

# REASSERTING THE ROLE OF MUNICIPAL LAW IN INTERNATIONAL TRADE AND INVESTMENT PROTECTION THROUGH CHOICE OF LAW

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## Abstract

*The purpose of international investment agreements (IIAs) and arbitration is to replace municipal law and its domestic mechanisms in foreign investment regulation and dispute settlement. However, IIAs do not take away party autonomy that goes with freedom of contract. Accordingly, even under the current regime of investment protection dominated by IIAs parties to international investment and other business transactions still make a choice of applicable law. Does a choice of municipal law retain it intact in the regulation of foreign investment even when IIAs are applicable? I challenge the conventional theory that the choice of a place as the seat of arbitration detaches the arbitration agreement from chosen municipal law of the host country. I also challenge the well-established rule in private international law that in determining the applicable law, the “closest connection” principle applies in all cases. Choice of law by its very nature has a limiting function; its sole and primary function is to limit the scope of the laws that may apply to the parties’ transaction and dispute if no choice of law is made. I argue then that unless authorised to make decisions as amiable compositeur or ex aequo et bono by the parties or under the applicable arbitration convention, a choice of law legitimately and effectively made limits the rights of the parties and the competence of tribunals in the determination of the applicable law to the laws of the country chosen by the parties, including its rules of private international law. Policymakers and academics critical of the IIA regime have taken it for granted that the regime has completely removed municipal law from the regulation of foreign investment and international trade. I argue that in light of choice of law, municipal law remains central in investment regulation and investor-state dispute settlement.*

## I. INTRODUCTION

Contractual parties may choose, and they commonly choose, the law to govern their legal relationship. They make a choice of law. Particularly in the context of international business transactions involving parties from different jurisdictions, if the parties do not make a choice of law, uncertainty may arise as to the applicable law which can further make it difficult for the parties in terms of knowledge of, and compliance with the appropriate law in the course of contractual performance or when a dispute arises.

The uncertainty as to the applicable law in the absence of choice of law may arise due to at least two reasons. First, the applicable law to a contract is determined by applying rules of private international law of a particular national legal system. Different countries have different legal rules of private international

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law for the determination of the law applicable to a contract. Thus unless a choice of law is made by the parties, it may be difficult determining the applicable law to the contract on the basis of rules of private international law. Second, uncertainty as to the applicable law to the contract may arise because even if it is certain the rules of private international law to apply to determine the applicable law, those rules may too general or too vague to enable the determination with reasonable certainty and accuracy. Choice of law then, when made within the legal limits of rules of the relevant system of private international law, can lead to certainty and predictability as to the applicable law to the contract.<sup>1</sup>

As stated by the United Nations Commission for International Trade Law (UNCITRAL), the autonomy of the parties may be limited to the extent that they are permitted to choose a legal system only if it has some connection with the contract. This may require a choice of the legal system of the country of one of the parties or of the place of performance or even of the seat of arbitration. It is also possible for the parties to choose the law applicable to the contract without these restrictions. To avoid the uncertainties surrounding lack of specificity as to the law applicable to the parties' transaction, the parties choose the law of a particular country to govern their contract.<sup>2</sup>

I address the important question of the role of municipal law in the regulation and protection of foreign investment and trade and shows how choice of law makes municipal law actively alive and central in this regard. The article does so by addressing the powers of international arbitrators in relation to choice of law. The questions are: Is it mandatory for arbitral tribunals to follow the choice of law made by the parties? If it is not mandatory in what circumstances may arbitrators depart from the law chosen by the parties? In investor-state arbitration implicating conflict of laws, which country should be the starting point in the determination of the applicable law: the *lex loci contractus* which is also chosen by the parties or the *lex fori*? According to UNCITRAL, if a dispute "is settled in arbitral proceedings, the law chosen by the parties will *normally* be applied by the arbitrators."<sup>3</sup> This suggests that arbitral tribunals may depart from the choice of applicable law made by the parties. As shown below, arbitrators have rejected the parties' choice of municipal law. That seems to be at odds with the concept of arbitration which is founded on the consent of the parties. As stated by the New Zealand Law Commission:

Arbitration law concerns a critical balance: the balance which is to be struck between the autonomy of the parties and the law of the land. On the one side of the balance is the agreement of the parties. The parties to a contract or to a dispute agree that their disputes are to be resolved by a tribunal which they establish themselves or to which they agree. The tribunal is to follow a procedure on which the parties may agree, and is to apply the law which they may state. The parties also, in general, pay for the arbitration. That is to say, the whole process rests on the parties' consent and is their creation. But not quite. For on the other side of the balance is the significant weight of the general law of the land. The very agreement that sets up the tribunal is an agreement under some system of law. It is national law, with national courts, which can be used to require a reluctant party to submit to arbitration, and to

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<sup>1</sup> UNCITRAL, *Legal Guide on Drawing up International Contracts for the Construction of Industrial Works* (United Nations 1987) at pp 299-301.

<sup>2</sup> *Ibid* 301.

<sup>3</sup> *Ibid*

enforce any resulting award. The law may state the procedure to be followed. The law might, as well, also be used to control the arbitrator.<sup>4</sup>

A conflict of law situation arises when two or more systems of law have some possible basis to govern the resolution of a legal dispute.<sup>5</sup> Where the parties have made choice of applicable law for the resolution of their dispute, it does seem no conflict of law situation remains to be addressed because *prima facie* an arbitral tribunal knows the governing law. For example, under the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), a tribunal “shall decide a dispute in accordance with such rules of law as may be agreed by the parties,”<sup>6</sup> and a tribunal may “decide a dispute *ex aequo et bono* if the parties so agree.”<sup>7</sup>

The backlash against investment treaty law and arbitration is a manifestation of its inability to work to the satisfaction of states which have constructed this regime.<sup>8</sup> The limitations and inadequacies of the investment treaty regime call for the need to rethink the role of municipal law in foreign investment regulation. Such a supplementary role can be achieved through choice of applicable law made by the parties, which as stated often involves a selection of municipal law. The role of municipal law in the regulation of foreign investment and international business transactions depends on tribunals’ recognition and acceptance of a choice of domestic law made by the parties in respect of that system of law. I review and discuss the circumstances in which arbitral tribunals have accepted or rejected choice of particular domestic law in order to contribute to a new understanding of the continued role of municipal legal systems along with IIAs in investment regulation and protection in light of choice of law.

International arbitration is not only a creature of states, it also depends on their goodwill and support through their laws and courts for the enforcement of arbitral awards. Without states’ cooperation and support the international arbitral system will simply not work. The system will operate at the risk of its own collapse if it does not respect and uphold national laws simply because those laws will not work in favour of the investor. As Professor William Park argues, freedom from the constraints of substantive and procedural law is desirable in international arbitration. However, arbitration “affects not only winners and losers but also society at large. Thus, the fashions for non-national justice and arbitral autonomy, if pushed

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<sup>4</sup> Law Reform Commission, *Arbitration* (Report No 20, 1991), <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R20.pdf> at para 3 at 2.

<sup>5</sup> Jeremy Kirk, “Conflicts and Choice of Law within the Australian Constitutional Context” 31 *Federal Law Review* 248 at 249. No consensus exists as to the appropriate methodology to use to resolve conflict. For divergent views see Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press, 1963); David F Cavers, *The Choice of Law Process* (The University of Michigan Press, 1965); Robert A. Leflar, “Choice-Influencing Considerations In Conflicts Law” (1966) 41 *New York University Law Review* 267; Arthur Taylor and Donald Theodore Trautman Von Mehren, *The Law of Multistate Problems, Cases and Materials on Conflict of Laws* (Little, Brown and Company, 1965); and William F. Baxter, “Choice of Law and the Federal System” (1963) 16(1) *Stanford Law Review* 1

<sup>6</sup> Entered into force 14 October 1966, art 42(1).

<sup>7</sup> entered *Ibid* art 42(3).

<sup>8</sup> M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015); M. Sornarajah, “A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment” (2006) *International Environmental Agreements* 329; M Sornarajah, “The Case against a Regime on International Investment Law” in Leon Trackman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University, 2013) 475; M Sornarajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010); Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010); Jane Kelsey (ed), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books Ltd, 2010); Jane Kelsey, “International Economic Agreements and Environmental Justice” in Klaus Bosselmann and Benjamin J. Richardson (eds) *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy* (Kluwer Law International, 1999) 154; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (University Press, 2008); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).

too far, will ultimately backfire to compromise the integrity of international dispute resolution. The chemistry for these trends may inflict on the business community an unjust uncertainty even less appealing than the mandatory norms of local arbitration law.”<sup>9</sup> It is, therefore, an imperative that arbitral tribunals respect and uphold national laws put in place by countries.<sup>10</sup> The obligations to respect and uphold national laws, irrespective of whose favour the laws will ultimately work, arise in particular where the parties have legitimately chosen particular national law as the governing law to their legal relationship. I argue that where the parties have made a choice of law within the legal limits permitting such choice to be made, the applicable and relevant laws of the jurisdiction of choice must be applied to the resolution of the conflict unless the internal rules of conflict of laws in that jurisdiction point to some other jurisdiction or unless the parties have reserved powers in arbitral tribunal to otherwise.

## II. THE NEED TO SUPPLEMENT IIAS WITH MUNICIPAL LAW

Foreign investors do business within national territories and should on the basis of territorial jurisdiction<sup>11</sup> be subject to the regulation and jurisdiction of each country in which they operate. In a country such as Ghana, the Constitution states in Article 36(4) that “[f]oreign investment shall be encouraged ... subject to any law for the time being in force regulating investment in Ghana.” This would seem to suggest that IIAs which are intended to promote and protect foreign investment should be made subject to existing laws in Ghana regulating foreign investment. That provision envisages the regulation of foreign investment under municipal law and IIAs come in to supplement and not to replace municipal law. However, the conclusion of IIAs by states is taken for granted to have completely removed foreign investors from being subject to domestic regulation under municipal law. The limitations of IIA regime and its arbitration system now compel the need to reform the regime, and indeed there are ongoing efforts to reform the regime to accommodate the interests of states.<sup>12</sup> The limitations of that regime compel the need to rethink the very presence and central municipal law role of municipal law in investment law in light of choice of law. For any claim that IIAs govern investment and trade protection to the exclusion of municipal law can only stand if the parties have not made a choice of municipal law as the governing law.

The global IIA regime reached 3,304 at the end of 2015. Around the same time, the number of investor-state dispute settlement claims reached 696 with 107 states as respondents.<sup>13</sup> In these claims, governmental measures on environment, taxation, human rights, development policies, and even judicial decisions have come under attack. This has led to a situation where states have begun to question the wisdom of the investment treaty regime and its investor-state dispute settlement mechanism (ISDS), and states’ opposition to the inclusion of ISDS in investment treaties has been growing. Extreme reactions reflect the actions of Latin American countries such as Bolivia, Ecuador and Venezuela which have withdrawn from

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<sup>9</sup> William W Park, “National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration” (1988-1989) 63 *Tulane Law Review* 647 at 649-650.

<sup>10</sup> Daniel Hochstrasser, “Choice of Law and “Foreign” Mandatory Rules in International Arbitration” (1994) 11 *Journal of International Arbitration* 57 at 85.

<sup>11</sup> See Ian Brownlie, *Principles of Public International Law* (7edn Oxford University Press, 2008) 301-303.

<sup>12</sup> UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (United Nations, 2012)

<sup>13</sup> UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges* (United Nations Publication, 2016) xii and 104.

ISDS under ICSID, and in the termination of investment treaties by a number of countries including Indonesia and Sotu Africa. India has reviewed its Model Bilateral Investment Treaty to make room for public interest regulation and the European Union (EU) has made efforts to reform substantially the investment protection and ISDS system including a proposal to establish an investment court.<sup>14</sup>

Overall then, both developed and developing countries are now very much interested in the legal and policy strategies to address the challenge the investment treaty regime poses to their autonomy to regulate in the interests of their citizens.<sup>15</sup> However, missing in these strategies is an analysis of the continued presence and relevance of municipal law in investment protection and ISDS in light of choice of law. I argue that where choice of municipal law is made, municipal law remains a central part of the legal regime for investment protection and ISDS. The concerns as to regulatory autonomy in international law can be addressed if the choice of municipal law made by the parties is respected and upheld by investors and arbitral tribunals; that is, if investors and tribunals. Just as arbitrators would respect and uphold the parties' choice of arbitration over litigation, they respect and uphold a choice of municipal law legitimately made over all other laws that could possibly be applicable to the parties' dispute.

### III. THE NATURE OF INTERNATIONAL ARBITRATION

Arbitration is consensual nature in the sense of being based on an agreement by the parties to resolve disputes through a third party nominated or selected by the parties rather than have the dispute litigated before a court.<sup>16</sup> Arbitration is a private matter based on agreement between the parties and this agreement usually covers issues such the use of arbitration, the identity of the arbitrators and how they are appointed, the procedure to be followed and the applicable law.<sup>17</sup> In that sense Professor Cindy Buys is right when she stated that "arbitration is about choice. The parties choose whether to arbitrate their disputes, whom [sic] the decision-makers will be, where the arbitration will take place, and what procedures will be applied."<sup>18</sup> Arbitration is promoted on a number of grounds. The Law Commission of New Zealand has very well summarised these supposed benefits:<sup>19</sup>

At its best, arbitration can offer advantages to the disputing parties over litigation – the opportunity to choose an expert as decision-maker, the degree of informality and flexibility in terms of procedure, the reduction in time and expense (consequent on flexibility and expertise), and the choice of the governing principles and law, as well as privacy. Not all of these features will always be present. For instance some arbitrations are very formal and drawn

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<sup>14</sup> UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges* (United Nations Publication, 2016); and August Reinisch, "The European Union And Investor-State Dispute Settlement: From Investor-State Arbitration To A Permanent Investment Court" (CIGI, Investor-State Arbitration Series Paper No 2 — March 2016).

<sup>15</sup> Dominic N Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Ghana: Perspectives in Constitutionalism and General International Law* (A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy in Law, The University of Auckland, 2015), <<https://researchspace.auckland.ac.nz/bitstream/handle/2292/28285/whole.pdf?sequence=2>>

<sup>16</sup> Law Reform Commission, *Arbitration* (Report No 20, 1991), <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R20.pdf> at 90

<sup>17</sup> *Ibid* at 58.

<sup>18</sup> Cindy G Buys, "The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration" (2005) 79 *St John Law Review* 59 at 59. A further useful reading on the nature of international arbitration is Henry P De Vries, "International Commercial Arbitration: A Contractual Substitute for National Courts" (1982-1983) *Tulane Law Review* 42.

<sup>19</sup> Law Reform Commission, *Arbitration* (Report No 20, 1991) 59.

out, with pleadings, discovery, oral evidence and full arguments, and involve, as well as the arbitrator, lawyers, expert witnesses and so on, all of whom have to be paid. Others are one-off affairs where a simple onsite inspection suffices for an immediate decision. Ultimately the difference between arbitration and litigation comes down to the factor of choice and the flexibility this allows for. There are, as well, public interests arising from this recognition of private ordering including the reduction of the pressure on the courts and cost savings.

Before the emergence of ISDS mechanisms, investor-state disputes were resolved through direct state-investor dialogue, in the municipal courts or through diplomatic espousal (by which a foreign investor would convince its home country to exercise diplomatic protection) and sometimes by the threat or use of military force.<sup>20</sup> Investment arbitration became popular in particular with the establishment of ICSID in 1965 and UNCITRAL Arbitration Rules in 1976. States started to include ISDS in investment treaties between the late 1950s and early 1970s. By the 1990s it became standard in investment treaties.<sup>21</sup>

The ICSID Convention observes that, while investment disputes between states and foreign investors “would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases.”<sup>22</sup> The “creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.”<sup>23</sup> According to the United Nations Commission on Trade and Development (UNCTAD), the ISDS mechanism was designed to “create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal. It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap, and flexible process”.<sup>24</sup> The provision for ISDS in investment treaties demonstrates the importance states attach to this mechanism as a guarantee that disputes that arise between them and investors will be settled in a neutral and impartial forum. Such a guarantee, it is claimed, is necessary to attract foreign investment.<sup>25</sup> In support of investor-state arbitration it has been argued that customary international law, diplomatic espousal and domestic legal systems in the developing world (where most foreign investments were made) proved ineffective for the settlement of investment disputes. Professor Jeswald Salacuse points out that the “shortcomings of both national and international remedies for government interference with foreign property rights led to the development of depoliticized alternatives.”<sup>26</sup>

However, the actual functioning of ISDS reveals systemic and endemic deficiencies in the regime.<sup>27</sup> UNCTAD has summarised the issues as “a perceived deficit of legitimacy and transparency; contradictions

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<sup>20</sup> Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Publication, 1919); M Sornarajah, *The Pursuit of Nationalized Property* (Martinus Nijhoff Publishers, 1986); J W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010); and Christopher Dugan et al, *Investor-State Arbitration* (Oxford University Press, Oxford, 2008).

<sup>21</sup> UNCTAD, *Investor-State Dispute Settlement: A Sequel* (United Nations, 2014) 23.

<sup>22</sup> Entered into force on 14 October 1966, preamble para 3, <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)>

<sup>23</sup> International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (18 March 1965) para 9, <[http://www.sloarbitration.eu/Portals/0/Arbitrazno-pravo/CRR\\_English-final.pdf](http://www.sloarbitration.eu/Portals/0/Arbitrazno-pravo/CRR_English-final.pdf)>

<sup>24</sup> UNCTAD, *IIA Issues Note: Reform of Investor-State Dispute Settlement: in Search of a Roadmap* (No 2, United Nations, June 2013) 2. See also Buys, (n 18) 70 and 96

<sup>25</sup> M. Sornarajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010) 48-49.

<sup>26</sup> Salacuse, *Law of Investment Treaties*, (n 20) 45.

<sup>27</sup> UNCTAD, (n 24) 2.

between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures.”<sup>28</sup> The arbitral system has also been criticised as biased and its integrity questioned in part because arbitrators tend to be sympathetic to the party appointing them and the security of their appointment is dependent on them asserting jurisdiction over claims. The criticisms relating to bias and transparency can be supported or refuted by assessing the extent to which arbitrators comply with the parties’ choice of law. It may be that in order to serve the interest of the investor an arbitral tribunal will depart from choice of law made by the parties without giving concrete reason for its departure. Departure from choice may be justified by the argument that the law chosen by the parties will not lead to results that satisfy an arbitrator’s sense of justice.<sup>29</sup> Even in such a case, clear guidelines on when a tribunal can depart from choice of law will help clear perception of bias as well as help promote transparency and predictability as to when law chosen may or may not be applied. The point to emphasise is that if the making of the choice of applicable law cannot be questioned legally, that choice must be respected and upheld.

#### IV. FREEDOM OF CHOICE OF LAW

Parties to an international business transaction are free to choose the law of any state to govern their legal relationship. Party autonomy with regards to choice of law and arbitration is well established in international commercial and business transactions law.<sup>30</sup> Article 2 of the Hague Principles on Choice of Law in International Commercial Contracts establishes the parties’ freedom to choose the law that will govern their contract.<sup>31</sup> Article 42(1) of the ICSID Convention requires tribunals to decide a dispute in accordance with rules of law “as may be agreed by the parties.” The parties’ freedom to choose the applicable law is treated in Europe as “the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.”<sup>32</sup>

The internationality of a business transaction necessitates choice of law. Where a contract or a business transaction touches two or more countries each of which has its own substantive and procedural laws and conflict of law rules, it is inevitable to have uncertainty with respect to the governing law to the resolution of disputes that may arise between the parties to the transaction. Even within the domestic context in a federal country, different state laws may provide different advantages and disadvantages for the resolution of a dispute. A provision in a contract or business transaction for the applicable law and the forum for the resolution of disputes is an indispensable precondition to certainty and predictability as to the law

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<sup>28</sup> *Ibid* at 1; and Leon Trakman, “Investor State Arbitration or Local Courts: Will Australia Set a New Trend?” (2012) 46(1) *Journal of World Trade* 83 at 100-108.

<sup>29</sup> Park, (n 9).

<sup>30</sup> Zhaohua Meng, “Party Autonomy, Private Autonomy, and Freedom of Contract” (2014) 10(6) *Canadian Social Science* 212-216; Marlene Wethmar-Lemmer, “Party Autonomy in International Sales Contracts” (2011) *Journal of South African Law* 431; Guido Alpa, “Party Autonomy and Freedom of Contract Today” (2010) 21(2) *European Business Law Review* 119; and , Marta Pertegas and Brooke Adele Marshall, “Party Autonomy and Its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts” (2014) 39(3) *Brooklyn Journal of International Law* 975-1003

<sup>31</sup> Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (2015)

<sup>32</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I) (17 June 2008) preamble para 11.

applicable to such activity. A specification of the law applicable to the contract is a legal risk management mechanism to the extent that it helps avoid the submission of a dispute to a forum that may be hostile to the interests of one of or even both parties and that may be ill-suited with the nature of the dispute involved.<sup>33</sup> The efficient resolution of disputes depends in part on the appropriateness of the law in terms of its connection and suitability for the nature of the dispute involved. Therefore, it is an imperative for the parties to select a law that they consider appropriate for the resolution of their disputes that may arise between them. Professor Park states:<sup>34</sup>

Discussion of future disputes when signing the contract often seems a bit like planning for divorce at a wedding feast.

Yet lack of reasonable certainty regarding the applicable norms will not usually enhance cross-border commerce, finance or investment. While some deals may be consummated without regard to applicable law, others will not. In many contexts, multinational business enterprises will insist on calculating and balancing legal risks in making choices about their commercial opportunities.

A banker may extend credit on the basis of his borrower's reputation and balance sheet. The lender will nevertheless want to know that the loan agreement, as well as any security agreement or third party guarantee, will be enforced under the applicable law.

However, there are legal limits to the parties' autonomy to choose the law they want to govern their disputes resolution. This is because national laws and policies have implications for the recognition and enforcement of private commercial agreements whether between private parties and states or just between private parties themselves. Private commercial activities take place within national territories and therefore fundamental national laws and policies should be respected and upheld by private parties in making decisions on choice of law. Ultimately, private commercial activity will invariably be subject to various national rules and policies, at least when it comes to the enforcement of arbitral awards. Mandatory rules are laws and policies that may apply irrespective of a choice of applicable law and procedural regime selected by the parties.<sup>35</sup> Under Article 54(3) of the ICSID Convention, the execution of an arbitral award is governed by the laws concerning the execution of judgments in the state in which the award is sought to

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<sup>33</sup> Buys (n 18) 65 and 66

<sup>34</sup> Park (n 9) 659. For a critique of choice of law see: A Critique of the Choice-of-Law Problem (1933) XLVII(2) *Harvard Law Review* 173.

<sup>35</sup> Andrew Barraclough and Jeff Waincymer, "Mandatory Rules Of Law In International Commercial Arbitration" 6 *Melbourne Journal of International Law*. For further reading on mandatory national rules and how they affect party autonomy, choice of law and arbitration generally see: Pierre Mayer, "Mandatory Rules of Law in International Arbitration" (1986) 2 *Arbitration International* 274; Yves Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration" in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 227; Marc Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration" (1997) 14(4) *Journal of International Arbitration* 23; Bernd von Hoffmann, "Internationally Mandatory Rules of Law before Arbitral Tribunals" in Karl-Heinz Böckstiegel (ed), *Acts of State and Arbitration* (1997) 3; Daniel Hochstrasser, "Choice of Law and "Foreign" Mandatory Rules in International Arbitration" (1994) 11(1) *Journal of International Arbitration* 57; Günther Horvarth, "The Duty of the Tribunal to Render an Enforceable Award" (2001) 18 *Journal of International Arbitration* 135; Nathalie Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration" (1996) 7 *American Review of International Arbitration* 319; Audley Sheppard, "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" (2003) 19 *Arbitration International* 217; Lazareff, "Mandatory Extraterritorial Application of National Law" (1995) 11 *Arbitration International* 137; A F M Maniruzzaman, "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview" (1990) 7(3) *Journal of International Arbitration* 53; Mohammad Reza Baniassadit "Do Mandatory Rules Of Public Law Limit Choice of Law In International Commercial Arbitration?" (1992-1993) 10 *International Tax and Business Law* 59; Alexander K.A. Greenawalt, "Does International Arbitration Need a Mandatory Rules Method?" (2007) 18 *American Review International Arbitration* 103; and Sixto Sánchez Lorenzo, "Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I" (2010) 12 *Yearbook of Private International Law* 67. According to article 9 of EC Regulation:

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.



be enforced. By Article 25(1) of the ICSID Convention, any contracting state may notify ICSID of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of ICSID. Under Article 46 of the Vienna Convention on the Law of Treaties a state may invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent.<sup>36</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>37</sup> (New York Convention) in article III also requires each contracting state to recognise arbitral awards as binding and enforce them “in accordance with the rules of procedure of the territory where the award is relied upon.” The recognition and enforcement of the award may be refused if: the parties to an agreement to arbitrate were under some incapacity under the law applicable to them; the agreement arbitrate is not valid under the law to which the parties have subjected it; the subject matter of the difference is not capable of settlement by arbitration under the law of the country in which recognition and enforcement is sought; and if recognition or enforcement of the award would be contrary to the public policy of that country.<sup>38</sup> Clearly, these provisions subject international arbitration to some measure of control and regulation by national laws and policies. So choice of law decisions have to be made bearing in mind the laws of the country of choice as to the extent to which the subject matter is arbitrable and the enforceability of any ensuing award.

## V. CHOICE OF LAW AND APPLICABLE LAW IN INTERNATIONAL ARBITRATION

This section analyses the circumstances in which arbitral tribunals have refused to enforce the parties’ choice of law. A case in point where issues of choice of law and its scope came for consideration by an arbitral tribunal is *Balkan Energy Limited v The Republic of Ghana (BELG v Ghana)*.<sup>39</sup> Balkan Energy Ltd (Ghana) (BELG) was a limited liability company incorporated under the laws of Ghana. Its sole shareholder was Balkan Energy Limited (incorporated in the United Kingdom), which was in turn wholly owned by Balkan Energy LLC of the United States. Balkan Energy Ltd entered into a Power Purchase Agreement (PPA) with Ghana in 2007 for the refurbishment and commissioning of dual fired (diesel and gas) barge and associated facilities. The PPA provided that if any disputes arose out of or in relation to “this Agreement and if such matter cannot be settled through direct discussion of the Parties, the matter shall be referred to binding arbitration” which “[a]rbitration shall be governed by and conducted in accordance with UNCITRAL rules.”<sup>40</sup> Balkan Energy Ltd alleged breach of the PPA and commenced arbitration proceedings against Ghana.<sup>41</sup> The terms of appointment of arbitrators specified the UNCITRAL Rules as the governing rules of the arbitration and the laws of Ghana as the governing law of the PPA.<sup>42</sup> The parties had agreed that the PPA was governed by Ghanaian law, but they disagreed as to which law governed the arbitration agreement. Dutch law (*lex loci arbitri*) was favoured by BELG while the State

<sup>36</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, entered into force 27 January 1980 (United Nations, Treaty Series, vol. 1155) 331

<sup>37</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done in New York, 10 June 1958 (2006).

<sup>38</sup> *Ibid* art V.

<sup>39</sup> *Balkan Energy Limited (Ghana) v The Republic of Ghana, PCA Case No. 2010-7*, Interim Award, 22 December 2010.

<sup>40</sup> *Ibid* para 43.

<sup>41</sup> *Ibid* paras 4 and 6-7

<sup>42</sup> *Ibid* para 17

maintained that Ghanaian law as the proper law.<sup>43</sup> The State argued that Ghanaian law governed the arbitration clause and also determined issues of arbitrability because the parties “specifically subjected the PPA to the laws of Ghana, and the default position in international arbitration is that a choice of law provision in the main contract also applies to an arbitration clause contained therein.”<sup>44</sup> The BELG argued that the “conflict of laws rules ... should not be used to determine the law applicable to arbitrability, but, rather, only to determine the substantive contract law applicable to the arbitration agreement.”<sup>45</sup> It argued that even if the formal validity of the arbitration clause was governed by Ghanaian substantive contract law, Ghanaian law did not govern issues of arbitrability because tribunals “usually determine the arbitrability of a dispute on the basis of the law of the place of arbitration, except in exceptional cases involving matters of public policy.”<sup>46</sup>

Ghana objected to the jurisdiction of the Interim Tribunal arguing that both the PPA and the arbitration clause were void because the PPA did not receive Parliamentary approval as required by Article 181(5) of the Constitution of the Republic of Ghana 1992 (the Constitution).<sup>47</sup> Ghana maintained that both the PPA and the arbitration clause were an “international business or economic transaction,” and were therefore void and unenforceable for lack of prior parliamentary approval.<sup>48</sup> Ghana argued that the determination of the validity of either the PPA or the arbitration clause involved questions of interpretation of the Constitution, and was, therefore, non-arbitrable.<sup>49</sup>

The Tribunal held that it was competent to decide on the validity of the arbitration agreement and had jurisdiction to entertain the substantive suit under the competence-competence and separability principles in international arbitration which allow tribunals to determine questions concerning their jurisdiction and the substantive validity of the arbitration clause respectively.<sup>50</sup> According to the Tribunal, the arbitration clause was valid because all the formalities for its validity had been met.<sup>51</sup> The Tribunal held that the law applicable to the arbitration agreement was the law of the seat of arbitration, namely The Netherlands.<sup>52</sup> It reasoned that the constitutional interpretation issue did “not necessarily fall within the public policy restriction in The Netherlands, because, if it did, any arbitration agreement or contract which encounters an argument of constitutional nature in a foreign country would be excluded from the jurisdiction of an arbitration tribunal to decide upon.”<sup>53</sup> According to the Tribunal, the issue of the substantive validity of the PPA under the Constitution of Ghana and its consequences for the rights and obligations of the parties pursuant to their contractual undertakings were, “in essence, questions pertaining to the merits of the dispute, and they do not affect the validity or otherwise of the arbitration agreement.”<sup>54</sup>

The Tribunal held that there were strong arguments to be made “in favour of defining the scope of arbitrable matters in accordance with the *lex loci arbitri* ... [T]he Parties’ agreement to dispute settlement

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<sup>43</sup> *Ibid* para 98.

<sup>44</sup> *Ibid* para 67.

<sup>45</sup> *Ibid* para 88.

<sup>46</sup> *Ibid* para 88.

<sup>47</sup> *Ibid* para 9.

<sup>48</sup> *Ibid* paras 117-119.

<sup>49</sup> *Ibid* para 64.

<sup>50</sup> *Ibid* paras 100, 115, 152-153, 167 and 99.

<sup>51</sup> *Ibid* para 147.

<sup>52</sup> *Ibid* para paras 152-153.

<sup>53</sup> *Ibid* para 144.

<sup>54</sup> *Ibid* para 112.

before the PCA is an indicator that the Parties intended to remove questions relating to dispute resolution – as opposed to the substantive performance of the contract – from the place of either Party, to a neutral forum.”<sup>55</sup> Tribunal also saw “no reason, under Dutch or Ghanaian law, that constitutional provisions should be inherently non-arbitrable.”<sup>56</sup>

The position of the Tribunal seems to suggest that the law of the place of arbitration is not only mandatory and automatically applicable to the dispute but that it is inherently neutral because of the choice of the place as the seat of arbitration. This is quite unfounded. It is arbitration that was chosen as a ‘neutral’ mechanism for the settlement of the parties’ disputes and not necessarily The Netherlands. The Netherlands was the seat of arbitration because it happened to have been chosen by the parties given the facilities it has for such arbitration. Any other place could have been chosen as the seat of arbitration for as argued by Professor Jan Paulsson “[u]nless there are objective reasons to conclude that a *situs* is hostile to awards rendered in compliance with the Rules agreed between the parties, it is assumed that the whole world is a possible *situs*.”<sup>57</sup>

The fact that The Netherlands was the seat of arbitration did not mean that its laws were inherently neutral and necessarily became applicable to the parties’ dispute. The application of Dutch law would invariably result in a decision being made in favour of one of the parties just as it would have been the case if the law of one of the parties were applied. The mere agreement to have a dispute resolved in a particular jurisdiction does not make the law of that jurisdiction automatically and inherently applicable to the disputes between the parties. This is particularly the case if the parties agree that both the contract and the agreement to arbitrate are to be governed by the law of either contracting party. If The Netherlands as the seat of arbitration were neutral, it would be neutral because it was *the place of arbitration* and, more important, for purposes of the *presumed neutrality* of those who sit to arbitrate but that did not automatically and inherently import neutrality in the application of Dutch law. Thus, if by the text of the parties’ agreement they meant to have the law of the host state to investment to govern the validity of the contract and the arbitration agreement that should be so upheld and respected. Moreover, if indeed the choice of a place as the seat of arbitration is meant to completely detach the laws of the countries of the parties from the dispute, then the winning party cannot rely on the laws of the host country to enforce an award arising from the settlement of the dispute. Arbitral tribunals should not seek to sever or detach the law of the host country (which has also been chosen by the parties as the applicable law) for purposes of establishing their jurisdiction or validating an agreement to arbitrate and at the same time expect the investor to rely on these same laws for purposes of enforcing an ensuing award.

As to which law was applicable to the arbitration clause itself, Ghana argued that since the PPA was governed by the laws of Ghana, a matter which was not disputed by BELG, the laws of Ghana should also apply to the arbitration agreement contained in the PPA. Balkan Energy Ltd argued contrary that since the PPA “did not make an express choice of law in respect of the arbitration agreement,” the arbitration

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<sup>55</sup> *Ibid* para 142.

<sup>56</sup> *Ibid*.

<sup>57</sup> Jan Paulsson, ‘Delocalisation Of International Commercial Arbitration: When and Why It Matters’ (1983) 32 *International and Comparative Law Quarterly* 53 at 55.

agreement was governed by the law of the seat of arbitration, in this case Dutch law.<sup>58</sup> It made this argument despite the fact that the terms of appointment of the Tribunal the parties had specified that the governing law to the PPA was Ghana law. Thus, the question of there being no express choice of law in the PPA should not have been an argument to be made by BELG and entertained by the Tribunal. The decision of the Tribunal shows that it was out to make a decision that gave effect to the arbitration agreement. This is because the position of the Tribunal throughout was very linear and lopsided towards validating the arbitration agreement rather than objectively deciding on the issues. In other words, the Tribunal started from an approach that was biased in favour of justifying or validating the agreement to arbitrate and favouring the rights of BELG rather than from a very neutral position to assess the merits of each claim objectively. Thus holding in favour of BELG on this issue, The Tribunal stated:<sup>59</sup>

*in deciding this issue, it should favour the approach that is more conducive to making the arbitration agreement effective rather than an approach that would render the agreement ineffective. The Parties agreed to an arbitration clause providing for the resolution of disputes arising under the PPA by arbitration and it is this choice that should prevail and not an interpretation the result of which would be the exact opposite. A contract cannot be deemed to contain a clause which is self-defeating of its objectives. The validation principle invoked by the Claimant lends support to the conclusion that it makes more sense to consider that the Parties opted for an approach that would validate rather than render invalid the arbitration agreement.*

The solution to this issue is also not clear-cut by reference to conflict of law rules. The basic tenet underlying the doctrine of *lis pendens*, however, points in the direction of finding in favour of the law that is most closely connected to the arbitration agreement. In this case it is the law of the Netherlands that appears to have the *closest connection* with the arbitration agreement under the PPA. This is borne out by the fact that The Netherlands was chosen as the seat of the arbitration and by the explicit decision to operate under the UNCITRAL Rules, which, among other consequences, determines the courts which will be competent to consider any challenge to the award rendered. More important still is the argument invoked by the Claimant to the effect that *the choice of the seat of the arbitration in a neutral country indicates a clear understanding that the Parties wish to detach the arbitration agreement from the domestic law or the courts of either Party*. The situation is, of course, different with respect to the law applicable to the PPA, since the PPA contains a choice of law provision that expressly subjects the contract to Ghanaian law.

In the light of the above considerations, the Tribunal concludes that the law applicable to the arbitration agreement *in the PPA* is the law of The Netherlands. In so deciding, the Tribunal wishes to state that this entails no disrespect for the laws of Ghana or of other developing countries. The Tribunal is sensitive to the importance of according due respect to the laws of every sovereign State; and it emphasizes that its decision in the present case is entirely unrelated to any views or judgments regarding the merits of the respective legal systems. Rather, *its decision is based solely on its appreciation of which solution appears to be more appropriate for the effective discharge of the dispute resolution functions which have been entrusted to it by the agreement of the Parties themselves*.

The Tribunal ultimately concluded that the proper law governing the validity of the arbitration agreement was Dutch law and therefore Article 181(5) of the Constitution did not in any way affect the validity of the arbitration agreement.<sup>60</sup> For the Tribunal then, the “more appropriate” solution for the “effective”

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<sup>58</sup> *Balkan Energy Limited v Ghana* (n 40) para 148.

<sup>59</sup> *Ibid* paras 149-150 and 152 respectively. (Emphasis added).

<sup>60</sup> *Ibid* para 154

discharge of the dispute resolution functions entrusted to it was to make a finding that the arbitration agreement is valid and binding. The position of the Tribunal is very problematic because it failed to explain why the same parties will make a choice of law of a place other than that of the seat of arbitration to govern the subject matter of the contract if indeed “the choice of the seat of the arbitration in a neutral country indicates a clear understanding that the Parties wish to detach the arbitration agreement from the domestic law or the courts of either Party.” The Tribunal did not give reasons why a finding of the invalidity of the arbitration agreement under the governing law of the PPA chosen by the parties themselves was not at all appropriate or was less appropriate in comparison with its finding that the arbitration was binding under Dutch law. It is as if an arbitration agreement must always be valid and binding. The conflict of laws rule requiring the application of the law of the seat of arbitration is a default rule to comply with only if the parties have not made a choice of law. If the choice of the seat of arbitration means the law of the seat automatically governed the agreement to arbitrate, such logic should extend to the application of the law of the seat to the subject matter of the contract because of the law of either cannot truly be said to be neutral. If this logic were to be adopted then making choice of law becomes of no use.

The position taken by the Tribunal manifests a case of the bias of a system of dispute resolution that the parties chose on the basis of its claimed neutrality and impartiality. If the parties did not agree on a choice of law to govern the PPA, the Tribunal could embark on a journey in search of a law that would allow it to give effect to the arbitration agreement. However, in this case the parties had chosen Ghanaian law as the governing law to the PPA. The arbitration agreement was contained in the PPA. The fact that the PPA in its entirety was governed by Ghanaian law was not legitimately disputed by either party to the PPA. As Ghanaian law governed the PPA and its substantive contractual obligations, it equally governed the arbitration agreement contained therein. To argue or hold the contrary, as the Tribunal did, is to sever the scope of application of the governing law; to say that it applied to all other terms of the PPA but not the arbitration agreement contained in it. It has not been explained satisfactorily why the governing law regulated or governed all other terms of the PPA but not the arbitration agreement which itself was a term of the PPA. The separability principle that the Tribunal relied on does not prohibit the parties from agreeing to a governing law that covers the substantive contract and the arbitration agreement contained in it.

Certainly, by agreeing to have the dispute settled by arbitration under UNCITRAL Arbitration Rules<sup>61</sup>, those Rules were to govern the conduct of the arbitration but not necessarily govern exclusively, if at all, the substantive issue as to the validity of the arbitration. This is because it was the *settlement of the dispute* and the ensuring procedure to follow in its settlement that in strict and proper terms can be said was made subject to Rules and not the question of the validity of the agreement to arbitrate. There is no law that says that an agreement to arbitrate must be valid and effective all times and against the contrary. So a tribunal should be prepared to hold so if by the parties’ choice of law this should be the case. In the instant case, as the parties chose Ghanaian law as the governing law to PPA which terms included the arbitration

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<sup>61</sup> UNCITRAL Arbitration Rules as revised in 2010

agreement, that law should have been applied to determine the validity of the agreement to arbitrate. The only legitimate way to depart from that choice of law is if the internal conflict of law rules pointed to a different jurisdiction. In this regard, the Tribunal made some attempt to apply conflict of law rules (*lis pendens*) but on the basis of the totality of its analysis, that was ultimately intended to enable the Tribunal to effectuate its goal of holding the arbitration agreement to be valid.<sup>62</sup> The separability principle does not apply when both the substantive contract and the agreement to arbitrate are governed by the same governing law. If by the terms of that governing law either or both are invalid, the question of separability does not arise. The separability principle does not prohibit a determination of the validity of an agreement to arbitrate.

The lack of a well-reasoned decision of the Tribunal is also reflected in its contradictory factual findings. For example, the Tribunal stated that it (tribunal) “must note first that, while the Parties agree that the PPA is governed by Ghanaian law, they disagree as to which law governs the arbitration agreement.”<sup>63</sup> The Tribunal also stated:<sup>64</sup>

On 2 July 2010, the Tribunal adopted the Terms of Appointment, *which reflected points of agreement communicated by the Parties* in a joint letter of 8 June 2010 and telephone communications of 11 June 2010. *The Terms of Appointment confirmed* the UNCITRAL Rules as the governing rules and *the laws of the Republic of Ghana* as the governing law, and designated English as the language of arbitration and The Hague, the Netherlands, as the place of arbitration.

The parties to a contract are not limited in terms of the timing of agreeing on choice law or its modification.<sup>65</sup> Thus by the time of the commencement of the arbitration proceedings, the parties had made manifest the choice of governing law to the PPA by the terms of appointment of the arbitrators. The fact that the parties may not have expressly specified the choice of law in the PPA itself at the time it was made was therefore completely irrelevant and immaterial to any decision on whether the parties had agreed on choice of law. In fact the Tribunal itself stated that the argument of Ghana that “the PPA is governed by the law of Ghana” was “a matter which is not disputed by the Claimant.”<sup>66</sup> The parties were only “in dispute as to the law that should apply” to invalidate the arbitration agreement.<sup>67</sup> Yet the claimant had argued that parties had “not expressly agreed on the governing law” to the arbitration agreement and that in “such situations, it is common for arbitral tribunals to refuse to apply the general choice-of-law clause in the main contract to the arbitration agreement, *especially where the Parties’ chosen law would invalidate the arbitration clause.*”<sup>68</sup> Clearly the concern of the claimant was not that chosen law was legitimately not applicable to the arbitration agreement; its primary concern was that the application of the chosen law

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<sup>62</sup> The claimant had argued that “should the Tribunal wish to proceed instead by applying conflict of laws rules ... the conflict of law rules of the seat of arbitration should be applied in determining the substantive law applicable to an arbitration agreement.” *Ibid* para 131. The claimant argued further that the parties may be said to “have impliedly chosen the law that will validate the arbitration agreement” and not one that will invalidate it. *Ibid*. That was ultimately what the Tribunal did in applying *lis pendens*, making a decision that validate the agreement to arbitrate despite an obvious choice of law.

<sup>63</sup> *Ibid* para 98.

<sup>64</sup> *Ibid* para 17. (Emphasis added).

<sup>65</sup> See for example EC Regulation 593/2008, article 3(1): “The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation.”

<sup>66</sup> *BELG v Ghana*, (n 39) para 148

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid* para 131 (emphasis added).

would invalidate the arbitration agreement. So this was a case of a party seeking to avoid the consequences of applying the chosen law the party had voluntarily agreed to. This certainly a legitimate basis to refuse to apply the chosen law.

The so-called “general choice-of-law clause” governed the PPA that contained the arbitration agreement and the parties had not expressly agreed that the agreement to arbitrate was to be governed by any other law. The agreement to arbitrate was contained in the PPA so it was governed by that governing law of the PPA. In the absence of express agreement that the arbitration agreement, though contained in the PPA, was separable from other terms of the PPA and was to be governed by some other law, the presumption reasonably and necessarily is that the arbitration agreement was to be governed by the law governing the PPA. Yet, the Tribunal agreed with the claimant that there was no choice of law with regards to the agreement to arbitrate and concluded that Dutch law properly applied to the validity of the arbitration agreement.<sup>69</sup> In so holding, the Tribunal emphasized that the New York Convention “supports the conclusion that, in the absence of a choice of law provision in the arbitration agreement, the law of the seat of arbitration should be the applicable law for determining the validity of the arbitration agreement.”<sup>70</sup> This conclusion is quite misleading. The New York Convention does not say that the governing law to a substantive contract cannot affect an agreement contained in it. The Convention does not say that the parties must agree to a separate choice of law clause to an agreement to arbitrate contained in the contract. So the parties may well agree that the governing law to the contract covers an agreement to arbitrate.

In the instant case, the arbitration agreement was contained in the PPA. This explains probably why the arbitration agreement did not contain its own separate provision on choice of law. If the parties intended the arbitration clause to be independent and separate from the PPA and be governed by a different law, they would not have included it in the PPA; at the minimum they would have specified in the PPA that the agreement to arbitrate would be governed by a law other than the one that governed the PPA. Thus the conclusion of the Tribunal that “the arbitration agreement embodied in ... the PPA is both valid and enforceable *independently from the issue of the validity of the PPA*”<sup>71</sup> is equally inaccurate and misleading of the real issue. The real issue was whether the arbitration agreement “embodied in ... the PPA” was valid and enforceable in light of the governing law to the PPA in which it was embodied. The issue was not whether the validity of the arbitration agreement was dependent on the validity of the PPA. The fact that both could be invalidated on the basis of the governing law does not mean that the validity of one was dependent on the validity of the other.

Article 23 of UNCITRAL Arbitration Rules states that for the purpose of giving effect to the power of a tribunal to rule on its own jurisdiction, “an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail *automatically* the invalidity of the arbitration clause” (emphasis added). This provision does not say an agreement to arbitrate can never be invalidated on the basis of the invalidity of the underlying contract. It does not also say that the parties cannot agree to a choice law that covers both

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<sup>69</sup> *Ibid* para 53.

<sup>70</sup> *Ibid* para 151.

<sup>71</sup> *Ibid* para 167. (Emphasis added).

the underlying contract and its agreement to arbitrate. If the parties can choose a law to govern both the subject matter of the contract and the arbitration agreement, then that chosen law can determine the validity of both. Thus, the requirement that an agreement to arbitrate be treated as *independent of the other terms of the contract* does not mean that the governing law cannot cover and affect the agreement to arbitrate if by specifying the governing law the parties intended that it should cover and affect all the other terms of the contract. If the parties do not expressly exclude an agreement to arbitrate from being affected by the governing law to the contract in which the agreement is embodied, then the agreement like all other terms of the contract is subject to the law chosen by the parties. It can further be argued that the object of Article 23 of UNCITRAL Arbitration Rules, is to preserve the jurisdiction of the arbitral tribunal, so that at least the tribunal can commence proceedings to decide on the validity of an agreement to arbitrate in the first place. The object of the provision is not to preserve or assure an unquestionable and all-time validity of an agreement to arbitrate.

## VI. CHOICE OF LAW, RENVOI AND MUNICIPAL LAW IN INTERNATIONAL ARBITRATION

### A. *The Obligation to Apply the Chosen Law*

The *BELG v Ghana* case considered above highlights the important issues rightly raised by Daniel Hochstrasser, namely “whether the choice of law made by the parties limits the arbitral tribunal with respect to the applicable law to such provisions which are part of the legal system designated by the parties as the *lex contractus*.”<sup>72</sup> The starting point for addressing this issue is an analysis of the provisions of conventions that govern the exercise of the powers of an arbitral tribunal. The analysis below shows that international arbitration conventions require arbitral tribunals to keep faith with the parties’ choice of law. The scope of the chosen law and the limitations of choice of law on the powers of arbitral tribunals to depart from that chosen law have not been considered in arbitral proceedings; it was certainly not argued in *BELG v Ghana*. I argue that a choice of law made by the parties limits the competence of a tribunal in the determination of the applicable law to the laws of the country designated by the parties, including its rules of private international law.

The ICSID Convention states in Article 42(1) that a 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.” This is an important provision that can promote the application of municipal law in the settlement of investment disputes. By this provision, the primary obligation of a tribunal when there is a choice of law is to apply the law chosen by the parties. This provision limits the competence of a tribunal to go about fishing for some other law when the parties have legitimately made a choice of law, and this is the case even if the consequences of applying the choice of law will be unpalatable to a tribunal, the parties or one of them. The provision does not make room for a

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<sup>72</sup> Hochstrasser, ( n 35) 57.



tribunal to apply some other law when the parties have made a choice of law. It is only in the the absence of such agreement on choice of law that a tribunal is bound to apply the law of a *contracting state party* to the dispute, which could be that of the host state or home state. The law of the contracting state in such circumstances is defined to include the state's rules on the conflict of laws. Rules of international law as may be applicable only come in after consideration of the law of a contracting state to be applied if no choice of law agreement is made. Article 42(1) of the ICISD Convention places overriding consideration to the need to respect and uphold the parties' choice of law and of the law of a contracting state, which in most cases is municipal law. It also gives overriding consideration to municipal law when it requires that the law of a contracting state broadly stated should apply in the absence of choice of law agreement by the parties. It can be argued that by this provision international law only comes in when there is no choice of law and the law of a contracting state does not apply or when the law of choice or its rules of conflict of laws dictate otherwise. These interpretations are particularly right because by virtue of Article 42(2) and (3) a tribunal "may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law" neither does it have the power to decide a dispute *ex aequo et bono* if the parties have not so agreed. Strictly interpreted, under Article 42, the law of the seat of arbitration does not even come where the parties have not made a choice of law.

Thus, a tribunal cannot simply decide to depart from the parties' choice of law because the applicable law will lead to an agreement to arbitrate being invalidated or because equitably and in the sense of judgement of a tribunal, an application of that choice of law will not lead to a party or the tribunal's expected outcome. It is not the job of a tribunal to validate an agreement to arbitrate against the express dictates of the law chosen by the parties. As UNCTAD rightly stated, amiable composition "implies a resort to rules, whereas *ex aequo et bono* involves ignoring them entirely. Either way, neither an amiable composition nor an *ex aequo et bono* clause can be assimilated in any sense to a choice by the parties of non-state rules."<sup>73</sup> Unless a choice of law or rules of conflicts of law of the country chosen dictate otherwise, Article 42 of the ICSID Convention does not retain any discretion in a tribunal to go about making a determination of the law that is most closely connected to the situation. This is unlike Regulation (EC) No 593/2008, of the European Commission which states that "[w]here all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."<sup>74</sup> Article 42 of the ICISD Convention which gives wide scope for the effect of choice of law is similar to Article 9 of the Hague Principles on Choice of Law which reads (emphasis added):<sup>75</sup>

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<sup>73</sup> UNCTAD, *Dispute Settlement International Commercial Arbitration: Law Governing the Merits of the Dispute* (United Nations, 2015) at 15.

<sup>74</sup> Regulation (EC) No 593/2008 Of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) *Official Journal of the European Union* (17 June 2008) art 3(3).

<sup>75</sup> The scope of the chosen law with respect to "validity and the consequences of invalidity of the contract" is however, extended by article 9(2) which states that article 9(1) *e*) does not prevent the application of any "other governing law" that supports the formal validity of the contract. Thus in addition to the law of the chosen country, laws of other countries that have a connection to the arbitration (including the seat of arbitration) may be looked in determining validity of a contract. However, in order not to defeat the parties' objective in making a particular choice of law that "other governing law" should be determined by the rules of conflict of law of the chosen country if for some legitimate legal reason the laws of the chosen country cannot be followed.

The law chosen by the parties *shall govern all aspects of the contract* between the parties, including but not limited to - a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations.

Article 8 of the Hague Principles strictly limits the scope of choice of law to the law chosen by parties by excluding rules of private international law from the law chosen by the parties unless the parties expressly provide that rules of private international law shall apply. Article 35(1) of UNCITRAL Arbitration Rules is similar effect as Article 42 of the ICSID Convention. It states that 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.” By Article 35(2) of the Rules, an arbitral tribunal may decide as *amiable compositeur* or *ex aequo et bono* “only if the parties have expressly authorized the arbitral tribunal to do so.” Article 35(1) and (2) of UNCITRAL Arbitration Rules do not make room for a tribunal to depart from the applicable law chosen by the parties. Thus, in the *BELG v Ghana* case which was decided under these Rules, the Tribunal was under obligation to follow the governing law agreed to by the parties, namely Ghanaian law. If it did, it would have found that the arbitration agreement was invalid since The Supreme Court has held in *Attorney-General v Faroe Atlantic Co Ltd*,<sup>76</sup> *Attorney-General v Balkan Energy Ghana Ltd*<sup>77</sup> and *Amidu v Attorney-General Cases*<sup>78</sup> that international business or economic transactions such as power purchase agreements, international loan agreements, and international project implementation agreements that have not been laid before and approved by Parliament as required by Article 181(5) of the Constitution are unconstitutional and void and the State cannot be required to pay damages for breach of such agreements. Such a finding of unconstitutionality would be the result of the parties’ choice of law, not the result of a unilateral application of domestic law by Ghana. It was to avoid these consequences that the Tribunal chose to apply the law of the seat of arbitration in obvious disregard of the parties’ freely chosen law as established in Section V above.

The position of these conventions regarding fidelity to the choice of law sticks to arbitration doctrine and practice that refuses the application of foreign public law. The position emphasizes party autonomy, the need for that autonomy and will of the parties to be respected and upheld and the fact that arbitration is mandated by the parties and therefore arbitrators must follow the will of the parties on choice of law.<sup>79</sup> As international arbitration depends on the good faith and domestic institutional support to realise its objectives (for example reliance on domestic courts to enforce arbitral awards), arbitrators should equally respect laws that states have enacted in legitimate exercise of their legislative powers.<sup>80</sup> That obligation to respect and uphold national laws is particularly compelling when the parties to arbitration have chosen a

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<sup>76</sup> *Attorney-General v Faroe Atlantic Co Ltd* [2005-2006] SCGLR 271

<sup>77</sup> *Attorney-General v Balkan Energy Ghana Ltd*, Judgment, 16 May, 2012

<sup>78</sup> *Amidu v Attorney-General*, Writ No. JI/15/2012, Judgment, 14 June 2013; and *Amidu v Attorney-General*, Writ No. JI/23/2012, Judgment, 21 June 2013.

<sup>79</sup> Hochstrasser, (n 35) 58 and 84

<sup>80</sup> *Ibid* at 85

particular national law to govern their relations and when that choice has been made within the limits of mandatory rules in that or other relevant country. Arbitration being dependent on the agreement of the parties to submit their disputes for settlement by arbitration, arbitrators whose authority derives from such agreement must equally be limited by the arbitration agreement and choice of law by made the parties to govern their substantive relationship. Arbitrators should not substitute their own view as to what the parties should have agreed to for what the parties have actually voluntarily agreed to. Arbitrators should decide within the scope of the agreement to arbitrate and the chosen law and should not wish for the parties what they have not wished for themselves.<sup>81</sup> Professor Buys rightly argued this point when she stated “[i]n light of the contractual nature of arbitration, parties to a commercial arbitration agreement ought to be assured that their choice of the applicable law will be respected as well.”<sup>82</sup> In other words, according to Professor Buys, as “arbitrators are appointed by the private agreement of the parties ... their allegiance should be to seeing that the terms of that private agreement are carried out. The arbitrator’s duty to respect the wishes of the parties as expressed in their written agreement extends to respect for the parties’ choice of law in a commercial transaction.”<sup>83</sup> Arbitral respect for the parties’ choices as reflected in the agreement to arbitrate is not only consistent with the underlying principles of freedom of contract and party autonomy, it can also lead to reviewing courts respecting party autonomy and upholding decisions of arbitral tribunals subject to overriding public policy considerations and mandatory national rules.<sup>84</sup>

Despite the need to keep faith with party autonomy and the parties’ choice of law made in exercise of that autonomy, there are cases, as reflected in *BELG v Ghana*, when one party becomes dissatisfied with the choice of law that the parties have agreed to and seek to have the arbitrator apply the law of a different country. The party objecting to the application of the choice of law might argue that there does not exist a reasonable or substantial connection between the law chosen and the parties’ transaction. The party may also be seeking simply to avoid the natural consequences of an unfavourable outcome against it that may result from the application of the chosen law. For example, in *BELG v Ghana* BELG requested the Tribunal to “refuse to apply the choice-of-law clause to the arbitration clause because Ghanaian law discriminates between national and international transactions to which Ghana is a party and thwarts the Parties’ true intentions to arbitrate.”<sup>85</sup> It further argued that if the Tribunal proceeded to apply conflict of laws rules, “the conflict of law rules of the seat of arbitration should be applied in determining the substantive law applicable to an arbitration agreement.”<sup>86</sup>

In most cases, the tribunal will turn to the law of the seat of arbitration because traditionally it is taken that the designation of a place as the seat of arbitration is treated as consent to the procedural law of that place and as evidence that the substantive law of the seat applies.<sup>87</sup> In *BELG v Ghana* the Tribunal held that parties’ agreement to dispute settlement before the Permanent Court of Arbitration “is an indicator that

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<sup>81</sup> Buys, (n 18) at 67-68

<sup>82</sup> *Ibid* at 69.

<sup>83</sup> *Ibid* at 69

<sup>84</sup> *Ibid* 71.

<sup>85</sup> *BELG v Ghana* (n 39) para 130

<sup>86</sup> *Ibid* para 131.

<sup>87</sup> Buys, (n 17) 71. E.g. in *BELG v Ghana*. The Tribunal relied on the provision of The Netherlands’ arbitration law that commences its provided that an arbitration agreement in proceedings subject to the Dutch arbitration law cannot serve to determine legal consequences of which the parties freely dispose in support of its decision to apply the *lex fori* rather than the *lex loci contractus* which was also chosen by the parties. *Ibid* para 141.

the Parties intended to remove questions relating to dispute resolution – as opposed to the substantive performance of the contract – from the place of either Party, to a neutral forum.”<sup>88</sup>

The parties to a choice of law agreement should not be allowed to evade their contractual obligation to observe that agreement if they are challenging the applicability of the chosen law in disguise, that is as a camouflage to avoid the consequences attached to the application of the law they have freely agreed should apply to their transaction and dispute. If the substantive law cannot be applied for some substantive and legitimate reason, a tribunal should apply the conflict of law rules that accompany the substantive law chosen by the parties because in the absence of a specific definition of the scope of the chosen law by the parties themselves, the chosen law must be taken to include its conflict of law rules.

### *B. Choice of Law and the Law of the Seat of Arbitration*

The conventional theory that the choice of a place as the seat of arbitration gives reason to disregard the chosen law which also happens to be the law of one of the parties and consider instead the law of the place of arbitration needs to be reconsidered. The place of arbitration is simply chosen as a place of arbitration for purposes of dispute resolution. If the parties really consider the place of arbitration as neutral not only in terms of location but also in terms of the law and institutional support, they probably will go ahead to submit the dispute to public institutions at the place of arbitration to be decided under the laws of that country; they will not choose arbitration and the law of one of the parties as the governing law. Therefore, in the absence of the parties expressly giving some role for the law of the seat of arbitration in the parties’ dispute resolution, the law of that place is in no different position than the law of any other place which could equally have been chosen as the seat of arbitration or which has some other connecting fact but has not been chosen. To give effect to the intention of the parties that the chosen law should govern their legal relationship, the rules of conflict law of the country of the chosen law must apply if the applicability of the chosen law is challenged. The seat of arbitration has interest in the way justice is administered within its territory. However, that country’s legal system may also recognise party autonomy and its laws must not be applied to defeat party autonomy which has been legitimately exercised.

Professor Buys envisages a situation “where there is little or no connection between the parties to the contract and the law that is chosen.”<sup>89</sup> While there are other important factors that can connect the parties and their transaction and the some other law, it must be borne in mind that the very purpose of choice of law is to connect the chosen law and the parties and their transaction and disputes. The parties would have made that choice of law well aware of other connecting factors. In choosing the laws of a particular jurisdiction the parties mean to exclude all other factors that could plausibly be connected to their transaction and dispute. So it seems there can hardly be a lack of “closest connection” between a transaction or dispute and the chosen law. If the parties have the freedom to contract and autonomy to choose the law to govern their contract and they have legitimately done so, there must be compelling and fundamental factors to ignore that choice as a connecting factor. Such a compelling factor cannot be that

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<sup>88</sup> *BELG v Ghana* (n 39) para 142

<sup>89</sup> *Ibid.*

the chosen law will invalidate the underlying agreement or agreement to arbitrate. Such a compelling factor does not also include a tribunals wish or desire to do justice beyond the terms of laws governing the exercise of its powers, that is if the tribunal is not authorised by the parties or the applicable arbitration convention to exercise its powers as *amiable compositeur* or *ex aequo et bono*.

### C. *Renvoi and Scope of Chosen Law*

The function of choice of law is to specify the laws within a particular country to govern the parties' legal relationship, and those laws must be taken as including not only the specific law that may be applied, but also the rules of internal conflict of laws that may be used to determine the specific law or rule to apply.<sup>90</sup> This approach is consistent with the doctrine of *renvoi* which requires an identification and evaluation of governmental interests; choice of law decisions of interested states other than the forum.<sup>91</sup> The doctrine of *renvoi* "is that, when by its rules of the conflict of laws a court must apply the law of some other legal unit, it must apply not only the internal law of that unit, but also its rules of the conflict of laws."<sup>92</sup> The rules of the conflict of laws are taken "as incorporating not only the ordinary or internal law of the foreign state or country, but its rules of the conflict of laws as well. According to *this* theory 'the law of a country' means the whole of its law."<sup>93</sup>

In *Bankswitch Ghana Ltd v The Republic of Ghana*<sup>94</sup> the parties had a dispute relating to *secure document management system agreement* which had made provision for international arbitration and specified that the agreement "shall be governed by the Laws of the Republic of Ghana." The investor argued that a tribunal "is not allowed to apply principles of national law to the exclusion of those of customary international law, especially when the relevant contract (i) incorporates customary international law (either expressly in the contract or through the governing law's application of the Doctrine of Incorporation) and (ii) where the relevant contract is 'international' in nature."<sup>95</sup> It further argued that where international law "provides a cause of action to an individual, a tribunal must measure the State's conduct against international law standards, even if the contract is governed by a national law."<sup>96</sup> The Tribunal agreed with the investor, holding that "when a State party enters into a commercial contract with a foreign party, even in the case of a contract that names a domestic legal regime as the governing law, international law will apply to some aspects of the contract."<sup>97</sup> In other words, "a governing law clause providing for the application of national law does not preclude an international tribunal from resorting to relevant customary international law principles, if applicable."<sup>98</sup> Accordingly, the Tribunal concluded that while the agreement stated that it was to be governed by the laws of Ghana "that choice of law clause does

<sup>90</sup> On the issue whether choice of law means legal system or choice of law Ian FG Baxter, "International Business and Choice of Law" (1987) *The International and Comparative Law Quarterly* 92-115.

<sup>91</sup> John David Egnal, "The 'Essential' Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law" (1981) 54 *Temple Law Quarterly* 237, 238-239.

<sup>92</sup> The Harvard Law Review Association, "A Distinction in the Renvoi Doctrine" (1922) 35(4) *Harvard Law Review* 454.

<sup>93</sup> Ernest G. Lorenzen, "The Renvoi Doctrine in the Conflict of Laws: Meaning of 'The Law of a Country'" (1918) 27(4) *The Yale Law Journal* 509 at 511.

<sup>94</sup> *Bankswitch Ghana Ltd v The Republic of Ghana*, UNCITRAL, Award Save as to Costs, 11 April 2014

<sup>95</sup> *Ibid* para 11.57

<sup>96</sup> *Ibid* para 11.58

<sup>97</sup> *Ibid* para 11.64

<sup>98</sup> *Ibid* para 11.67

not insulate the Government from its obligations under customary international law to treat what is essentially a foreign investment fairly and equitably and not to take that investment without compensation.<sup>99</sup>

The position of the Tribunal raises the question as to the scope of applicable law chosen by the parties. Does chosen law include international law or is it limited strictly to the municipal law of the country concerned? An answer to this question requires clear understanding of what the intention of the parties who made the choice of law is as well as an examination of the extent to which international law is incorporated and embedded in the applicable municipal law. This is better addressed if the parties define what they mean by the “governing laws” of the country. They could define this to include or exclude international law rules.

The purpose of making a choice of applicable law is to provide for specificity and predictability as to the law that will regulate the parties’ relationship, including for dispute resolution. Choice of law by its very nature has a limiting function; its sole and primary function is to limit the scope of the laws that may apply to the parties’ transaction and dispute if no choice of law is made. Choice of law in this sense excludes other laws and rights available under those laws. If the parties intend their legal relationship to be governed by any possible applicable law, they will not make a choice of applicable law. In making a choice of law the parties know or ought to know that they are not only limiting the scope of the laws that will apply in relation to them, they also know or ought to know that they are limiting the scope of other rights that could be available to them under the excluded laws. Thus a choice of municipal law means that the parties want their rights to be governed exclusively by municipal law and rules of international law and private international law that according to the legal system of the chosen country are part of the laws of that country.

A choice of municipal law makes municipal law a central part of the trade and investment regimes and places municipal law on the same level as IIAs. In such a case, municipal law can no longer be treated as an appendage or secondary to IIAs. This is so because IIAs do not limit freedom of contract and party autonomy. In fact, IIAs or arbitration conventions affirm party autonomy with respect to choice of law as reflected in the Hague Principles on Choice of Law, Article 2; ICSID Convention, Article 42; EC Regulation 593/2008, Article 3; and UNCITRAL Arbitration Rules, Article 35. Therefore, if the parties being aware of their rights under other laws proceed to specify municipal law as the applicable law, their rights under the laws not specified are extinguished and ceased to exist and arbitrators must give effect to the rights of the parties under the chosen law. In this connection, the chosen law includes judgments of the chosen jurisdiction and arbitral tribunals must follow those judgments if the choice of law has been effectively made.

Arbitral Tribunals must respect and uphold the choice of applicable law because as stated by Professor Park, the “authority of the arbitrator ... derives not only from the consent of the parties, but also from the several legal systems that support the arbitral process: the law that enforces the agreement to arbitrate, the

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<sup>99</sup> *Ibid* para 11.68

forum called on to recognize and enforce the award, and the law of the place of the proceedings.”<sup>100</sup> Therefore, national laws must be followed not only when they serve the interest of the investor but also when they serve the interest of the state as well, even if that means detriment to the company. Investors must accept the consequences attached to their voluntary agreement as to choice of applicable national law. The essence of binding arbitration is that the parties voluntarily select the law to govern their legal relationship and select their own private judges and procedures. Implicit in such an agreement is the assumption that arbitrators “will follow the minimum requirements of fair hearing, including respect for the party-chosen law.”<sup>101</sup> As Professor Park rightly stated:<sup>102</sup>

No one opts for an unfair result applied to himself. However, it is rarely possible to predict in advance of the dispute who will get the rough side of the law, since the contours of the controversy do not exist. For this reason, parties to commercial transactions agree to “play by the rules,” aware that application of the rules will not always produce agreeable results. It is not irrational to assume that businessmen desire the application of rules of law as an accepted calculus of justice, even though those rules lead to consequences that could be described as unfair.

## VII. CONCLUSION

Professors Elliot Cheatham and Willis Reese rightly argue that “[a]ll laws, be they statutory or judge-made, are the products of policies which, in turn, are deemed of sufficient importance to warrant their embodiment into law. A choice of law decision is, therefore, of real concern to the states involved, since in net effect it determines whose policy shall prevail in the particular case. This consideration dictates that the law of the state with the dominant interest, should normally at least, be applied.”<sup>103</sup> I argue that “the state with the dominant interest” to have its law applied in a dispute involving contractual parties is the state the laws of which have been chosen as the applicable law to the contract. In most cases, this state is home country of one of the parties as well as a contracting state, and rarely is the seat of arbitration. International arbitration tribunals should faithfully apply the law chosen by the parties because the choice of applicable law expresses the will and intention of the parties to have that specific law and not another law applied to their transaction. If that choice of applicable law has been legitimately made, then the parties’ will and intention should be given effect to. If that will was expressed in manifest violation of certain mandatory rules and public policy, the need to apply some other law may arise but in such a case conflict of law rules of the chosen law should be applied to determine the applicable law.

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration<sup>104</sup> was intended to take account of the public interest involved in arbitrations and to promote fair and efficient settlement of international investment disputes through increased transparency and accountability. Choice of law helps promote the objective of transparency in arbitration because it gives rise to predictability and certainty of the applicable law to the parties’ dispute. Therefore, there is the need for clear guidelines on

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<sup>100</sup> Park, (n 9) 657.

<sup>101</sup> *Ibid* 660.

<sup>102</sup> *Ibid* 662.

<sup>103</sup> Elliot E Cheatham and Willis L M Reese, “Choice of Applicable Law” (1952) *Columbia Law Review* 958, 972

<sup>104</sup> *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (United Nations, 2015).

the scope of the chosen law and on when departure from choice of law is or is not permissible. If the parties have made a choice of law, they are entitled to know the circumstances in which an arbitral tribunal may not follow that choice of law. This will improve transparency in treaty-based investor-state arbitration and efficiency by ensuring that arbitral tribunals do not whimsically depart from choice of law to make decisions that favour just one of the parties. For this reason, it is recommended that United Nations Convention on Transparency in Treaty-based Investor-State Arbitration be amended to include the factors and circumstances in which a tribunal may or may not follow the parties' choice of law. These factors could include the rule that the doctrine of *renvoi* be applied in making decision whether to follow or depart from a choice of law. Specifically, where choice of law is made, the applicable and relevant laws of the chosen jurisdiction to the dispute should be followed irrespective of the legal effect and no matter who will win or lose unless the internal conflict of laws rules of that jurisdiction point to the laws of some other jurisdiction. This will give effect to the consensual nature of arbitration and promote the role of the municipal law, which is often the chosen law, of the host country in the regulation of foreign investment and other international business transactions and in the settlement of investment disputes.