberg, French contractor v. Egyptian employer, XII Y.B. COM. ARB. 113 (1987).

[8] *See, e.g.*, Frédéric-Edouard Klein, *Du caractère autonome de la clause compromissoire, notamment en matière d'arbitrage international (Dissociation de la nullité de cette clause de celle du contrat principal)*, 1961 REV. CRIT. DIP 499, 500; AHMED BUZGHAIA, LE PRINCIPE DE L'AUTONOMIE DE LA CLAUSE D'ARBITRAGE – ESSAI D'INTERPRÉTATION DE LA JURISPRUDENCE FRANÇAISE (Thesis, University of Nice (France), 1980); *see also* CA Paris, Feb. 21, 1980, General National Maritime Transport Co. v. Götaverken Arendal A.B., 107 J.D.I. 660 (1980), and P. Fouchard's note, especially at 671; 1980 REV. ARB. 524, and F.C. Jeantet's note; Dalloz, Jur. 568 (1980), and J. Robert's note; 1980 REV. CRIT. DIP 763, and E. Mezger's note; JCP, Ed. G., Pt. II, No. 19,512 (1981), and P. Level's note; for an English translation, see VI Y.B. COM. ARB. 221 (1981); 20 I.L.M. 883 (1981), with an introductory note by F.C. Jeantet.

[9] *See supra* paras. 388 *et seq.*

procedure will be the same as that governing the arbitration agreement, which is not necessarily the case.[10]

1176. — It has also been pointed out that to assimilate the law governing the arbitral procedure with that governing the merits would be to unduly favor the contractual element of arbitration over its judicial element. As arbitrators administer justice, it is appropriate to determine the rules governing the arbitral procedure using specific connecting factors.[11]

1177. — Another more pragmatic view is that the considerations likely to guide the parties or the arbitrators in choosing the applicable law are not necessarily the same in the case of the substance of the contract and the arbitral procedure.[12] This is the more persuasive argument. To take just one example, the parties may wish to adopt Anglo-American style procedure, with discovery and examination of witnesses, while having the merits of any dispute governed by a law which they consider to be more suitable in view of the nature of the contract or the circumstances of the case. Arbitrators may share the same concerns, and are therefore in no way required to reason in the same way when determining the law governing the arbitral procedure and that governing the merits.

§ 2. – The Procedural Law and the Law of the Seat

1178. — In the past, whenever the parties had indicated no choice of procedural law, it was not uncommon for the arbitral procedure to be governed by the law of the seat of the arbitration. It is widely accepted today that the seat of the arbitration, often chosen for reasons of convenience or because of the neutrality of the country in question,[13] does not necessarily cause the procedure to be governed by the law of that jurisdiction. As the choice of a seat by the parties, the arbitral institution or the arbitrators themselves is often made on grounds entirely unrelated to the arbitral procedure, that choice will not automatically have an impact upon the conduct of the arbitral proceedings. This approach is endorsed by a

[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. 1e civ., Mar. 18, 1980, *Compagnie d'Armement Maritime*, *supra* note 5, at 880.

[12] *See* J. Robert, note following CA Paris, June 18, 1974, *O.C.P.C.*, *supra* note 4, at 189; Loquin, *supra* note 11, at 880.

[13] On this issue, see especially Yves Derains, *Le choix du lieu de l'arbitrage/The Choice of the Place of Arbitration*, 1986 INT'L BUS. L.J. 109. *See also* THE PLACE OF ARBITRATION (M. Storme and F. de Ly eds., 1992).

majority of authors,[14] and is also evident in the development of national legislation (A), international conventions (B), arbitration rules (C) and arbitral case law (D).

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.[15]

The same position was also widely followed in other legal systems, including the 1929 Swedish Arbitration Act,[16] and the 1969 Swiss *Concordat*, which contains numerous mandatory provisions applying to all arbitrations held in Switzerland.[17] The same thinking inspired the resolution adopted in Siena in 1952 by the Institute of International Law.[18] 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.[19] The Netherlands[20] and Portuguese[21] arbitration statutes

[14] *See, e.g.*, Philippe Fouchard, *L'arbitrage international en France après le décret du 12 mai 1981*, 109 J.D.I. 374, ¶ 25 at 388 (1982); Bernardette Demeulenaere, *The place of arbitration and the applicable procedural law: The case of Belgium*, *in* THE PLACE OF ARBITRATION 67 (M. Storme and F. de Ly eds., 1992); Gabrielle Kaufmann-Kohler, *Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration*, *in* ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 336 (A.J. van den Berg ed., 1999).

[15] *See, e.g.*, Cass. req., Dec. 8, 1914, Salles v. Hale, D.P., Pt. I, at 194 (1916); 1914 REV. DR. INT. PR. ET DR. PÉN. INT. 433. For an analysis of this case law, see PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL ¶¶ 504 *et seq.* (1965).

[16] For a commentary, see THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION IN SWEDEN 45 (2d. ed. 1984). No similar provision is found in the 1999 Swedish Arbitration Act which replaced the 1929 Act as of April 1, 1999 although, on the law applicable to the arbitration agreement, see Section 48 of the Act.

[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.*

[20] Art. 1036 of the Code of Civil Procedure.

[21] Art. 15 of Law No. 31/86 of August 29, 1986 on Voluntary Arbitration; *see* Dário Moura 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.

of 1986, the Swiss Private International Law Statute of 1987,[22] the Algerian legislative decree of 1993[23] and the Egyptian[24] and Italian[25] arbitration statutes of 1994 have taken a similar approach. English law long attached important consequences to the choice of the seat, which even prevailed over an apparently clear choice of procedural law by the parties.[26] The 1996 Arbitration Act, however, now recognizes the freedom of the parties (and the arbitrators, in the absence of a choice by the parties) to choose the law applicable to the arbitral procedure, subject to a limited number of mandatory provisions (Sec. 4). The UNCITRAL Model Law of 1985 likewise opted for a considerably reduced role of the seat in determining the law applicable to procedure. Under the heading "Determination of rules of procedure," it provides in Article 19, paragraph 1 that "[s]ubject to the provisions of this Law," which in fact means subject to those provisions of the Model Law considered to be mandatory, "the parties are free to agree on the procedure to be followed by the arbitral tribunal." The article then specifies that "[f]ailing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."[27]

1181. — The changing position in national legislation is often summarized as being that, unlike a national court, the arbitrator "has no forum."[28] It would be, however, equally true

[22] Art. 182, para. 2; for a commentary, see LALIVE, POUDRET, REYMOND, *supra* note 6, at 351; ANDREAS BUCHER AND PIERRE-YVES TSCHANZ, 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 J. INT'L ARB. 9, 47 (June 1988).

[23] Art. 458 bis 6 of the Algerian Code of Civil Procedure (Legislative Decree No. 93-09 of April 25, 1993); *see* Mohand Issad, *Le décret législatif algérien du 25 avril 1993 relatif à l'arbitrage international*, 1993 REV. ARB. 377; Mohammed Bedjaoui and Ali Mebroukine, *Le nouveau droit de l'arbitrage international en Algérie*, 120 J.D.I. 873 (1993).

[24] Art. 25 of Law No. 27 for 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters; *see* Bernard Fillion-Dufouleur and Philippe Leboulanger, *Le nouveau droit égyptien de l'arbitrage*, 1994 REV. ARB. 665, 676.

[25] Art. 816 of the Code of Civil Procedure; *see* Piero Bernardini, *L'arbitrage en Italie après la récente réforme*, 1994 REV. ARB. 479, 490.

[26] Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48; XIX Y.B. COM. ARB. 235 (1994) (High Ct., Q.B. (Com. Ct.) 1992).

[27] Art. 19, para. 2. For a commentary, see Klaus Lionnet, *Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified? The Answer of the Uncitral Model Law*, 8 J. 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 Article 1042 of the ZPO. On the 1999 Swedish Arbitration Act, see *supra* note 16.

[28] *See, e.g.*, Berthold Goldman, *La volonté des parties et le rôle de l'arbitre dans l'arbitrage international*, 1981 REV. ARB. 469, 471; Eric Loquin, *Les pouvoirs des arbitres internationaux à la lumière de l'évolution récente du droit de l'arbitrage international*, 110 J.D.I. 293 (1983), especially at 298 *et seq.*

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,[30] provides in its Article 2 that:

> [t]he 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,[31] provides that the recognition or enforcement of an award may be refused or suspended

> [i]f 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.[32] Article V, paragraph 1(d) enables contracting states to refuse recognition or enforcement of an award where

[29] On this issue, see Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. – FOREIGN INV. L.J. 208 (1995), and, for a French version, *Trente ans de Lex Mercatoria – Pour une application sélective de la méthode des principes généraux du droit*, 122 J.D.I. 5 (1995).

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

[31] 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.

[32] *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 325–30 (1981).

> the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

This approach is unsatisfactory. Article V, paragraph 1(e) of the Convention already allows a court to refuse enforcement of an award set aside in the country of the seat and, under Article VI, a court can stay enforcement proceedings if an action to set aside is pending in the country of the seat. Where the breach of the procedural rules of the seat is sufficiently serious, it is likely to give rise to an action to set aside before the courts of that jurisdiction, which may defeat the enforcement procedure by virtue of Articles V, paragraph 1(e), and VI. Conversely, if the breach of a procedural rule of the "arbitral forum" did not open up the possibility of an action before the courts of that "forum" to set aside the award, it would be inappropriate for such a breach to constitute a ground on which to refuse enforcement elsewhere.

For a party seeking to prevent enforcement of the award, Article V, paragraph 1(d), does have the advantage of dispensing with the need to bring an action before the courts of the seat for the breach of the procedural rules of the seat to produce effects in other legal systems. However, that is precisely what is wrong with the approach adopted in the Convention. If the breach of a procedural rule of the "arbitral forum" can form the basis of an action before the local courts, and if such an action has not been commenced, it is going too far to allow other legal systems to examine that breach without requiring the party relying on it to bring an action before the courts of the country whose procedural rules have been violated. Those courts are, after all, best positioned to hear such an action. If, on the other hand, the laws of the jurisdiction where recognition or enforcement is sought do contain the same requirement, the award could be rejected simply by application of Article V, paragraph 2, on the basis of a breach of local public policy, and the issue of compliance with the rules of the state where the seat is located would not arise.

In modern arbitration law, the existence of legislation which allows parties to exclude any action to set aside the award at the place of the seat[33] highlights the paradox in the concern of the authors of the New York Convention that compliance with the procedural rules of the seat of the arbitration be policed by the courts of other jurisdictions where enforcement is sought. For example, where an award is made in Belgium, Sweden or Switzerland, the parties are entitled to exclude all actions to set aside the award before the local courts, unless at least one of the parties to the dispute has Belgian, Swedish or Swiss nationality or residence. If the parties have not determined the law governing the arbitral procedure, either directly or by reference to arbitration rules, the New York Convention allows the court hearing a request for enforcement of the award to refuse such enforcement on the grounds of a breach of the procedural law of the situs. The paradox is evident in that the legal system of the forum has specifically declared that it is not willing to impose its rules on the conduct of the arbitration.

Under such circumstances, a court hearing the enforcement proceedings should exercise its discretion under Article V of the New York Convention so as to avoid refusing to give

[33] *See infra* para. 1594.

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 1(d) of the New York Convention.

1184. — The 1961 European Convention on International Commercial Arbitration 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]

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[34] For a commentary, *see* Lazare Kopelmanas, *La place de la Convention européenne sur l'arbitrage commercial international du 21 avril 1961 dans l'évolution du droit international de l'arbitrage*, 1961 AFDI 331; FOUCHARD, *supra* note 15, ¶¶ 513 *et seq.*; Dominique T. Hascher, *European Convention on International Commercial Arbitration of 1961 - Commentary*, XX Y.B. COM. ARB. 1003, ¶ 29 at 1019 (1995), and the cases cited therein.

[35] Art. 44. On this issue, see E. Gaillard, note following Cass. 1e civ., Nov. 18, 1986, Atlantic Triton v. République populaire révolutionnaire de Guinée, 114 J.D.I. 125, 129 (1987).

[36] *See* Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. 136, Year 1972, Part II, at 331; Emmanuel Gaillard, *Centre International pour le Règlement des Différends Relatifs aux Investissements (C.I.R.D.I) – Chronique des sentences arbitrales*, 113 J.D.I. 197, 198 (1986).

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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[37] Goldman, *supra* note 28, at 476. On this issue, see also Karl-Heinz Böckstiegel, *The Legal Rules Applicable in International Commercial Arbitration Involving States or State-controlled Enterprises*, *in* INTERNATIONAL ARBITRATION – 60 YEARS OF ICC ARBITRATION – A LOOK AT THE FUTURE 117 (ICC Publication No. 412, 1984). For a critical view of this evolution, see Lionnet, *supra* note 27.

Arbitration Rules[38] and the Swiss Private International Law Statute.[39] 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."[40]

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

> [s]ubject 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,[41] and it influenced the authors of the 1985 UNCITRAL Model Law.[42] 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[43] 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.

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[38] *See infra* para. 1188.

[39] Art. 182, para. 3. *See infra* para. 1194.

[40] On this issue, see DERAINS AND SCHWARTZ, *supra* note 6, at 208 *et seq.*

[41] On this issue, see Karl-Heinz Böckstiegel, *Die UNCITRAL-Verfahrensordnung für Wirtschafts-schiedsgerichtsbarkeit und das anwendbare nationale Recht*, 28 RIW 706 (1982).

[42] *See supra* para. 1180.

[43] *See* F.A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION – LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed., 1967), *reprinted in* 2 ARB. INT'L 241 (1986). *See also supra* para. 1180.

1191. — For many years, where the parties had not determined the arbitral procedure, arbitrators would generally apply the law of the seat of the arbitration. This was quite natural in ICC arbitration, as it was the position taken in the ICC Rules.[44] However, it was of more significance in *ad hoc* cases. It was widely accepted that "in default of agreement by the parties, the arbitration is submitted to the judicial sovereignty of the seat of the arbitration at the place where the case is heard," as observed in the 1963 award in the *Sapphire v. NIOC* case.[45]

1192. — Another trend has emerged, however, which rejects the idea of having the law of the seat necessarily govern the arbitral procedure. This could be clearly seen in ICC arbitration even prior to the amendment of the ICC Rules in 1975.[46] For example, in a 1971 award made in an arbitration in Geneva involving an Indian party and a Pakistani party, it was held that "by virtue of the ICC Rules . . . , the arbitrator has a broad discretion in procedural matters." The tribunal added that limits to that discretion exist because "the arbitrator cannot avoid his duty to comply with the fundamental general principles of procedure," and not because of the requirements of a particular national law.[47] The same tendency to go beyond applying a particular national law, be it the law of the seat or any other, can be seen in *ad hoc* arbitration. The 1958 award in the *Saudi Arabia v. ARAMCO* arbitration is a good illustration. The case concerned a state contract, and it was held that the procedure should be governed solely by the provisions of public international law, and not by those of the Canton of Geneva, where the arbitration took place. The grounds given were that an arbitration involving a sovereign state could not be governed by the law of another country.[48] Similarly, at a preliminary meeting held on June 9, 1975 in the *LIAMCO v. Libya* case, the arbitrator decided that:

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[44] *See, e.g.*, ICC Award No. 2272 (1975), Italian claimant A. v. Belgian respondent B., II Y.B. COM. ARB. 151 (1977).

[45] Sapphire International Petroleums Ltd. v. National Iranian Oil Co., 35 INT'L L. REP. 136, 169 (1967); *see also* December 22, 1954 Award by L. Python, The Alsing Trading Co., Ltd. v. Etat Hellénique, 23 INT'L L. REP. 633 (1956) and, for a commentary, Stephen M. Schwebel, *The Alsing Case*, 8 INT'L & COMP. L.Q. 320 (1959); for excerpts of the French original, see 1955 REV. ARB. No. 2, at 27; the October 10, 1973 Award by G. Lagergren in BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic, which held that Danish law would govern the procedure in a case with no link with Denmark other than the location of the seat (53 INT'L L. REP. 297 (1979); V Y.B. COM. ARB. 143, 147 (1980); see excerpts in French reproduced in 1980 REV. ARB. 117; for a commentary, see Brigitte Stern, *Trois arbitrages, un même problème, trois solutions – Les nationalisations pétrolières libyennes devant l'arbitrage international*, *id.* at 3, especially at 8 *et seq.*); Robert B. von Mehren and P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981).

[46] *See supra* para. 1187.

[47] ICC Award No. 1512 (1971), Indian cement company v. Pakistani bank, I Y.B. COM. ARB. 128 (1976); for a French translation, see 101 J.D.I. 905 (1974), and observations by Y. Derains.

[48] Aug. 23, 1958 award, *supra* note 7.

> 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.[49]

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.[50]

These awards reflect the dominant trend now found in international arbitral case law.[51]

§ 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

[49] *See* April 12, 1977 award in Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic, 20 I.L.M. 1 (1981), VI Y.B. COM. ARB. 89, 91 (1981); for a French translation, see 1980 REV. ARB. 132, especially at 147 *et seq.*, and the commentary by Stern, *supra* note 45.

[50] Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 17 I.L.M. 1, ¶ 16 at 9 (1978); 53 INT'L L. REP. 389 (1979); IV Y.B. COM. ARB. 177 (1980); for extracts of the French original text, see 104 J.D.I. 350 (1977), with a commentary by Jean-Flavien Lalive, *Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères (Arbitrage Texaco/Calasiatic c/ Gouvernement Libyen), id.* at 319. *See also* Gérard Cohen Jonathan, *L'arbitrage Texaco-Calasiatic contre Gouvernement Libyen (Sentence au fond du 19 janvier 1977)*, 1977 AFDI 452; François Rigaux, *Des dieux et des héros – Réflexions sur une sentence arbitrale*, 1978 REV. CRIT. DIP 435; Joe Verhoeven, *Droit international des contrats et droit des gens (A propos de la sentence rendue le 19 janvier 1977 en l'affaire California Asiatic Oil Company et Texaco Overseas Oil Company c. Etat libyen)*, REV. BELGE DR. INT. 1978–1979, at 209; Stern *supra* note 45.

[51] *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.I. 989 (1979), and observations by Y. Derains); ICC Award No. 5103 (1988): "[a]s regards the law applicable to the arbitral procedure, this was subject, as set forth in the terms of reference, to the Rules of the ICC Court of Arbitration and to the provisions of the terms of reference. Where an issue was not covered by such rules and provisions, according to Article 11 of the Rules and Article 1494, paragraph 2 of the French New Code of Civil Procedure, to which the parties expressly referred in the terms of reference, the arbitral tribunal itself determined the rules to be followed and took the measures necessary for the conduct of the case and the assessment of the evidence" (Three European companies v. Four Tunisian companies, 115 J.D.I. 1206 (1988), and observations by G. Aguilar Alvarez); ICC Award No. 7489 (1993), ICC BULLETIN, Vol. 8, No. 2, at 68 (1997). However, references to the law of the place of the arbitration have not altogether disappeared in certain awards. *See, e.g.*, ICC Award No. 5029 (1986), *supra* note 7; the November 3, 1977 *ad hoc* Award, Mr. Gastambide presiding, Mechema Ltd. v. S.A. Mines, Minerais et Métaux, 1980 REV. ARB. 560, and J. Schapira's note; for an English translation, see VII Y.B. COM. ARB. 77 (1982), which provided that "it is generally accepted that, failing an agreement of the parties, the arbitral procedure is governed by the law of the country in which the arbitration takes place;" ICC Award No. 7184 (Paris, 1994), ICC BULLETIN, Vol. 8, No. 2, at 63 (1997). Compare with the February 5 and May 31, 1988 *ad hoc* Awards by J. Stevenson, president, I. Brownlie and B. Cremades, arbitrators, in Wintershall A.G. v. Government of Qatar, which applied the mandatory provisions of Dutch law (the Netherlands being the seat of the arbitration) as required by that law (28 I.L.M. 795, 801 (1989); XV Y.B. COM. ARB. 30 (1990); *see infra* para. 1194).

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.[52] 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 "[s]ubject 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)). 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

[52] *See* MARCEL HUYS, GUY KEUTGEN, L'ARBITRAGE EN DROIT BELGE ET INTERNATIONAL ¶¶ 137 *et seq.* (1981); Marcel Huys, *Belgium*, *in* INTERNATIONAL CHAMBER OF COMMERCE, ARBITRATION LAW IN EUROPE 31 (ICC Publication No. 353, 1981).

principle of due process among the grounds for setting an award aside or refusing its enforcement, while Article 1502 5° 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. 4695, Parties from Brazil, Panama and U.S.A. v. Party from Brazil, XI Y.B. COM. ARB. 149 (1986). On awards recognized in one jurisdiction but set aside in another, see *infra* para. 1595.

§ 1.– Is It Necessary or Appropriate to Determine the Procedural Law in Advance?

1197. — In their arbitration agreement, or once the dispute has arisen, the parties are free to choose or refrain from choosing the law governing the arbitral procedure. More significantly, in the absence of a choice by the parties, the arbitrators enjoy the same freedom. In France, the arbitrators' freedom to determine the procedure "to the extent that is necessary" is enshrined in Article 1494, paragraph 2 of the New Code of Civil Procedure. French arbitration law, in keeping with its liberal tradition, thus does not oblige the arbitrators to determine the law governing the arbitral procedure at the outset of the proceedings, although the option of doing so does remain open to them. The arbitrators will only be obliged to determine the procedural law in advance where the parties have expressly required them to do so.[58] If the parties have given no such instructions, the arbitrators must simply decide whether it is an appropriate course of action.[59] The Swiss courts have taken the same approach.[60]

1198. — There is still a considerable divergence of opinion as to whether it is appropriate for arbitrators to determine in advance the law applicable to all procedural issues which may arise during the arbitration. As the parties usually do not specify a procedural law in their arbitration agreement, it is generally up to the arbitrators to determine the rules governing the procedure, or to obtain an agreement between the parties on the matter once the dispute has arisen. However, the arbitrators themselves may disagree as to how the proceedings should be conducted. Some arbitrators prefer to choose the procedural law—or rules of law—at the outset of the arbitration, when the parties will be unaware of the particular difficulties which may arise and therefore more likely to reach an agreement as they are not in dispute on any specific issue. This approach is considered to enhance the predictability of the arbitration.

Other arbitrators deem it wiser not to resolve questions of procedure until they know exactly what is at stake, and are reluctant to bind themselves in advance by choosing a given law which may prove ill-suited to resolve subsequent specific difficulties. For example, the suitability of hearing witnesses (based on Anglo-American methods of direct and cross-examination), or the parties themselves (as traditionally occurs in Switzerland), can best be judged after the arbitrators have heard the parties' respective arguments and have acquainted themselves with the evidence already submitted. The fact that the arbitrators are not obliged

[58] *See* Goldman, *supra* note 28, at 475.

[59] On the freedom of the arbitrators and its limits in this area, see Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, *in* ICCA CONGRESS SERIES NO. 7, PLANNING EFFICIENT ARBITRATION PROCEEDINGS/THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 24 (A.J. van den Berg ed., 1996) and, for a French version, *Le pouvoir des arbitres de régler la procédure – Une analyse comparative des systèmes de civil law et de common law*, 1995 REV. ARB. 163; Patrice Level, *Brèves réflexions sur l'office de l'arbitre*, *in* NOUVEAUX JUGES, NOUVEAUX POUVOIRS – MÉLANGES EN L'HONNEUR DE ROGER PERROT 259 (1996).

[60] *See* Swiss Fed. Trib., Aug. 17, 1994, Türkiye Elektrik Kurumu v. Osuuskunta METEX Andelslag, 1995 BULL. ASA 198, and F.R. Ehrat's note; 1996 REV. SUISSE DR. INT. ET DR. EUR. 539, and observations by F. Knoepfler.

to resolve each difficulty by reference to the same procedural law[61] 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,[62] 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,[63] and it is now found in Article 1494, paragraph 1 of the French New Code of Civil Procedure, which provides that:

> [t]he 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.[64]

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[61] *See infra* para. 1202.

[62] *See supra* paras. 1193 *et seq.*

[63] *See, e.g.*, Cass. req., July 17, 1899, Ospina v. Ribon, Sirey, Pt. I, at 393 (1900); D.P., Pt. I, at 225 (1904), and P. Pic's note; 26 J.D.I. 1024 (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).

[64] *See, e.g.*, Fouchard, *supra* note 14, ¶ 25; Pierre Bellet and Ernst Mezger, *L'arbitrage international dans le nouveau code de procédure civile*, 1981 REV. CRIT. DIP 611.

1202. — Article 1494, paragraph 1 is particularly important for the wide-ranging freedom it confers on the parties. It treats the idea of submitting the procedure to a particular law as simply one of a number of options. The parties can also choose to marry principles drawn from several national laws, selecting and combining them however they see fit. They may also submit procedural issues to rules of law other than those of a particular legal system, such as procedural principles shared by several legal systems, general procedural principles common to most legal systems, or *lex mercatoria*.[65] The parties are also entitled to resolve all procedural issues themselves, in their arbitration agreement. French international arbitration law thus gives them total freedom to "invent their procedure."[66] In practice, the parties usually confine themselves to referring to the provisions of a set of arbitration rules,[67] as suggested by Article 1494 of the New Code of Civil Procedure. That reference is sometimes implicit: for example, it is generally implicit in institutional arbitration that the rules of a chosen institution will govern the arbitration.[68] The reference to arbitration rules will need to be explicit where the parties want to apply *ad hoc* arbitration rules such as the UNCITRAL Rules. Armed with the freedom conferred on them by French law, the parties can even allow the arbitrators simply to seek guidance from a particular law or set of rules, without having to apply its provisions to the letter. This approach is also found in Swiss law, and the expressions "rules of reference" or "law of reference" are used in such circumstances.[69]

B. - CHOICE MADE BY THE ARBITRATORS

1203. — French law is equally liberal in the absence of a choice of procedural law made by the parties. Article 1494, paragraph 2 of the French New Code of Civil Procedure provides only that, in the absence of any indication as to the parties' intentions, "the arbitrator shall determine the procedure, if need be, either directly or by reference to a law or to arbitration rules." The arbitrators are thus given the same freedom of choice as the parties. Like the parties, they may choose a particular national law, combine several national laws, refer to supra-national principles or to a set of arbitration rules, or simply select "rules

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[65] Among those principles, it was held, for example, that the parties "are obliged to co-operate in the production of evidence, particularly in arbitration" (ICC Award No. 1434 (1975), Multinational group A v. State B, 103 J.D.I. 978 (1976), and observations by Y. Derains); ICC Award No. 3410, unpublished, cited by Sigvard Jarvin, *The sources and limits of the arbitrator's powers*, 2 ARB. INT'L 140, 151 (1986). On an agreement regarding the duty not to aggravate existing disputes, see the December 21, 1994 Procedural Order in ICC Case No. 8238, 123 J.D.I. 1063 (1996), and observations by D. Hascher. Similarly, the requirement that a party have standing has been presented as a general procedural principle (*see* ICC Award No. 7155 (1993), Norwegian company v. Three French companies, 123 J.D.I. 1037 (1996), and observations by J.-J. Arnaldez). For a general presentation of these principles, see MATTHIEU DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL ¶¶ 714 *et seq.* (2d ed. 1990).

[66] Goldman, *supra* note 28, at 474.

[67] See the observations by G. Muller, sole arbitrator, in ICC Award No. 5505 (1987), Buyer from Mozambique v. Seller from the Netherlands, XIII Y.B. COM. ARB. 110, 115 (1988).

[68] *See supra* paras. 321 *et seq.*

[69] *See, e.g.*, LALIVE, POUDRET, REYMOND, *supra* note 6, at 352.

of reference" or a "law of reference."[70] 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.[71]

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."[72] We believe that such concerns are unjustified. The absolute freedom conferred on the parties and the arbitrators in determining—or even creating—the arbitral procedure has to be judged in the light of the constraints resulting from the regime covering actions to set aside or resist enforcement of the award.[73] The rule which grants the parties and the arbitrators full autonomy can therefore be considered a substantive rule allowing absolute discretion.[74] 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.[75] 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.[76]

[70] *See supra* para. 1202.

[71] On these notions, see especially PIERRE MAYER, LA DISTINCTION ENTRE RÈGLES ET DÉCISIONS ET LE DROIT INTERNATIONAL PRIVÉ (1973).

[72] *See* Bellet and Mezger, *supra* note 64, at 621.

[73] *See supra* paras. 1193 *et seq.*

[74] *See* JEAN-MICHEL JACQUET, PRINCIPE D'AUTONOMIE ET CONTRATS INTERNATIONAUX (1983).

[75] *See infra* para. 1638.

[76] 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.

§ 3. - The Consequences of the Determination of the Law Governing the Arbitral Procedure

1205. — The consequences of the determination of the law governing the arbitral procedure go beyond simply providing the parties and the arbitrators with a body of rules enabling all procedural issues arising in the course of the arbitration to be resolved.

In some cases, the choice of a procedural law also has an impact on the jurisdiction of the courts which may be involved in constituting the arbitral tribunal and, in some legal systems, reviewing the award. However, these indirect consequences have diminished, without disappearing altogether, in modern arbitration legislation. This is a welcome development, as the law governing the arbitral procedure, where there is one,[77] is a highly artificial means of connecting an arbitration to a legal system.

1206. — In some jurisdictions, access to the courts to obtain assistance in constituting the arbitral tribunal still depends on the choice of procedural law. In most legal systems, that assistance depends solely on the location of the seat of the arbitration.[78] French law gives wider access to its courts, by providing that they will have jurisdiction to resolve difficulties concerning the constitution of the arbitral tribunal not only if the seat is in France, but also, irrespective of the location of the seat, if French law has been chosen to govern the arbitral procedure.[79] It is therefore only where the arbitration agreement has no connection with French law, in that it neither locates the seat in France nor provides that French law will govern the procedure, that the French courts will refuse to assist in the constitution of the arbitral tribunal.[80] Other recent statutes, such as the 1996 English Arbitration Act (Section 2(4)) and the German Arbitration Statute of December 22, 1997 (Art. 1025 ZPO) either require, using general terms, some form of connection with the jurisdiction (as in England), or base the jurisdiction of the courts on the place of business or habitual residence of the parties. Neither statute refers to the law chosen to govern the arbitral procedure.

1207. — An increasingly small number of legal systems connect the procedural law, as well as the seat of the arbitration, to the "nationality of the award," which in turn triggers jurisdiction over actions to set the award aside.

This was the case, as regards actions against awards, in French law prior to the 1981 reform. An award made in an arbitration governed by French law could thus be considered a "French" award, and as such it would be governed by the rules applicable to actions to set aside or resist enforcement of awards made in France.[81] Conversely, the connection between the choice of a procedural law and the "nationality" of the award led the French courts to

[77] On the freedom of the parties and the arbitrators to refrain from determining a procedural law, see *supra* para. 1197.

[78] *See, e.g.*, Art. 11(3) of the UNCITRAL Model Law and Art. 176, para. 1 of the Swiss Private International Law Statute.

[79] Art. 1493, para. 2 of the New Code of Civil Procedure. *See supra* paras. 832 *et seq.*

[80] On this issue, see *supra* para. 839 and, on the situation in other legal systems, see *supra* para. 916.

[81] *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.[82] 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.[83] 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.[84] 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.[85] 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.[86]

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

[82] *See* CA Paris, Feb. 21, 1980, *Götaverken*, *supra* note 8; CA Paris, Dec. 9, 1980, Aksa v. Norsolor, 1981 REV. ARB. 306, and F.C. Jeantet's note; 1981 REV. CRIT. DIP 545, and E. Mezger's note; for an English translation, see 20 I.L.M. 887 (1981).

[83] *See infra* para. 1593.

[84] *See* Hiscox v. Outhwaite, (No. 1) [1992] 1 A.C. 562; [1991] 3 All E.R. 641; [1991] 3 W.L.R. 297; [1991] 2 Lloyd's Rep. 435; XVII Y.B. COM. ARB. 599 (1992) (H.L. 1991); see also the disapproving commentary by Claude Reymond, *Where is an arbitral award made?*, 108 L.Q. REV. 1 (1992); the disapproving observations by Albert Jan van den Berg, *New York Convention of 1958 – Consolidated Commentary – Cases Reported in Volumes XVII (1992) – XIX (1994)*, XIX Y.B. COM. ARB. 475, 483 (1994); Albert Jan van den Berg, *New York Arbitration Convention 1958: Where is an arbitral award "made"? Case comment House of Lords, 24 July 1991, Hiscox v. Outhwaite*, *in* THE PLACE OF ARBITRATION 113 (M. Storme and F. de Ly eds., 1992); Michael E. Schneider, *L'arrrêt de la Chambre des Lords dans l'affaire Hiscox v. Outhwaite*, 1991 BULL. ASA 279. *See also infra* para. 1593.

[85] *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 Compernolle, *L'arbitrage dans les relations commerciales internationales: questions de procédure*, 1989 REV. DR. INT. DR. COMP. 101.

[86] *See* Peter Schlosser, *La nouvelle législation allemande sur l'arbitrage*, 1998 REV. ARB. 291; Klaus Peter Berger, *Germany Adopts the UNCITRAL Model Law*, 1 INT'L ARB. L. REV. 121 (1998); Karl-Heinz Böckstiegel, *An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law*, 14 ARB. INT'L 19, 23 (1998).

the same approach in applying the New York Convention.[87] Prior to the 1981 reform, the French courts took that view,[88] which was rightly criticized.[89] 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.

[87] See the references cited *supra* para. 1207.

[88] *See* CA Paris, Feb. 21, 1980, *Götaverken*, *supra* note 8.

[89] *See* P. Fouchard, note following CA Paris, Feb. 21, 1980, *Götaverken*, *supra* note 8, at 672 *et seq.*; VAN DEN BERG, *supra* note 32, at 20 *et seq*