MASTERS DISSERTATION

DISSERTATION

Discretion of arbitrators and application of mandatory rules: is the doctrine of party autonomy in international commercial arbitration concerning the choice of the substantive law as provided by the U.N.C.I.T.R.A.L. Arbitration Rules, the I.C.S.I.D. Convention and the I.C.C. Arbitration Rules experiencing a crisis?

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TABLE OF SOURCES

A. Legislations.

1.1 **United Nations.**

- Charter of the United Nations.
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- United Nations Commission on International Trade Law Model Law.

1.2 **International Centre for Settlement of Investment Disputes.**

- Convention on the settlement of investment disputes between States and Nationals of other States.

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- *Amco v. Indonesia*, Award, 20 November 1984.
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- *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980.
- *Genin v. Estonia*, Award, 25 June 2001.
- *Kaiser Bauxite v. Jamaica*, decision on jurisdiction 6 July 1975.
- *Klöckner v. Cameroon*, Decision on annulment, 3 May 1985.
- *MCI v. Ecuador*, Award, 31 July 2007.
- *SOABI v. Senegal*, Award, 25 February 1988.
- *World Duty Free v. Kenya*, Award, 4th October 2006.

2.3 **International Chamber of Commerce.**

- ICC Case No. 2730, Award, 191.
- I.C.C. Case No. 4145.
- I.C.C. Case 6320, Award, 1992.

LIST OF ABBREVIATIONS

Am. Rev. Int'l Arb.	American Review of International Arbitration
Arb. Int'l	Arbitration International
Bus. L. Int'l	Business Law International
Colum. L. Rev.	Columbia Law Review
Contemp. Asia Arb. J.	Contemporary Asia Arbitration Journal
Duke L. J.	Duke Law Journal
Emory Int'l L. Rev.	Emory International Law Review
Finnish Y.B. Int'l L.	Finnish Yearbook of International Law
Int'l & Comp. L.Q.	International & Comparative Law Quarterly
I.C.C.	International Chamber of Commerce
I.C.S.I.D.	International Centre for Settlement of Investment Disputes
J. Int'l Arb.	Journal of International Arbitration
JIL	Journal of International Law
MJIL	Melbourne Journal of International Law
Stockholm Int'l Arb. Rev.	Stockholm International Arbitration Review
Transnat'l Law.	Transnational Lawyer
U.N.C.I.T.R.A.L.	United Nations Commission on International Trade Law
Va. J. Int'l L.	Virginia Journal of International Law

ABSTRACT

The flexibility provided by international arbitration is appealing for parties because of the important autonomy it grants them. Indeed, the latter can decide for a major party of the arbitral proceedings. Parties can benefit from international conventions to have a legal framework. This is what the United Nations Commission on International Trade Law Arbitration Rules, the International Centre for Settlement of Investment Disputes Convention and the International Chamber of Commerce Arbitration Rules provide.

The international conventions all contain the doctrine of party autonomy for the choice of the substantive law. Consequently, parties are free to choose the law they want to the merits of their case. This doctrine aims at giving precedence to the choices of parties. However, the discretionary power of the arbitrators combined with the growing mandatory rules that have to be applied crystallise the threats of parties concerning their autonomy for the choice of the substantive law. The doctrine may be facing a crisis as the extent of autonomy of parties seems to decrease.

The discretion the arbitrators to choose the law applicable to the merits can reduce the autonomy of parties and then decrease the extent of the doctrine. Effectively, the arbitral tribunal has the possibility to choose the substantive law and benefit from elaborate mechanisms to select a law among a wide spectrum of set of rules. Nonetheless, this freedom is subordinated to the absence of choice of parties. Therefore, this discretionary power does not have harmful effect on the doctrine of party autonomy as it intervenes after the choice or absence of choices of parties.

The application of mandatory rules may be another source of concerns for parties. Indeed, these rules tend to protect fundamental value of states or of the international community. The interests of states and of parties are competing: states want the guarantee that their mandatory rules will be applied and parties want to avoid the application of too restrictive mandatory rules.

The doctrine of party autonomy is not facing a crisis as the discretionary power of parties remains broad. Ultimately, international commercial arbitration maintains one link with states: the recognition and enforcement of arbitral awards. Consequently, states can legitimately lobby on the application of their mandatory rules.

"*In practice arbitrators may allow themselves a greater freedom as to rules of substantive law than the courts are inclined to do. The arbitrators will above all be guided by the terms of the international contract and the customs of the international trade. At least this is what parties, as a rule, expect them to do.*"[1] Professor Sanders rightly highlighted the expectations of parties when they have recourse to international commercial arbitration: on one hand, they want to have the benefits of flexible proceedings for the settlement of their dispute and on the other hand, a system of dispute resolution whose characteristics fundamentally differ from the ones of domestic courts. This approach of settling disputes is unequivocally in favour of parties. Indeed, parties have the opportunity to have a justice that fits to their expectations and interests. This flexibility is expressed through the doctrine of party autonomy.

Arbitration is generally defined as: "*A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.*"[2] The word commercial is used "*to refer to transactions carried out by business entities in the course of their ordinary business.*"[3] Then, the overall expression "international commercial arbitration" is meant "*to include an out-of-court resolution of disputes regarding transactions containing elements connected with two or more countries.*"[4]

Although several ways to settle a dispute can be listed, international commercial arbitration is the principal method of dispute settlement between parties, states and investors for disputes related to international trade, investments.[5] This appealing effect can mainly be explained by all the possibilities that are offered to parties. Indeed, arbitration is based on the will of parties. This element represents the cornerstone in international commercial arbitration as parties have the possibility to decide upon the major part of the arbitral proceedings; the autonomy of parties is given priority. Therefore, the extent of powers of the arbitral tribunal is subordinated to the will and choices of parties. As a matter of fact, international arbitration provides for a broad flexibility. This first characteristic calls for a preliminary remark. There is a perpetual interaction between the discretionary powers of the parties and of arbitrators. This interaction reveals a dichotomy between the arbitral tribunal which has, at the end of the

[1] Pieter Sanders, *Trends in the field of international commercial arbitration* (Recueil des Cours, volume 145, 1975), 216
[2] Black's Law Dictionary, 8th ed., p.112
[3] Giuditta Cordero Moss, *International Commercial Arbitration, Party Autonomy and Mandatory Rules* (T. Ashehoug, 1999) 45
[4] *Ibid*. 43
[5] Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (student version, 5th edn, OUP Oxford, 2009) 1

proceedings, the power to render arbitral awards that are binding on the parties but which somehow has to respect the choices of parties and the parties who will eventually have to respect and conform to the award but who own the power to decide on every aspects of the arbitral proceedings at the beginning. This characteristic is indicative of a substantive difference with domestic proceedings where judges have more discretionary power. However, this difference is due to the private nature of arbitration and public nature of domestic proceedings. In international arbitration, the origin of powers the arbitrators is contractual, coming from the arbitration agreement whereas in domestic courts, judges are conferred powers by public authorities. Choices concerning the different aspects of the arbitral proceedings operated by parties will be contained in the arbitration agreement. This agreement is of salient importance as it represents a body of rules which determines the way the proceedings will be conducted. As a consequence, the arbitral tribunal that is acting as the executant of the choices of parties, will have to refer to this agreement to conduct the proceedings in accordance with the parties' expectations. Amongst the information contained, the law applicable to the merits of the dispute may be indicated provided that the parties managed to agree upon an applicable law or decided to use to this right instead of conferring it to the arbitrators.

The United Nations Commission on International Trade Law (hereafter the U.N.C.I.T.R.A.L.) was established in 1966 and is a subsidiary body of the General Assembly of the United Nations. This commission set up its own Arbitration Rules since 1976. The Arbitration Rules are widely used to settle disputes and "*are recognized as a very successful text.*" [6] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereafter I.C.S.I.D. Convention or Washington Convention) is the body of rules attached to the International Centre for Settlement of Investment Disputes. This convention entered into force in 1966 and deals with legal dispute concerning investments. In 2012, 369 cases were registered as using the I.C.S.I.D. rules for arbitral proceedings.[7] Finally, the International Chamber of Commerce Arbitration Rules (hereafter the I.C.C. Arbitration Rules) contain all the provisions for the settlement of disputes through arbitration under the auspices of the International Court of Arbitration created in 1923. In 2012, the I.C.C. received 759 requests for arbitration. [8] Doubtlessly, these information indicate that the three

[6] General Assembly Resolution 65/22 of 6 December 2010, UNCITRAL Arbitration Rules as revised in 2010, A/65/465, recital 4
[7] The ICSID Caseload – statistics (Issue 2013 – 1), 8
[8] The I.C.C. International Court of Arbitration, statistics in 2012, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ accessed 23 July 2013

international conventions are of leading authority in international commercial arbitration and that they represent usual choices – among the other conventions - by parties who have recourse to arbitration to settle their disputes.

These widely used international conventions all contain a similar provision: autonomy for parties concerning the choice of the law applicable to the merits of their case. This autonomy refers to the doctrine of party autonomy. This doctrine which is mainly used in international arbitration is favourable for parties since it gives priority to their interests and expectations. A trend favouring the interests of parties to the detriment of the interests of states has been assessed.[9] Consequently, the influence of states on international commercial arbitration significantly decreased. Yet, does that mean that international arbitration is genuinely released from any national restraints? The answer to that question is tricky. Indeed, if the doctrine of party autonomy allows the parties to a dispute not to apply the mandatory rules[10] of the state where the arbitral proceedings take place, it does not *de facto* mean that they enjoy unlimited discretionary power when designating the substantive law. Mandatory rules of states are the rules that aim at protecting the fundamental values of states. However, these rules are subjective by nature: each states have their own approach of mandatory rules and except the rules belonging to the international public order, these rules differ from state to state. Then, differences appear since some states have a liberal or restrictive approach. That is the reason why parties try not to apply these rules that do not increase their profits. However, arbitrators also have a discretionary power in the choice of the law applicable to the merits. The existence of this freedom leads to wonder to what extent they can use it. A too broad discretion may be a threat to the autonomy of parties. In addition, sovereign states will try to ensure that the application of the rules they consider as mandatory is effective. Therefore, they may be reluctant to allow unlimited discretion to parties. Thus, the autonomy of party seems to be competing with the discretion of the arbitral tribunal and the interests of states. Do these antagonisms represent a threat for the autonomy of parties? Does an arbitral tribunal have the power to disregard the choice of the substantive law made by parties? Does the protection of the mandatory rules of states represent an interference in the proceedings in

[9] Luca G. Radicati Di Brozolo, *Arbitrage commercial international et lois de police, Considérations sur les conflits de juridictions dans le commerce international* (Recueil des Cours, volume 315, 2005), 284

[10] In this study, the meaning used for mandatory rules will be the one used by Marc Blessing, *Impact of the extraterritorial application of mandatory rules of law on international contracts* (Swiss Commercial Law Series, N. P. Vogt volume 9, 1999), 5: "*In the wide sense, these include mandatory rules (i) of an internal or domestic mandatory nature, and (ii) those of a foreign legal order, and (iii) those of an international character, claiming application irrespective of any law chosen or determined as applicable, and (iv) those pertaining to a truly supra-national order.*"

international commercial arbitration? Discretion of arbitrators, limitations imposed by states, is the doctrine of party autonomy in international commercial arbitration concerning the choice of the substantive law as provided by the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules facing a crisis?

Such questions require the analysis of the extent of autonomy conferred to parties by the three international conventions and its consequences (chapter 1), the degree of discretion of the arbitral tribunal as contained in the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules associated with the impact the nature of arbitration can have (chapter 2) and finally that the application of the mandatory rules conceptualise the restrictions of the doctrine of party autonomy (chapter 3).

CHAPTER 1: The complementarity between the concept of party autonomy and international commercial arbitration

"Even when laws have been written down, they ought not always to remain unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars."[11]

Applied to the doctrine of party autonomy, this statement made by Aristotle is full of meaning. Indeed, the flexibility conveyed by this doctrine in international commercial arbitration enables parties, when they choose the substantive law, to avoid the rigidity and to benefit from rules that adapt themselves to their specific needs. Therefore, the arbitral award will be rendered in a way that fits their expectations.

I-Party autonomy as provided in international conventions

The phenomenon of globalization significantly increased international trade relations. Indeed, in the current globalized world, international trade appears as the nerve centre. The corollary of this growing phenomenon is the augmentation of international commercial disputes. However, parties may be more seduced by more flexibility, certainty and confidentiality as provided in international commercial arbitration. That is the reason why, several arbitration regimes have been created and became very popular. Among the existing conventions, three models coming from international institutions are widely used and have a common characteristic: they all contain the doctrine of party autonomy but this autonomy is granted differently according to each convention. These three conventions are the United

[11] Aristotle, Politics Book II, Chapter 8 in in Craig VanGrasstek, *The history and future of the World Trade Organization* (Atar Roto Presse SA, Geneva, 2013), 201

Nations Commission on International Trade Law Arbitration Rules (A), the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (B) and the International Chamber of Commerce Arbitration Rules (C).

A-The United Nations Commission on International Trade Law Arbitration Rules

Article 35 of the Arbitration rules states that:

"*1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.*

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contracts, if any, and shall take into account any usage of trade applicable to the transaction."[12]

This article provides for substantive autonomy to parties by two means: a structural one and a literal one.

The structure of this article is straightforward since it contains a general rule and an exception. The general rule – which corresponds to the possibility for parties to choose the law applicable to the merits of their dispute - takes precedence over the discretion of arbitrators. Arbitrators could benefit from discretion in this step only in exceptional cases. However, this exception can only happen in two specific situations: in case of failure of the parties in deciding the law applicable or of express authorization from the parties for the arbitral tribunal to decide *ex aequo et bono* or as *amiable compositeur*. The subordination of the discretionary powers of arbitrators to either the failure of parties to choose the applicable law or to their express choice is a way to ensure that the doctrine of party autonomy is protected and respected. This choice copes with traditional practices in international arbitration.[13] Furthermore, aware that significant freedom is sought by parties during arbitral

[12] U.N.C.I.T.R.A.L. Arbitration rules, article 35 para. 1

[13] Alan Redfern and Martin Hunter, *Law and practice of International Commercial Arbitration* (5th edn, OUP Oxford, 2009) 3.94-3.96

proceedings, it then contributes to the fact that: "*the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances.*"[14]

The importance of the wording chosen which calls for several remarks is not to be misconstrued as it has been carefully selected[15] and evidences the willingness of drafters that party autonomy prevails overs the discretion of arbitrators.

Firstly, the use of the auxiliary "shall" expresses the obligation for the arbitrators to apply the choice made by parties. The consequence is that not only parties have a broad freedom concerning the choice of the applicable law but this wording ensures that their choice will be applied. Therefore, this hierarchy doubtlessly strengthens the predominance of autonomy granted to parties.

Secondly, the use of the expression "rules of law" in the first sentence of the first paragraph unequivocally broadens the autonomy for parties. Indeed, the absence of express restrictions concerning the choice of the applicable law is to be understood as meaning that parties are free to choose any laws they want for the settlement of their dispute. Therefore, the applicable law can emanate from a domestic legal system, be a non-state law or be a law that has no connection with the case. This interpretation that was rightly stated by Redfern and Hunter[16] was the intention of the Working Group of the United Nations Commission on International Trade Law (hereafter U.N.C.I.T.R.A.L.).[17] In addition, the choice of singular regarding the appropriate "law" that the arbitral tribunal has to apply decreases its discretionary power.

As a conclusion, the structure of this article reveals a dichotomy between the freedom afforded to the arbitrators and parties when choosing the substantive law: the doctrine of party autonomy is favoured. Thus, at that stage, parties do not seem to experience any restrictions as for the choice of the law applicable to their dispute.

[14] General Assembly Resolution 65/22 (n 6) recital 4
[15] Working Group, 43rd Session (21 June – 9 July 2010), UN Doc A/65/17, para. 155, p. 25
[16] Alan Redfern and Martin Hunter (n 11) 3.195
[17] Working Group, 43rd Session (21 June – 9 July 2010), UN Doc A/65/17, para. 155, p. 25

B-Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

Article 42 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provides that:

"1. *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

2. The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

3. The provisions of paragraph (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree."[18]

Article 42 conveys a satisfactory content as for the expectations of parties who have recourse to international arbitration to settle any legal dispute resulting from an investment. This is expressed by an elaborate mechanism that combines flexibility and certainty. The result of these two characteristics is beneficial for parties.

On one hand, the flexibility provided by these provisions emanates from the important autonomy granted for the choice of the law applicable to the substance of their dispute. The wording is of paramount importance to find out the flexible part. The use of "rules of law" means that parties are not bound by any particular legislation: they are free to select any law including non-state law. Consequently, parties have the opportunity to choose the law that best fit to their case, or aims at attracting investors. What is more, when read in conjunction with paragraph 3, the autonomy for parties is broadened since parties can also use equitable principles stemming from the expression *ex aequo et bono*. Furthermore, the presence of numerous awards dealing with the issue of granting freedom to the parties regarding the selection of the applicable law is the concrete evidence that this debate involves practical consequences of salient importance. As a matter of fact, the arbitral tribunal stated in 1975 in the case *Kaiser Bauxite v. Jamaica* that parties can select in their agreement the law of the

[18] Convention on the settlement of investment disputes between States and Nationals of other States, article 42, para. 1

host state in combination with principles of international law.[19] In the case *Autopistas v. Argentina* in 2003, the arbitral tribunal stated that the wording "rules of law" "*allows the parties to agree on a partial choice of law, and in particular to select specific rules from a system of law.*"[20] Plus, parties also have the possibility to subject some parts of their agreement to different law. This possibility is commonly named dépeçage.[21] In *World Duty Free v. Kenya*, the tribunal affirmed that an agreement which contains two choice of law clauses designating different laws but whose effect contain significant similarities can be applied.[22] Those three cases assuredly express the extent of autonomy and flexibility provided by article 42: choices of law that may seem unusual can be accepted. At this stage, every combination undertaken by parties may be accepted.

On the other hand, the certainty resulting from the mechanism has an important function. Effectively, the consequence in the event where parties fail to determine the applicable law, the arbitrators will have the obligation to do it. The effective application of this obligation lies in the auxiliary "shall" in the second sentence of the first paragraph and the prohibition for the arbitral tribunal of a finding of *non liquet*. This resulting certainty is important and has a practical impact as parties often fail to agree on the law to be applied.[23]

To conclude, the flexibility and certainty present in this article represent a valuable income for parties. Indeed, the obligation for the tribunal to apply the choice of parties and the subordination of the discretion of the arbitrators in case of failure of parties combined with the flexibility are concrete elements that aim at ensuring that parties can design the governing law in their agreement the way they wish. Consequently, like article 35 of the U.N.C.I.T.R.A.L., this provision provides for high degree of party autonomy.

C-The International Chamber of Commerce Arbitration Rules

Article 21 of the International Chamber of Commerce Arbitration Rules reads as follow:

[19] *Kaiser Bauxite v. Jamaica*, decision on jurisdiction, 6 July 1975, para. 12
[20] *Autopistas v. Argentina*, Award, 23 September 2003, para. 96
[21] Black's Law Dictionary, 7th edn., p. 448: "*A court's application of different states laws to different issues in a legal dispute; choice of law on an issue-by-issue basis.*"
[22] *World Duty Free v. Kenya*, Award, 4 October 2006, para. 158-159
[23] David J. Branson, Richard E. Wallace, 'Choosing the substantive law to apply in international commercial arbitration' [1986-1987], Va. J. Int'l L., 39, 42

"1. *The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*

2. The arbitral tribunal shall take account of the provisions of the contract, if any; between the parties and of any relevant trade usages.

3. The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers."[24]

The drafting of this article has some similarities with articles 35 of the U.N.C.I.T.R.A.L. Arbitration Rules and 42 of the I.C.S.I.D. Convention. Effectively, its content emphasizes the autonomy of parties over the discretion of arbitration. However, this article stands out from the two other by the degree of discretion it confers to the arbitrators in case of failure of parties in the choice of law. The elaboration of this article then calls for several remarks.

Firstly, the cornerstone of this article lies in the first sentence with the possibility for parties to choose the law they want. This principle that "*parties are free to agree*"[25] represents the doctrine of party autonomy in the arbitration rules of the International Chamber of Commerce. As a matter of fact, parties beneficiate from an important degree of autonomy. In addition, the choice of "rules of laws" unequivocally indicates that parties are free to designate state law, non-state law, *lex mercatoria*, any law they want to govern their dispute. This possibility is confirmed by a statement of an arbitrator: "*The principle of party autonomy – widely recognized – allows the parties to choose any law to rule their contract, even if not obviously related to it.*"[26] This first sentence of the first paragraph, when read jointly with the third paragraph also affirms the significant autonomy of parties. Furthermore, the use of the word "shall" is the insurance for parties that their choice will be applied. Therefore, arbitrators will accept the decision of parties without proceeding to any review. As a consequence, the elaboration of this article shows that the doctrine of party autonomy clearly takes precedence over the discretion of the arbitral tribunal.

Secondly, article 21 differs from the two abovementioned in the discretion granted to the arbitrators in the event where parties fail to agree upon a law. The difference stems from

[24] International Chamber of Commerce Arbitration Rules, article 21, para. 1
[25] Eric A. Schwartz, Yves Derains, *A guide to the new ICC Rules of Arbitration* (Kluwer Law International, 1998), 217
[26] I.C.C. Case No. 4145, para. 11, p. 101

the wording, the arbitrators shall apply the "rules of laws." Professors Schwartz and Derains rightly stated that it is a broad concept[27] which is difficult to interpret when used in the context of the discretion of the arbitrators. As a consequence, the arbitrators have at their disposal an important discretion and freedom to determine the applicable law when parties have failed to do so. Nonetheless, it is of paramount importance to be aware that this discretion does not entail the autonomy granted to parties because this situation is subordinated to the failure of parties. Therefore, since the autonomy of parties intervenes first, their autonomy is not affected. This article combines a high degree of autonomy for parties with a possible subsequent discretion for the arbitral tribunal.

As a conclusion, this article has some similarities with the two others articles. However, its main difference is the successful combination of autonomy for parties and for arbitrators. The balance of interests remains in favour of the parties who, at that stage, do not seem to experience any restrictions.

II-International commercial arbitration

International commercial arbitration provides for autonomy for parties. The latter could tailor the arbitral proceedings in the way they want to and designate any law applicable to the merits of the dispute. However, parties shall neither underestimate the importance of the selection of the substantive law (A) nor the high stakes resulting from a wise use of the doctrine of party autonomy (B). Eventually, parties should also be aware of their broadened autonomy with the doctrine of dépeçage (C).

A- The importance of the establishment of the substantive law

[27] Eric A. Schwartz, Yves Derains (n 23) 218

Among the several laws that intervene in the arbitral process: "*the substantive law applicable to the merits of the dispute, is the most important.*"[28] Parties do have an interest in establishing the governing law.

Once the procedural law to be applied has been established, the arbitrators will be in charge of the sensitive and important task of the determination of the substantive law.

The establishment of the law applicable to the merits of the dispute is of salient importance for parties because of the certainty it conveys. Indeed, when the law will be chosen, the arbitral tribunal could not act beyond the powers they have been granted. In other words, the arbitrators will have to apply the law that parties have agreed upon. Two beneficial consequences for the parties stem from this statement. Firstly, parties will choose the law they want to be applied to their case. The settlement of the dispute will then be shaped accordingly to the parties' expectations. The second is the corollary of the first consequence. Effectively, the fact that parties have the guarantee their choice will be respected, the certainty as for the settlement of the dispute will critically increase. Parties could reasonably foresee the outcome of the case by knowing the applicable law. Therefore, such choice avoids unexpected situations. In addition, a prior choice of the governing law will give rise to an unequivocal situation as for the rights and obligations of the parties who will be aware of the way to perform their obligations and their responsibilities in case of breach.

Besides, the international nature of international commercial arbitration complicates the approach to adopt. Doubtlessly, an international affair with parties coming from different countries involves at least two distinct bodies of rules. However, the conflicting issue lies in the possibility that these legal systems have contradictory contents which may affect the sound administration of the case. As a matter of fact, this "*complex interaction of laws*"[29] does not serve the interests of parties. Hence, the importance for parties to agree upon a law.

Finally, the general rule for the choice of the substantive law is the doctrine of party autonomy: parties to an international commercial agreement will freely decide which law shall be applicable to this agreement.[30] The three international conventions namely the U.N.C.I.T.R.A.L. Arbitration Rules, the rules of arbitration of the I.C.S.I.D. and the I.C.C. Arbitration Rules all provide significant autonomy for parties in the elaboration of the choice of the applicable law.

[28] Rachel Engle, 'Party autonomy in international arbitration: where uniformity gives way to predictability' [2002], Transnat'l Law., 323, 329
[29] Alan Redfern and Martin Hunter (n 11) 3.07
[30] Alan Redfern and Martin Hunter (n 5) 195

B-Party autonomy: a theoretical doctrine with high practical stakes

The doctrine of party autonomy can be defined as the: "*conflict rule that permits the parties to choose the governing law for their agreement.*"[31] It is commonly accepted that this choice of law mechanism is the most used in international arbitration.[32] Wisely used, this legal opportunity has several advantages for parties. Indeed, the latter could choose a law they are familiar with in order to be aware of their rights and obligations, to predict more easily the outcome of a possible dispute, choose law more or less liberal so as to attract investors. Consequently, parties will benefit from a tailored justice.

Party autonomy is recognized by international conventions. As aforesaid, articles 35 of the U.N.C.I.T.R.A.L. Arbitration Rules, 42 of the Washington Convention and 21 of the I.C.C. Arbitration Rules promote this freedom for parties. These conventions institute a correlation between the powers of the arbitral tribunal and the parties: the discretion that arbitrators may have for the choice of law is subordinated to the absence of choice of law applicable to the merits by parties. As a consequence, as justly mentioned by professor Gaillard, this widely accepted autonomy changes the pre-established customs and the law of the seat – if chosen - has now a subsidiary application to the choice of parties and of arbitrators.[33] This change in the hierarchy of norms gives rise to interrogations as for the connection of international commercial arbitration with states and then prone to some restraints. According to professor Maniruzzaman, the answer is straightforward: "*Although the parties' freedom of choice is a general principle of private international law and is to be respected in principle, it should operate within the limits imposed by such equally important general principle of law or subject to any restraint of public policy.*"[34] Nevertheless, the link of international commercial arbitration and legal systems will be analysed subsequently.

Although the doctrine of party autonomy is predominantly used in the field of arbitration, it is however prone to critics.

As abovementioned, party autonomy confers great autonomy and power to parties who benefit from proceedings that best fit their needs and expectations. The assumption is then

[31] Giuditta Cordero Moss (n 3) 52
[32] Alan Redfern and Martin Hunter (n 11) 3.94
[33] Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Recueil des Cours, volume 329, 2007) 162
[34] A. F. M. Maniruzzaman, 'International arbitrator and mandatory public law rules in the context of state contracts: an overview' (1990), 7(3) JIL, 53, 54

that parties are fully aware of the functioning of international arbitration and are able to use this autonomy for their own advantage. However, professor Chatterjee cogently stated that most of the time, parties do not have this knowledge but lawyers act on their behalf and decide for everything for them.[35] As a consequence, the direct user of this autonomy is no longer parties but lawyers acting on behalf of parties. Therefore, a dichotomy appears between the original aim of this flexibility which was originally for parties and the current practices. This practice calls for several remarks.

Firstly, parties are no longer the direct beneficiaries of this doctrine but the intermediaries. There is then a downward slide with the original function of the doctrine: parties can benefit from this autonomy but through the actions of their lawyers. The latter seem to be on top of the hierarchy because the choice of parties is subordinated to the choice of their lawyers. Although lawyers have to take decisions respectively to the expectations of parties, their legal knowledge put them in an advantageous situation. Consequently, the level of benefit for parties depends upon the lawyers they have chosen and the latter's choices.

Secondly, relying on the knowledge of lawyers implies that lawyers are fully aware of the functioning of foreign legal systems. However, the majority of practising lawyers have an important knowledge of their legal system but only a few are able to advise on foreign legal systems. As a matter of fact, the doctrine of party autonomy that gives substantive freedom is not fully exploited because the majority of lawyers are likely to use the law of their home jurisdiction or laws the most commonly used. It was confirmed in 2010 that 44% of corporations, when free to choose the applicable law to the substance, designate the law of their home jurisdiction and 25% the English law.[36] As a consequence, parties have at their disposal legal mechanisms that guarantee they have important freedom but they do not fully use it.

Thirdly, aware of the necessity to hire international lawyers with knowledge of foreign legal systems, parties may begin a race to find the best lawyers as soon as possible to have the insurance that they take the more advantages from the arbitral proceedings because of the choice of the applicable law to the merits. Therefore, as professor Gaillard affirmed in a

[35] C. Chatterjee, 'The reality of the party autonomy rule in international arbitration' (2003), 20 (6) J. Int'l Arb., 539, 539

[36] White & Case, '2010 International Arbitration Survey: Choices in International Arbitration', Queen Mary University of London, School of International Arbitration, 2010.

colloquium of 27th June 2013,[37] it stems from current practices that parties do not hesitate to contact several lawyers for the same affair with the purpose to delay the proceedings so as to have more time for the others choices and then increase the likelihood of success. Such practices, if maintained by parties, could be harmful for international commercial arbitration.

C-Dépeçage

Professors Redfern and Hunter have identified five legal systems that interact in international arbitration. These five legal regimes correspond to the law that governs the arbitration agreement, the one governing the proceedings of the arbitral tribunal, the substantive law, other rules that are applicable and the law dealing with the recognition and enforcement of the award.[38] This gathering of laws creates difficulties in international situations. Indeed, parties can face different laws from five legal systems. As a matter of fact, the phenomenon of dépeçage became of growing importance.

Professor Reese has defined dépeçage as the doctrine which enables: "*to cover all situations where the rules of different states are applied to govern different issues in the same case.*"[39] Dépeçage is an illustration of the autonomy that parties benefit from with the doctrine of party autonomy. Effectively, parties have the possibility to choose different laws for each part of the contract. Dépeçage is said to be linked with the theories of Savigny.[40] Besides, the technique of dépeçage is now said to be: "*an integral part of the modern approach to choice of law.*"[41]

The functioning of the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules reveals that these conventions do also allow the use of the doctrine of dépeçage by parties. Effectively, these set of rules contain procedural rules for the conduct of the whole arbitral proceedings. However, as explained above, articles 35, 42 and 21 do not provide for the law applicable to the merits. In addition, these three

[37] G. Martin, 'L'argent dans l'arbitrage: compte rendu du colloque du 27 Juin 2013' (E. Gaillard), http://www.lepetitjuriste.fr/droit-international/largent-dans-larbitrage-compte-rendu-du-colloque-du-27-juin-2013 1st July 2013
[38] Alan Redfern and Martin Hunter (n 11) 3.07
[39] Willis L. M. Reese, 'Dépeçage: a common phenomenon in choice of law' [1973], Colum. L. Rev., 58, 58
[40] M. Zhang, 'Party autonomy and beyond: an international perspective of contractual choice of law' [2006], Emory Int'l L. Rev., 511, 520-521
[41] Willis L. M. Reese (n 37) 75

conventions do not deal with the issues of recognition and enforcement. Therefore, another law will have to be used.

The doctrine of dépeçage confers to parties more flexibility since they are able to combine different laws in their arbitral proceedings. It can beneficially be used to protect the expectations of parties.[42] On the other hand, its application may give rise to distorting effect on rules that are applicable.[43] However, although the possible flaws that this doctrine may have, it broadens the flexibility and autonomy for parties. The latter have the opportunity to have a settlement of their dispute representative to their expectations and needs.

As a conclusion, the three international conventions all convey important autonomy for parties as for the choice of the law applicable to the merits. The choice of parties is given priority in the arbitral proceedings. Besides, parties need to be aware of the importance of this autonomy and have to use it wisely because of the consequences it can give rise to.

[42] *Ibid*. 60
[43] *Ibid*. 65

CHAPTER 2: The discretion of arbitrators concerning the choice of the applicable law to the merits: is the doctrine of party autonomy facing tribulations?

Quis custodiet ipsos custodies? (Who watches the watchmen?)[44]

This quotation expresses the concerns parties may experience regarding their freedom. Effectively, the arbitrators, who are in charge of the sound operation of the proceedings, also benefit from discretionary power for the choice of the substantive law. This discretion may interfere with the autonomy of parties. Therefore, the discretion of parties may be threatened by the autonomy of the arbitrators.

I-The articulation of the autonomy of arbitrators and of parties in the three international conventions

As abovementioned, the three international conventions all have the doctrine of party autonomy as starting point for the elaboration of the law applicable to the merits of the dispute. However, they have different approaches concerning the discretion granted to the arbitrators if parties have not chosen any law. The assessment of the discretion that the arbitral tribunal is offered in the U.N.C.I.T.R.A.L. Arbitration Rules (A), the Washington Convention (B) and the I.C.C. Arbitration Rules (C) will enable to determine how the autonomy of parties and of the arbitrators is articulated and whether the autonomy of parties is affected.

[44] Juvenal, Saire VI in Craig VanGrasstek, *The history and future of the World Trade Organization* (Atar Roto Presse SA, Geneva, 2013), 271

A-U.N.C.I.T.R.A.L. Arbitration Rules

The second sentence of the first paragraph of article 35 reads as follow: "*Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.*"[45]

Article 35 of the U.N.C.I.T.R.A.L. Arbitration Rules provides for the arbitrators discretion when designating the applicable law. The establishment of the appropriate law is performed through the voie directe approach. In other words, the arbitral tribunal has the possibility to apply directly the law it considers appropriate. Such approach is beneficial for the arbitrators because it avoids them to have recourse to the conflict of laws of the state where its seat is located. Therefore, it is a timesaving procedure because the law is elected directly and not after several intermediaries. In addition, noting that conflict of rules are states' laws, the possibility not to use them to determine the substantive law reinforces the autonomous nature of international commercial arbitration. However, at this step, the application of the conflict of laws theory will depend on choices of arbitrators: some may have a preferred conflict of laws that they could apply because of the freedom they have or some others may prefer the voie directe approach and apply directly the law to the merits. The corollary of that freedom creates a dichotomy: on one hand the arbitral tribunal is given the necessary autonomy to decide which law is to be applied but on the other hand, parties cannot foresee any decision because of the consequent uncertainty.

Nevertheless, the autonomy that the arbitrators are given needs to be slightly modified. Indeed, the Working Group composed of the drafters of the convention purposefully decided to restrict the discretion of the arbitral tribunal by using a singular for the word "law" instead of "rules of law."[46] Considering the broad interpretation of this expression by professors Redfern and Hunter,[47] this drafting ensures parties that the discretion of the arbitrators is not unlimited.

Finally, the second paragraph of article 35 allows the arbitral tribunal to: "*decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized.*"[48] This provision broadens the discretion of the arbitrators since they can: "*decide according to*

[45] U.N.C.I.T.R.A.L. Arbitration rules, article 35 para. 1
[46] Working Group, 43rd Session (n 15) para. 155
[47] Redfern and Hunter (n 11) 3.195
[48] U.N.C.I.T.R.A.L. Arbitration rules, article 35 para. 2

an equitable rather than a strictly legal interpretation."[49] The main criticism that stems from this possibility is the very broad discretion given to the arbitrators and the uncertainty that may happen. However, the scope of this provision, which may seem broad at first sight, has been framed. Firstly, this approach does not grant unlimited freedom as the arbitrators generally emphasize the consideration of facts and interpret according to the spirit and letter of the contract.[50] Secondly, the application of this provision is subordinated to the express authorization of parties. Consequently, the harmful effect of this provision on the autonomy of parties is difficult to argue since there must be the willingness of the latter to apply this article. Finally, the discretionary power of the arbitral tribunal is limited – whether it is required to decide as *amiable compositeur* or *ex aequo et bono* or not – by article 34 paragraph 3 which imposes upon the arbitrators to justify their reasoning.

B-I.C.S.I.D. Convention

The second sentence of article 42 of the Washington Convention provides that: "*In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*"[51]

The mechanism contained in the Washington Convention differs from the two others conventions. Indeed, the case law has evidenced that the arbitral tribunal has first to establish that parties have not chosen any specific law. This is only in such case that the arbitrators will decide.[52]

The choice of the law of the contracting state is beneficial for parties because in investment relations, the law of the host state is often the one with the closest relation. The inclusion of the conflict of laws of the host state ensures the proper law will be selected because in the event where the law of that state is not the closest one, its private international

[49] Redfern and Hunter (n 11) 3.198
[50] *Ibid*. 3.199
[51] Convention on the settlement of investment disputes between States and Nationals of other States, article 42, para. 1
[52] *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, para. 4.2

law may provide for a *renvoi* to the most appropriate law.[53] The choice of the law of the contracting state party to the dispute has been decided several times by the arbitrators.[54]

The content of this article seems to evidence a discrepancy. Indeed, in the event where parties have not found any applicable law, the arbitrators enjoy great discretion. This is confirmed by the integration of the conflict of laws of the contracting states combined with the rules of international law that applies to the case. The consequence is that the discretion of the arbitral tribunal is broadened because it will have to choose a law among a broad spectrum of laws. However, the presence of clear guidance of what the arbitrators are required to do when choosing the law supervises the discretion of the arbitral tribunal. Consequently, the uncertainty is reduced. Furthermore, the way the sentence is drafted indicates that the arbitral tribunal shall, after having determined that parties have not chosen any law, apply the private international law of the contracting state party to the dispute. If the legal mechanism designates the law of that state, then the arbitrators will apply its substantive law. This is what an arbitral tribunal undertook in the case *Amco v. Indonesia*.[55] Furthermore, the subsequent interpretation of the reference to the "rules of international law" as having to be understood with the same meaning than article 38 (1) of the Statute of the International Court of Justice[56] brings some slight clarifications as to the hierarchy and the way the rules can be used.

As a consequence, the Washington Convention manages to maintain the necessary predominant nature of the doctrine of party autonomy although the arbitrators have discretion in the choice of the applicable law.

C-I.C.C. Arbitration Rules

The second sentence of the first paragraph of article 21 states that: "*In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.*"[57]

[53] Cristoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: a commentary* (Cambridge University Press, 2009) 595
[54] *Amco v. Indonesia*, Award, 20 November 1984; *SOABI v. Senegal*, Award, 25 February 1988; *Genin v. Estonia*, Award, 25 June 2001; *MCI v. Ecuador*, Award, 31 July 2007
[55] *Amco v. Indonesia*, 20 November 1984, para. 148
[56] Report of the Executive Directors on the Convention on the settlement of investment disputes between States and Nationals of other States, 47
[57] International Chamber of Commerce Arbitration Rules, article 21, para. 1

The wording of this sentence confers broad discretion to the arbitrators. Indeed, the use of "rules of law" that the arbitrators consider to be appropriate indicates that the latter can use the conflict of laws rule or have recourse to the voie directe approach and apply directly the substantive law. In addition, this broad expression is unequivocally to be understood as meaning that the arbitral tribunal has the possibility to apply not only national law but also non-state law. This freedom was confirmed by an arbitral tribunal which stated that: "*The Arbitral Tribunal has a broad power of appreciation in the choice of the applicable law, a discretionary power.*"[58]

Nonetheless, this broad freedom conferred to the arbitrators does not affect the autonomy of parties because, as demonstrated above, the power of the arbitrators intervenes when parties have not chosen any law. What is more, if both parties agree that the arbitral tribunal determines the law, they agree to transfer their discretionary power. This is somehow an application of their autonomy.

As a conclusion, the broad discretion granted to the arbitrators gives rise to several interrogations such as to what extent should the arbitrators be granted autonomy for the establishment of the law applicable? Does it affect the autonomy of parties? The answer to these questions is straightforward. Indeed, the arbitral tribunal is given its powers by parties: parties decide the extent of power they want the arbitrators to have. Thus, the latter have to act within the confines of the discretion they have been conferred upon. Therefore, the autonomy of parties does not seem to be affected by the discretion of the arbitral tribunal. However, the nature of international arbitration and the strength of its connections with states can have an impact on the discretionary power of the arbitrators and of parties.

II- The establishment of the applicable law in international commercial arbitration and its consequences

Aware of the developments explained above, the autonomy of parties takes precedence over the discretion of the arbitral tribunal. However, the importance of the meaning of the expression "applicable law" in international commercial arbitration (A) and the nature of

[58] ICC Case No. 2730, Award, 191

international arbitration (B) are not to be misconstrued because they might influence the discretion of the arbitrators for the of choice of law applicable to the merits. Furthermore, it can give rise to a growing practice like the delocalisation (C).

A-The meaning of applicable law

After the settlement of all the procedural issues, the arbitral tribunal will have to deal with the establishment of the applicable law. The most straightforward situations are when parties have chosen the law. Nonetheless, when the latter have not, the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules confer arbitrators some wide discretion. Nevertheless, the establishment of the applicable law remains problematic and prone to doctrinal debates. Indeed, professor Heiskanen identified three theories: the conflict of laws, the party autonomy and *lex mercatoria* theories.[59] All these three theories involve practical consequences concerning the choice of law.

1): The conflict of laws theory

The conflict of laws theory stresses the connection of arbitral tribunals with domestic legislations. Indeed, these tribunals are considered like courts, namely subject to national laws. In such situations, the applicable law will be determined by the conflict rules of the state where the arbitral tribunal has its seat. The consequence of this approach is a significant reduction of the autonomy of parties.[60] Effectively, parties could freely designate the law applicable to the merits of their case to the extent this possibility is accepted in the concerned domestic system of laws. Therefore, the interests of states are given priority contrary to the ones of parties. This approach coincides with the opinion of professor Mann who stated that: "*No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from*

[59] V. Heiskanen, 'Theory and meaning of the law applicable in international commercial arbitration' [1993], Finnish Y.B. Int'l L., 98, 100
[60] *Ibid*. 100

a system of municipal law."[61] This statement makes unequivocal that the extent of autonomy for parties depends on its recognition by national systems.

Nevertheless, this theory remains subject to critics. Indeed, the seat of arbitration may have been chosen for specific reasons such as the neutrality of the state but not necessarily for its conflict rules. Therefore, in such situation, a strict application of this theory may give rise to the establishment of an inadequate law. What is more, neither arbitrators nor parties have the insurance that the law of the seat of arbitration will be the law designated by the conflict rules.

This theory is neither in favour of parties since the extent of their autonomy is conditioned to its acceptance by domestic systems nor of the arbitrators who do not have the freedom to choose the law they deem the most appropriate: they will apply the substantive law that results from the application of the conflict of laws process of the state where the seat of the arbitral tribunal is located.

2): The party autonomy theory

According to this theory, the choice of parties is given priority. The arbitral tribunal has jurisdiction by virtue of the agreement of parties. As a matter of fact, since the tribunal is the result of an agreement, it is private in nature and shall not be bound by any domestic legislation other than the one chosen by the parties. In case of non-designation of applicable law by parties, the arbitrators will have the discretion to choose a law.[62] However, one difference with the conflict of laws theory is that: "*the lex arbitri is not necessarily the lex loci arbitri.*"[63]

Although this theory protects the interests and expectations of parties, the discretion granted to the arbitrators in case parties have not selected any law for their case may give rise to uncertainty. Indeed, and as confirmed by articles 35 of the U.N.C.I.T.R.A.L. Arbitration Rules, 42 of the Washington Convention and 21 of the I.C.C. Arbitration Rules, the arbitral

[61] F. Mann, 'Lex Facit Arbitrum' in Pieter Sanders (edn), *International Arbitration: Liber Amoricorum for Martin Domke*, (1967)
[62] Heiskanen (n 56) 101
[63] *Ibid*.

tribunal is offered discretion to determine the applicable law. Consequently, this approach can give rise to uncertainty which may affect the certainty that parties were seeking when they had recourse to international commercial arbitration. Such assessment leads to wonder to what extent should the arbitrators be given important freedom when deciding which law to be applied. Although this interrogation may appear legitimate, current trends seem to answer. Effectively, it is doubtlessly that the arbitrators will choose the law meticulously, by taking into account the interests of parties and by keeping in mind the letter and spirit of the contract made by parties so as to find the most appropriate law.

3): The lex mercatoria theory

The *lex mercatoria* theory combines some elements of the two previous theories. Indeed, the choice made by parties is to be given priority. However, if the latter does not chose any law, the arbitral tribunal will not have to apply the conflict of laws of the state where its seat is located but will have to respect the interests and expectations of parties when applying the principles emanating from the *lex mercatoria*.[64]

This theory grants important discretion to the arbitrators who, although have to conform to the expectations and needs of the parties are free to do it. However, the absence of clear guidance for the applicability of these principles increases the uncertainty. The arising question is how and when to apply these principles? The inherent risk due to this absence of guidance is the disparity between several arbitral proceedings: an arbitrator may decide to apply the *lex mercatoria* for a specific case but another arbitrator may refuse for a case with similar factual elements. Therefore, the establishment of criteria may be desirable.

B-The nature of arbitration

The nature of arbitration can influence the powers that the arbitrators have when designating the substantive law. This impact depends on the strength of the connection of arbitration and states.

[64] Heiskanen (n 56) 102

1): Contractual theory

When defining this theory, professors Barraclough and Waincymer said that: "*the entire arbitral process – from setting up the tribunal, to the arbitrators' powers and the binding effect of the award – is seen as a product of the parties' agreement.*"[65] As a matter of fact, since every aspects of the arbitral process emanate from the will of parties, their choices should take precedence over any external factors. As a consequence, this theory vividly seeks to protect and promote the interests of parties to the detriment of the ones of states. Professor Yu integrated the Latin expression of *pacta sunt servanda* to this theory so as to emphasize the contractual predominance.[66]

The extent of powers of the arbitrators will depend on the will of parties: they will decide what will their autonomy be and the arbitral tribunal will have the obligation to act accordingly. Therefore, concerning the choice of law, if parties have not chosen any law, the arbitrators will have to find a law in a way that is relevant with the spirit and letter of the contract to have a law that corresponds to the expectations and interests of parties. The arbitral tribunal can have great freedom but only if parties decide so.

2): Jurisdictional theory

This theory works is opposite to the former: the sovereignty of states is the cornerstone. Thus, every activity that takes place on the territory of a state acts under its jurisdiction. This approach corresponds to the one of professor Mann[67] and has similar characteristics with domestic litigation. Effectively, the arbitral tribunal will somehow act like domestic courts: it has significant powers for the designation of the applicable law and they will apply some domestic legislation. Parties will benefit from the doctrine of party autonomy insofar that the *lex fori* so allows.[68]

[65] Andrew Barraclough, Jeff Waincymer, 'Mandatory rules of law in international commercial arbitration', [2005], MJIL, 205, 209
[66] Hong-Lin Yu, 'A theoretical overview of the foundations of international commercial arbitration' [2008], Contemp. Asia Arb. J., 255, 266
[67] F. Mann (n 56)
[68] Hong-Lin Yu (n 59) 259

The connection of the arbitral process with sovereign states has an impact on the rights and obligations of the arbitrators. Indeed, although the appointment system is different - domestic judges are appointed by states whereas the arbitrators are conferred powers by parties – the arbitrators will have to apply mandatory rules. What is more, the arbitrators, when they select the law applicable to the merits, they have the obligation to act within the confines of the legal framework of the state where the arbitral tribunal has its seat. As a consequence, both the discretion of parties and of the arbitral tribunal is diminished by this theory.

3): Hybrid theory

This third theory contains elements from the two others theories. Indeed, this theory combines the private and contractual nature of arbitration which emanates from the contractual theory but also supports the view that arbitration remains subject to domestic regimes for the enforceability of the awards and the validity of the arbitration agreement which will have to be conform to the mandatory rules of the concerned state.[69]

The powers of the arbitrators are granted in a consensual way: parties decide of the extent of their powers. However, parties could not grant unlimited powers to the arbitral tribunal because mandatory rules establish limits. Consequently, powers of the arbitrators for the application of law are also limited: the starting point is the obligation for them to apply the choice of parties. Nonetheless, in the absence of such choice, the arbitral tribunal will find the applicable law through the conflict of laws of the state where the arbitral seat is located.

Consequently, the discretion of arbitrators is subordinated to the absence of choice of applicable law from the parties and the absence of mandatory rules in the *lex fori*. Thus, the autonomy of the arbitral tribunal is supervised by the parties and domestic legislations.

[69] *Ibid*. 275

C-Delocalisation

Should international commercial arbitration be detached or attached to a particular domestic legal system? This question represents the stake of the phenomenon of delocalisation or denationalisation. Effectively, as explained above through the analysis of the theories, the approach chosen will have an impact on both the autonomy of parties and of arbitrators.

The premise of this phenomenon is that: "*the parties have the power to stipulate that the law giving binding effect to the proceedings is not the law of the place of arbitration.*"[70] At first sight, this theory may be understood as being only linked to procedural issues but it has an important connection with the choice of substantive law. Indeed, professor Grigera Naon cogently stated that: "*the courts of the place of the arbitration normally do not exercise any controls, and thus are unable to influence arbitral choice-of-law reasoning or conclusions on the law or rules of law applicable to the merits.*"[71]

This growing phenomenon gave rise to plethora of doctrinal debates especially concerning the beneficial effects it may have. In this respect, several professors have expressed their opinion concerning the relevance to allow such detachment. As a matter of fact, Professor Paulson said that an arbitral award can have obligatory force even if it is rendered in accordance with a law different from the one where the seat of the arbitral tribunal is located.[72] On the other hand, Professor Park qualified the prior statement of a: "*dangerous heresy.*"[73] Besides, professor Cremades assessed a resurgence of the Calvo doctrine.[74] Nonetheless, these two approaches appear too Manichean. Effectively, a pragmatic approach, namely a combination of the two theories, may be more efficient from a practical point of view. This would enable to give weigh to the doctrine of party autonomy and to ensure that the mandatory rules of states are preserved. This approach seems necessary because party

[70] Paul Jaulsson, 'Arbitration unbound: award detached from the law of its country of origin' [1981], Int'l & Comp. L.Q., 358, 360

[71] Horacio G. Naon, *Choice-of-law problems in international commercial arbitration* (Recueil des Cours, volume 289, 2001), 185

[72] Paul Jaulsson (n 63) 358

[73] William W. Park, 'The lex loci arbitri and international commercial arbitration' [1983], Int'l & Comp. L.Q., 21, 25

[74] Bernardo M. Cremades, 'Resurgence of the Calvo Doctrine in Latin America' [2006], Bus. L. Int'l, 53. This doctrine is defined as having the consequence: "*of depriving private individuals of standing before international tribunals applying international law."* 54

autonomy is one of the keystones in international arbitration but the mandatory rules of states represent their more important interests.

The international conventions also tend to promote a combined approach by ensuring that the autonomy of parties prevails but that the interests of states are preserved. Article 42 of the Washington Convention combines domestic law – the law of the contracting state party to the dispute – with principles of international law. An arbitral tribunal confirmed that: "*Article 42 (1) therefore clearly does not allow the arbitrator to base his decision solely on the "rules" or "principles of international law.*""[75] As a matter of fact, this provision seems to have been interpreted as obliging arbitrators, when they have to designate the applicable law, to consider both domestic and international law but not only one of them. Article 21 of the I.C.C. Arbitration Rules also grants to the arbitral tribunal broad discretion. This discretion was rightly interpreted as enabling the arbitrators to apply any law that seems appropriate.[76] The arbitral tribunal will then be released from the difficulties stemming from the application of conflict of laws. Nevertheless, article 41 seems to contain a constraint to this freedom since it provides that: "*In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.*"[77] This article read in conjunction with article 21 confirms that the pragmatic approach is efficient. Indeed, the arbitral tribunal does benefit from discretion and is, in theory free to choose any law that it deems appropriate. However, an excessive use of this freedom may lead to an unenforceable award in some states because the substantive law used violates some mandatory provisions of the state where enforcement is sought.

As a conclusion, the arbitrators are conferred broad discretion in the arbitral proceedings and especially in the choice of the applicable law. It is arguable whether this represents a threat to party autonomy. However, it must be kept in mind that the *sine qua non* condition for the exercise of this power is the absence of choice of parties. The intrinsic nature of the doctrine of party autonomy is not affected by the discretionary power of the arbitrators. Effectively, although, the absence of choice may result from the impossibility to agree on an applicable law, this somehow amounts to a tacit agreement from parties to

[75] *Klöckner v. Cameroon*, Decision on annulment, 3 May 1985, para. 89
[76] Horacia G. Naon (n 64) 213
[77] International Chamber of Commerce Arbitration Rules, article 41

transfer their power to the arbitral tribunal. Choices of parties continue to be the focal point. As a consequence, the discretion power of the arbitral tribunal shall not be considered as prejudicing the autonomy of parties.

CHAPTER 3: Application of mandatory rules: a conceptualisation of the restrictions of the doctrine of party autonomy

"No man is above the law and no man is below it."[78]

This quotation illustrates that the autonomy of parties in international commercial arbitration remains restricted by limitations imposed by states at the international, supranational and national levels. These limitations are the result of the application of the mandatory rules which conceptualise the restrictions experienced by the doctrine of party autonomy. The issue is the determination of how to proceed to the applications of these restrictions. Professor Moss justly raised this thorny issue with the following question "*Can an arbitral tribunal disregard the choice of law made by the parties*?" [79] During the assessment of the substantive law, the arbitrators will face a complex situation. Indeed, their "*priority is to respect the will of the parties, therefore avoiding the application of a law not chosen by them.*"[80] However, the arbitrator also "*must consider the fate of his award so as to prevent annulment, thus taking into consideration the mandatory rules of the country or countries where enforcement of his award could conceivably be sought.*"[81]

I-Restrictions to party autonomy in the international conventions

The effective application of mandatory rules of states implies to disregard the choice of parties. However, it is arguable whether this choice is harmful for parties when a mandatory rule is at stake. Indeed, this may be a way to ensure to parties that their award will be subsequently enforced. The U.N.C.I.T.R.A.L. Arbitration Rules (A), the Washington

[78] Theodore Roosevelt, Third Annual Message (7 December 1903)
[79] Giuditta C. Moss, 'Can an arbitral tribunal disregard a choice of law made by the parties?' (2005) 1 Stockholm Int'l Arb. Rev. 1
[80] Serge Lazareff, 'Mandatory extraterritorial application of national law' (1995) 11 Arb. Int'l 2, 137, 140
[81] *Ibid*.

Convention (B) and the I.C.C. Arbitration Rules (C) all have their own particular approach for the application of mandatory rules.

A-U.N.C.I.T.R.A.L. Arbitration Rules

The main criticism that can be made to this set of rules is the absence of clear indications concerning the interaction of the doctrine of party autonomy and the mandatory rules. This absence of normative precisions can be harmful for parties. Indeed, the latter can be confused as for the extent of autonomy they may enjoy regarding the substantive law. This risk of confusion is confirmed by the content of the third paragraph of article 1 which expressly provides that in case of contradiction between the mandatory rules of the *lex arbitri* and the rules of the conventions, the ones coming from the *lex arbitri* shall take precedence. As a consequence, this preliminary remark indicates that parties who are not very familiar with practices in international commercial arbitration may be confused. In this respect, a "*less sophisticated party*"[82] may make full use of the freedom contained in article 35 to serve their own interests. Nevertheless, two main risks stem from such behaviour. Firstly, the law agreed upon by parties may be declared inapplicable by the arbitrators. Secondly, in the event where the chosen law is used for the settlement of the award its recognition or enforcement may be refused because that law may be in breach either of a mandatory law of the state where enforcement is sought or a mandatory law belonging to the international public order.

Besides, a more elaborate analysis enables to determine other restrictions concerning the choice of the substantive law. The first conclusion will be linked to the intrinsic risks that an award which disregards mandatory rules conveys. The second is less obvious and deals with the nature of the United Nations Commission on International Trade Law.

As explained in the paragraph above, article 1 paragraph 3 of the U.N.C.I.T.R.A.L. Arbitration Rules provides a normative hierarchy between the mandatory rules of the *lex arbitri* and the rules of the convention. Although it does not deal with the rules applicable to the substance, it may be inferred that this reasoning used for procedural matters can also be used for substantive matters. Therefore, without explicit references, parties may have an

[82] Giuditta C. Moss, 'Revision of the UNCITRAL Arbitration Rules: further steps' (2010) 13 Stockholm Int'l Arb. Rev. 3, 96, 97

indication. What is more, the United Nations Commission on International Trade Law Model Law (hereafter the U.N.C.I.T.R.A.L. Model law) is a set of rules that national legislators can include in their legislation with the existing rules for arbitration. Article 34 and 36 respectively provide for setting aside an arbitral award and refusing recognition and enforcement of an award in case it violates the mandatory rules of the state either where an action to set the award aside is brought or where recognition or enforcement is sought.[83] Likewise, article V (2) (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter the New York Convention) states that an arbitral award can be refused recognition and enforcement in case it would be contrary to the mandatory rules of the concerned state.[84] Considering that in 2013, 148 states have ratified the New York Convention[85], parties who don't apply mandatory rules of states are likely to have their award challenged or refused recognition or enforcement. Such situation would represent a significant loss of time and money for the latter. Finally, the award of parties can be refused recognition or enforcement because it does not respect regional mandatory rules. This is what happened in the case *Eco Suisse v. Benetton* where the European Court of Justice stated that an arbitral award which does not respect European competition law can be set aside.[86]

The United Nations Commission on International Trade Law has been created by a United Nations General Assembly Resolution.[87] This commission is a subsidiary body of the United Nations General Assembly. Consequently, it can be assumed that every works from the Commission are done in accordance with the spirit and letter of the United Nations Charter. As a matter of fact, parties can easily be aware that the U.N.C.I.T.R.A.L. Arbitration Rules tacitly prohibits the choice of substantive law which would be contrary to the rules protected by the United Nations Charter, especially the rules belonging to the international public order.[88]

[83] United Nations Commission on International Trade Law Model Law, articles 34 (2) (b) (ii) and 36 (b) (ii)
[84] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article V (2) (b)
[85] New York Convention Countries < http://www.newyorkconvention.org/contracting-states> accessed 16 July 2013
[86] Case C-126/97 *Eco Swiss v. Benetton* [1999] ECR I-3055
[87] U.N.G.A. Resolution 2205 (XXI), 17th December 1966
[88] Charter of the United Nations, article 2 para. 4

B-Washington Convention

Likewise for the U.N.C.I.T.R.A.L. Arbitration Rules, the limitations concerning the choice of the substantive law are not straightforward and obvious at first sight. Indeed, the Washington Convention does not contain provisions that explicitly prohibit the choice of specific laws for the substance of a dispute. The consequence of this absence of explicit forbidding is the theoretical limitless freedom for parties. However, reasonable parties may come to the conclusion that this absence is not to be understood as allowing any choice of substantive law. Effectively, the arbitral tribunal may refuse the chosen law, the arbitral award can be refused recognition or enforcement or the award can also be challenged.

Admittedly, the concept of mandatory rules is a ground that may be used to preclude parties from choosing a foreign law to the merits of their case.[89] The main concerns with the provisions of the Washington Convention are twofold. Firstly, that concept, when used at the national level, is defined on a national basis. It aims at protecting the interests of states. As a matter of fact, states may have similar provisions considered as mandatory rules but they will also have their own interests to protect. The second concern is the corollary of the first one. Indeed, because mandatory rules depend on the approach of each state, the arbitrators cannot know every mandatory rule of every state. The consequence is an increased difficulty for the arbitrators who do not know all the mandatory rules of states and then might experience a challenge of the award they have rendered if mandatory rules are not applied. What is more, articles 52, 53 and 54 of the Washington Convention which respectively deal with the annulment, recognition and enforcement of the arbitral award do not mention the requirement of mandatory rules as a compelling ground. Nonetheless, whilst not stated, parties should opt for the behaviour of a reasonable person and foresee the consequences of a non-respect of domestic mandatory rules. Effectively, the New York Convention acts as the Sword of Damocles to always remind that in case of non-compliance with mandatory rules, the recognition or enforcement of the award is likely to be refused on the basis of article V (2) (b). Besides, as for the international public order, an arbitral tribunal stated that: "*in light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States […] Thus,*

[89] Cristoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair (n 49) 566

claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[90] As a consequence, although not explicitly prohibited, the arbitrators have ensured that parties cannot designate laws which are not conformed to fundamental principles internationally recognized.

C-I.C.C. Arbitration Rules

In contrast with the two other conventions, the I.C.C. Arbitration Rules contain provisions that seem unequivocal as for the existing derogations to the doctrine of party autonomy. Article 41 states that both the International Court of Arbitration and the arbitral tribunal have to: "*make sure that the award is enforceable at law.*"[91] This article tacitly imposes an obligation upon the shoulders of the arbitrators because an arbitral award that violates domestic mandatory rules of a state will be neither recognized nor enforced by the concerned state. Therefore, in such a situation, article 41 would not be respected. Besides, article 6 of Appendix II provides that: "*when the Court scrutinizes draft awards in accordance with Article 33 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.*"[92] The complementarity of this provision with article 41 offers a broad protection. Indeed, not only the award will be consistent with the law of the arbitral seat but with the law of states where enforcement is sought. Therefore, this convention differs from the two others because it successfully manages to weld the protection of the interests of parties and of states. This interpretation is confirmed by an arbitral tribunal which said that: "*priority of the will of the parties must, however, be construed to be subordinate to the mandatory application of a 'loi de police.*' "[93] The arbitral tribunal did not hesitate to reverse the hierarchy of norms in favour of the effective application of the mandatory rules of a state.

[90] World Duty Free v. Kenya, Award, 4 October 2006, para. 188
[91] International Chamber of Commerce Arbitration Rules, article 41
[92] *Ibid*. Appendix II, article 6
[93] I.C.C. Case 6320, Award, 1992

As a conclusion, in the application of the rules of the three international conventions, arbitral tribunals give priority to the choices of parties as much as possible but in case of contradiction with mandatory rules, the latter shall prevail. The relevancy of this approach may be open to debate. However, considering that the expectations of parties are to have "*justice and fair treatment*"[94] it can legitimately be accepted that favouring the application of mandatory rules is consistent: parties benefit from that choice since it reduces the likelihood that the recognition or enforcement of the award be refused. Between effective enforcement of the award or strict application of the law they have chosen, parties have to decide to which consequence they grant more importance.

II-The upholding of symmetry between party autonomy and interests of states: an endless quest?

The predominance of the interests of states over the choice of parties when some mandatory rules are at stake can have beneficial effects for parties since the ground of violation of mandatory rules could not be used to refuse the recognition or enforcement of the award. Nevertheless, this hierarchical order intimates that a removal seems to take place from one of the core characteristics of international commercial arbitration: the freedom of parties in the proceedings. What is more, this approach also promotes the application of laws considered as mandatory in a state abroad. In other words, this practice confers an extraterritorial value to these rules. Some states where enforcement or recognition is sought may be reluctant to proceed to such a promotion of foreign mandatory rules because their approaches to the moral principles protected in these rules are different. Furthermore, granting that discretion to the arbitrators may confer them powers similar to domestic judges; there would be no relevance to have recourse to international arbitration if that was the case. All these consequences highlight the sensitiveness of this debate. As a matter of fact, it is of interest to suggest some solutions on how to improve the current situation. The symmetry might be maintained by changing the approach to mandatory rules (A) or by imposing liability on the arbitrators (B). These propositions will enable to assess whether the doctrine of party autonomy concerning the choice of the substantive law as provided by the

[94] Serge Lazareff (n 73), 150

U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules is experiencing a crisis (C).

A-Normative suggestions

Professors Barraclough and Waincymer made two normative suggestions so as to reach a balance between the competing interests of parties and of states.[95]

The first proposal is a complete application of all mandatory rules. The advantage is that there would be a growing consistency in the awards rendered and more predictability for parties who could foresee more easily the outcome of the case in the event of a consistent practice. This proposal could be used in situations dealing with laws which belong to the international public order. Indeed, the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Rules do give priority to these rules if they may be violated by the choice of parties. However, the situation would not be the same with domestic mandatory rules which vary from states to states. Furthermore, imposing this kind of external obligation on parties who have recourse to international arbitration to settle their dispute may reduce their interests in this dispute settlement method. What is more, this solution is unlikely to be accepted as it would represent a complete removal from the original characteristics of international arbitration, namely the emphasis on party autonomy. Indeed, the interests of states would vividly be favoured to the disadvantage of the ones of parties. The prospect of success of this approach seems low. Indeed, it does not fit in the theories explained above, namely the contractual and hybrid theories.

Although more appealing for parties, the opposite approach, namely applying no mandatory rules is not likely to be applied either. Effectively, this liberal approach would give clear emphasis on the interests and expectations of parties. This approach, which corresponds to the contractual theory, gives priority to the interests of parties over the ones of states. Thus, it is a way to ensure the prospective award will be shaped the way they expected. The certainty and predictability will also significantly evolve because while the discretion of parties will augment, the discretionary power of the arbitral tribunal will decrease. Furthermore, it can also be advantageous for the arbitrators because they will no longer face complex situations in which they do not know whether they have the obligation or not to

[95] Andrew Barraclough, Jeff Waincymer (n 58) 224

apply rules that may be considered mandatory. Nonetheless, the major risk with this suggestion is the refusal of recognition or enforcement in the concerned state if the law chosen violates its mandatory rules. Indeed, states whose sovereignty would be eroded because of the non-application of the rules they consider of substantive importance will be reluctant to give effect to an award within their territory. Besides, this idea is not considered by the three international conventions because they all try to reach a symmetry between the protection of states and of parties. The I.C.C. Arbitration Rules is a good example where it is clearly written in Appendix II, article 6 that the mandatory rules of the place of arbitration have to be taken into account.

B-Establishment of liability for the arbitrators

A normative change as previously explained seems hardly achievable. The interests of either states or parties would be too favoured contrary to the ones of the others. Another possibility, however, would be to establish liability on arbitrators.

Professor Guzman suggests to proceed to the following analogy: to the extent that the arbitrators may be compared to domestic judges, arbitral awards, like judicial decisions, can be subject to review.[96] This suggestion would consist in allowing the review of the arbitral award by a domestic court in the event where the governing law used for the award would be contrary to mandatory rules. The arbitrators would have a duty to apply mandatory rules. The arbitrator would then be liable and would have to assume any consequences such as the negative impact for his reputation or facing proceedings for this breach of duty.

This proposal if applied could have positive effects. Firstly, it would contribute to the protection of the interests of states. In the current practice, signatories states of the New York Convention have the possibility to ensure the effective application of their mandatory rules but this protection takes place in the downstream section of the process since it intervenes after the arbitral proceedings and during the recognition or enforcement step. This obligation for the arbitrators would establish a double protection mechanism: during the proceedings and when recognition or enforcement is sought. Secondly, the discretionary power of the

[96] Andrew T. Guzman, 'Arbitrator liability: reconciling arbitration and mandatory rules' 49 Duke L. J., [1999-2000], 1279, 1316

arbitrators would be reduced. Indeed, they will no longer have the power to apply or not to apply a law they might consider as mandatory; they will have the obligation to apply it. As a matter of fact, the certainty and predictability will increase which would be auspicious for parties. Yet, could this solution, if applied, really give rise to satisfactory results, namely a fair balance between the competing interests of states and parties? The use of domestic courts is unlikely to prove efficient. Effectively, one of the main reasons for parties to have recourse to international arbitration is to avoid the length of proceedings in national courts. Therefore, transferring the power of review to domestic courts would have congesting effects: the arbitral award may be rendered in a period of time as decided by parties but the review of the award would be longer. What is more, this right could be prone to manipulation and used to delay the procedure of recognition or enforcement. A sort of "torpedo-effect" may then arise because this review could be used fraudulently in order to excessively delay the process of recognition or enforcement although any mandatory rules have been misapplied. A solution could be either the issuing of an injunction provided the grounds to issue it are clearly established or engaging the liability of the party who abuses of the review. Finally, aware of the impact the establishment of their liability may have, the arbitrators might become pusillanimous and adopt an extreme position to protect themselves from any liability: they may be inclined to apply all mandatory rules. The above analysis of this approach showed that it is of little efficiency.

Would this suggestion be compatible with the three international conventions? Article 38 U.N.C.I.T.R.A.L. Arbitration Rules provides that party have the possibility to request that any clerical mistakes be corrected. However, no review is allowed concerning an inadequate application of the law; as stated in the annex, parties have the possibility to challenge the award before national courts. Furthermore, this proposal would clearly contradict with article 16 which provides that parties agree to waive their right to make claims against arbitrators. Under the Washington Convention, the review of the award for a misapplication of the law is not expressly written either. In addition, the convention does not contain any provision related to the liability of arbitrators. As a matter of fact, there would be no contradictions but the practice of arbitral tribunals evidenced that the combination of party autonomy and mandatory rules is reconcilable under the aegis of the I.C.S.I.D. Convention. The content of the I.C.C. Arbitration Rules is satisfactory. Indeed, article 41 read in conjunction with article 6 of Appendix II ensure the proper application of the mandatory rules. Nevertheless, the strength of article 41 is likely to be affected by the interpretation it is given: an obligation of means for

the arbitrators will reduce their liability whereas an obligation of results will have the opposite effect, namely increasing the obligations of the arbitral tribunal. An obligation of results may be beneficial for parties but practical difficulties may render this obligation very complex to apply: the arbitrators are not familiar with mandatory rules of every domestic systems. Furthermore, article 40 limits the liability of the arbitrators. Therefore, establishing their liability would be contradictory with the existing provisions.

C-Is the doctrine of party autonomy as provided by the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules experiencing a crisis?

It is arguable from what has been explained above whether the doctrine of party autonomy as provided by the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules experiences a crisis. Indeed, originally, international commercial arbitration aims at being as flexible as possible. This purposeful approach is to enable parties to have arbitral proceedings designed in a way that corresponds to their expectations and interests. This flexibility allows them to set aside, to some extent, the application of some rules. However, both the wording of the conventions and practices evidence a change. In other words, the threat seems to be systemic.

Law is evolutionary by nature. It needs to be readapted to the current needs in a given society and even more in a globalized world. The revision of the U.N.C.I.T.R.A.L. Arbitration Rules of 2010, the last amendment of the Washington Convention which dates back from 2006 and the nine modifications of the I.C.C. Arbitration Rules evidence that rules need to evolve accordingly with the societal needs at a given period. Yet, is there really a crisis? A need for a change does not necessarily involve the idea of crisis. As professor Gonzalez Campos pertinently said, a crisis implies a rupture with the prior characteristics which gives rise to uncertainties as for the function of this field of law.[97] The discretion of the arbitrators and the application of mandatory rules may be considered as encroaching upon the extent of autonomy parties have. The consequence would be a crisis of the doctrine of party autonomy provided by the three conventions which affects the essence of the doctrine. However, the

[97] Julio D. Gonzalez Campos, *Diversification, Spécialisation, Flexibilisation et Matérialisation des règles de Droit International Privé* (Recueil des Cours, volume 287, 2000), 27

autonomy conferred to parties by the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules remains broad. There is no rupture with the prior characteristics of party autonomy as provided by the former versions of the conventions. Indeed, the former versions of the three international conventions did not provide for an unlimited autonomy for parties. The autonomy that parties benefit from has increased in the revised versions. The application of mandatory rules has a limitative function over the doctrine of party autonomy: its scope is not unlimited. However, it does not represent a threat that may affect the essence of the doctrine. Therefore, the doctrine of party autonomy concerning the choice of the substantive law provided by the U.N.C.I.T.R.A.L. Arbitration Rules, the Washington Convention and the I.C.C. Arbitration Rules is not experiencing a crisis.

As an overall conclusion, articles 35 of the U.N.C.I.T.R.A.L. Arbitration Rules, 42 of the I.C.S.I.D. and 21 of the I.C.C. Arbitration Rules have a similar approach: they emphasize on the autonomy of parties concerning the choice of the substantive law. Therefore, the doctrine of party autonomy has then a predominant importance. Parties are free to designate any law they want: domestic law, non-state law, *lex mercatoria* etc. This wide flexibility must be wisely used as the consequences may be of major importance for parties: the choice of a law that best fits to their expectations, is it better to choose themselves the applicable or to transfer this power to the arbitrators?

What is more, the arbitral tribunal may also be conferred an important discretionary power as for the choice of the law applicable to the merits. Articles 35, 42 and 21 all contain this type of provision. The structure of these articles ensures that the arbitrators are given sufficient enough autonomy so as to select the most appropriate law. Nevertheless, the approach concerning international arbitration institutes the debate concerning the assessment of the international nature of international arbitration. In other words, to what extent do the arbitrators are free to choose any law they deem appropriate? Are they bound by any domestic set of rules? However, the discretionary power conferred to the arbitrators does not represent a threat to the autonomy of parties because this power is subordinated to the absence of choice of law from the parties.

The application of certain mandatory rules, whether purposefully disregarded by parties, can be interpreted as a genuine risk for party autonomy. This eventuality combined

with the discretion of the arbitrators may be, at first sight, the source of a crisis for party autonomy as provided in the U.N.C.I.T.R.A.L. Arbitration Rules, the I.C.S.I.D. Convention and the I.C.C. Arbitration Rules. Nonetheless, the autonomy of parties continues to be the nerve centre in the three conventions. This doctrine is not experiencing a crisis: the doctrine of party autonomy remains the principle. Some changes in these conventions are to be expected but a broad autonomy for parties will still be consubstantial to international commercial arbitration. Among the possible changes, more transparency for the prohibition of the setting aside of certain mandatory rules by parties may be advisable. The inclusion of express provisions stating that certain mandatory rules shall not be disregarded, like in the I.C.C. Arbitration Rules would be a way to reduce misunderstandings as for the extent of autonomy of the parties. However, it would legitimate the interference of states' interests, namely public concerns in the realm of private interests. It is legitimate to wonder whether considering the mandatory rules of states "*from the perspective of transnational legal principles enjoying worldwide recognition or belonging to public international law*"[98] would be an efficient way to quench the struggle between the competing interests of parties and states.

[98] Horacio G. Naon (n 64) 380, 381

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