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# The Place Of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning

*Filip De Ly**

## I. The Place of Arbitration and Arbitration Planning: The Theoretical Framework

Quite recently, international arbitration law and its practice have become more and more complex. This process is caused by various factors. First, there have been many changes in domestic arbitration laws since 1979 when England amended its Arbitration Act in part to maintain London's attractiveness as a major place for international arbitration. Since then, many jurisdictions have followed suit. Some amendments to arbitration laws had a limited and technical character[1] but most changes were to a large extent inspired by concerns of either maintaining a country's status as one hospitable to international commercial arbitration[2] or of promoting a country with little arbitration tradition. This phenomenon of international regulatory competition[3] was,

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1 *E.g.*, Sweden in 1976, Austria in 1983 and Italy in 1983. *See* F. De Ly, De Liberalisering Van de Internationale Arbitrage, Tijdschrift voor Privaatrecht 1029-1030 (1985).

2 *E.g.*, the French Decree of May 12, 1981 inserted into the New Code of Civil Procedure ("Nouveau Code de Procédure Civile", hereinafter N.C.P.C.); the Dutch Arbitration Act of 1986; the Swiss Statute on Conflict of Laws dated December 18, 1987, ch. 12; the Portugese Arbitration Law of 1986; the Spanish Arbitration Law of 1988; and in the United States, Florida, Hawaii and Georgia.

3 *See also* Goldstajn, *Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects*, in Essays on International Commercial Arbitration 28-9 (P. Sarcevic ed. 1989).

*inter alia*, the result of efforts by domestic lobbies to initiate or encourage domestic legislators to look afresh at arbitration laws. Given its international context, regulatory competition definitely led to some deregulation or liberalization of arbitration law. In the case of the Belgian reform of international arbitration law[4], one author even suggested that Belgium had become an arbitration paradise.[5] Paradoxically, this development has not been offset, but rather seems to be intensified by unification efforts such as the UNCITRAL Model Law on International Commercial Arbitration. So far, major arbitration countries have not and probably will not adopt the Model Law.[6] To a large extent, the Model Law is used by countries which have little tradition in the field of international commercial arbitration. The Model Law thus seems to fall back on its original purpose, to provide a tool for easy introduction or modernization of arbitration law, and may never lead to greater uniformity after all.[7] One is thus confronted with a multitude of legislative changes in arbitration laws in both traditional and non-traditional arbitration countries.[8] As a consequence of these developments, the comparative legal environment for international commercial arbitration has become much more prominent. Legal considerations relating to various jurisdictions are therefore paramount in handling international commercial arbitration.

Second, and related to the first factor, is the emergence of many new arbitration centers which offer their services in administrating arbitrations. In many cases, these centers not only act within their own system of institutional arbitration, but are also capable of handling ad hoc arbitrations as, for example, under the UNCITRAL Arbitration Rules. The list of arbitration centers has grown considerably[9] and the possibilities for choosing a proper arbitration center entrusted with the administra-

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4 *See infra* section III, C.

5 Storme, *Belgium: A Paradise for International Commercial Arbitration*, INT'L BUS. LAWYER 294-295 (1986).

6 Adopted by the United Nations Commission on International Trade Law on June 21, 1985, I.L.M. 1302 (1985). The Model Law has already been adopted by Cyprus, Hong Kong, Bulgaria, Canada and its provinces and territories, Australia, Nigeria, and in the United States by the states of California, Connecticut and Texas. (Uncitral Document A.CN9/337, June 1, 1990). Recently, Scotland also adopted the Law. In the Federal Republic of Germany, the subject of introduction of the Model Law has also been debated extensively.

7 *See also* Jarvin, *The Place of Arbitration, Swedish and International Arbitration 1990*, in YEARBOOK OF THE STOCKHOLM CHAMBER OF COMMERCE 88 (1990), also published as Jarvin, *Choosing the Place of Arbitration, Where Do We Stand?*, 16 INT'L BUS. LAWYER 418 (1988). Gaillard, *The Uncitral Model Law and Recent Statutes on International Arbitration in Europe and North America*, ICSID REV. 425-26 (1987).

8 Of course, a sharp distinction between traditional and non-traditional arbitration countries cannot be made, but they rather might be placed on a sliding scale.

9 A list of major arbitration centers was at one time published in the Year Book of Commercial Arbitration. Because of the growing number of centers, the publication of a list has been discontin-

tion of the arbitration have been enlarged. The importance of this phenomenon, however, is difficult to measure since most of these centers do not publish figures regarding their annual case load.

Finally, the arbitration process is becoming more and more litigation-minded and less conciliation-minded. According to Y. Derains, the spirit of arbitration has been lost.[10] Of course, many cases are still being settled while arbitration proceedings are under way. Also, many parties still comply voluntarily with awards. However, one sees that many new issues are being raised in the course of arbitration proceedings or in the context of proceedings before domestic courts.[11] Traditional advantages of arbitration such as speed and cost efficiency have thus come under pressure. In developing arbitration strategies, the aforementioned pitfalls should be taken into account.

Growing complexities in the law and practice of international commercial arbitration and a certain loss of the spirit of arbitration require reflection by all interested parties (litigating parties, their counsels, arbitrators and arbitration centers) in order to maintain some of the traditional advantages of arbitration. Specifically, one may want to minimize risks related to either the intricacies of arbitration law and practice or the explorations and challenges by overzealous parties with regard to procedural steps available and decisions or awards made. The purpose of such reflection is to maintain the reputation of international commercial arbitration as a speedy and cost efficient dispute resolution mechanism for international business transactions. This may be achieved by an attempt to identify the options which interested parties may have and to indicate their respective advantages and disadvantages[12]. This process may be defined as arbitration planning. Because of its importance for the arbitral process, this article will primarily analyze arbitration planning devices in relation to the place of arbitration.

Arbitration planning may occur at various stages and levels. As to the stages, it appears that careful planning may primarily prove to be useful in the negotiation process[13], in the process of drafting the arbitral

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ued. Arbitration centers have organized themselves within the International Federation of Commercial Arbitration Institutions.

10 Derains, *New Trends in the Practical Application of the ICC Rules of Arbitration*, 3 NW. J. INT'L L. & BUS. 44-45 (1981).

11 *E.g.*, challenge of arbitrators, actions to have decisions of arbitration centers reviewed by domestic courts, liability actions against arbitration centers and arbitrators.

12 *See* R. COULSON, INTERNATIONAL ARBITRATION: A WORLD OF OPTIONS in ARBITRATION UNDER INTERNATIONAL COMMERCIAL CONTRACTS 45 (1982); Iwasaki, *Selection of Situs: Criteria and Priorities*, ARB. INT'L 57 (1986).

13 In most cases, an agreement to resort to arbitration has been reached prior to any dispute and this agreement (called the arbitral clause) is included in the main contract. After a dispute has

clause, at the time of instituting the proceedings and during the proceedings. This will help avoid many problems which might arise with regard to setting aside proceedings and enforcement of the award.

As to the levels, international arbitration planning may be factual or legal. Repeatedly, practitioners and scholars have insisted upon the fact that practical considerations also determine the choice of an arbitration place.[14] Traditionally, reference has been made to the availability of skilled arbitrators, secretarial staff and translators, and to good libraries, conference rooms, lodging, transportation and communication facilities. A central location to the parties and the arbitrators is also important.

These observations, however, need some further qualification. First, the availability of certain services at the place of arbitration does not seem to be as crucial as it was in the past because it has become more and more accepted that some proceedings might also take place in a country other than that of the arbitral place.[15] Second, there seems to be a relation between the relevance of services and the type of arbitration. Quality arbitration with trade associations or quick arbitration proceedings will usually require less services than, for instance, extensive arbitral proceedings involving complex factual and legal disputes over turnkey contracts. Third, and related to the previous argument, the particular circumstances of each case will determine to what extent each of these aforementioned practical observations might be relevant. For instance, translation services will be important when the arbitration proceedings involve many documents which have to be translated. On the other hand, these services are irrelevant when all documents are written in languages with which all parties are familiar.

For these reasons, one can hardly say that all these practical requirements should necessarily be met. However, it is true that in many cases and in varying degrees, these elements remain highly relevant. Their relevance should not be exaggerated, however, because there are many countries which, from this practical point of view, qualify as arbitral places.[16] Still, from a wide variety of possible arbitration places only a limited number of countries are frequently chosen. This might indicate that the legal considerations for choosing an arbitration place are much more important than the practical ones.

The choice of the arbitral place may depend upon a variety of legal

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arisen, parties are less inclined to provide for arbitration. Therefore, negotiation as to the agreement to arbitrate usually is part of the negotiations regarding the main contract.

14 Iwasaki, *supra* note 12, at 63-4.

15 *See infra* section II.

16 I.C.C. figures indicate that in 1989 arbitration places have been fixed in 32 different countries. Derains, *Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale*, 1018 (1990).

factors. One might, in this regard, distinguish between legal factors which are closely related to the arbitral process and those which are not. Among the latter, one might think of tradition and neutrality. Choosing the place of arbitration is probably not always a completely rational process based purely upon information about the law and practices of the place of arbitration. For example, when parties agree on the place of arbitration during contract negotiations, that place might be chosen on the basis of a traditional conviction that the law of that country is hospitable to international commercial arbitration and that many arbitrations have taken place and still take place in that country without major obstructions. Switzerland and Sweden might be cited as countries which traditionally have been perceived as safe arbitration places. However, perception does not always match reality. In the case of Switzerland for the period between the early 1980s and the coming into force of the new arbitration law on January 1, 1989, there had been question as to whether the Swiss Concordat of 1969 was still fit for international commercial arbitration given the means of recourse available under it and liberalization of arbitration laws in other major arbitration countries.

Neutrality may also be an important lègal factor in arm's length transactions (*i.e.*, between parties with comparable bargaining position).[17] As to the arbitral place, this implies that neither party may, from a legal point of view, have an undue advantage or disadvantage with regard to that place. Competitive disadvantages might be present where one party has a superior knowledge of the law and practice at the arbitral place or if that place offers tactical advantages to only one party because of its relation to the disputed matter. Also, the attitude of local courts is highly relevant from the neutrality perspective. Neutrality requires that local courts should interact with the arbitral process without any overt or hidden bias. Any such prejudice may not only be related to protection of domestic interests but also to a lack of understanding of some foreign interests. These fears of prejudice explain why in certain East/West and North/South relations, arbitration places are sought in countries such as Switzerland, Austria or Sweden which are politically neutral.

More technical legal aspects may also explain the process of choosing the arbitration place. These factors primarily relate to (1) conflict of laws issues; (2) the agreement to arbitrate; (3) the procedural aspects of international commercial arbitration including means of recourse against awards; (4) the law to be applied to the merits of the dispute; and (5) the

17 *See* Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, in SWISS ESSAYS ON INTERNATIONAL ARBITRATION 28-33 (1984); Derains, *Le Choix du Lieu de l'Arbitrage*, R.D.A.I. 109-110 (1986).

recognition and enforcement of arbitral awards.[18]

Under the conflict of laws perspective, the question arises whether and to what extent the place of arbitration may, in major arbitration jurisdictions, be considered a relevant connecting point with respect to international commercial arbitrations. At this point, the analysis relates to the impact of the place of arbitration upon the conflict of laws rules which the arbitrators have to apply and upon the law applicable to the arbitral agreement, to the arbitral proceedings and to the merits of the dispute. Under the same analysis, one may wonder whether and to what extent court supervision over arbitrations, and recognition and enforcement of the award is dependent upon the law of the arbitral place.

As to the other perspectives, the analysis does not focus upon the place of arbitration as a connecting factor but rather attempts to compare national laws regarding the agreement to arbitrate, procedural aspects, the merits of the dispute, and recognition and enforcement. Any such comparative analysis might end up with conclusions as to the advantages or disadvantages of choosing a particular arbitral place. However, given the scope of this article, major elements of international commercial arbitration in the law of important arbitration countries will not be reviewed from a comparative point of view.[19]

The important, if not pivotal, position of the law at the place of arbitration for modern arbitration law and practice will hereafter only be discussed from a conflict of laws perspective. This may already give some partial answers with regard to the issue of arbitration planning. Furthermore, it might be a good starting point for further analysis of comparative arbitration law in major arbitration countries. The discussion will, however, start with some research as to a definition of the key notion of the place of arbitration.

## II. THE PLACE OF ARBITRATION: DEFINITION AND DETERMINATION

Traditionally, the place of arbitration has been defined as the place of the arbitral tribunal's seat.[20] However, application of this criterion

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18 *Compare* Branson & Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INT'L L. 927-28 (1984).

19 Many publications on international arbitration law only discuss one legal system. Comparative studies which analyze arbitration law from the practical perspective of arbitration planning are hard to find. Some publications tend to give an overview of the law on arbitration in various countries. For example, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (P. Sanders ed. 1984) and SURVEY OF INTERNATIONAL ARBITRATION SITES 166 (J.S. McClendon 2d ed. 1988) may form a starting point for comparative analysis.

20 Mann, *Internationale Schiedsgerichte und Nationale Rechtsordnung*, ZHR 113 (1968), also

may cause practical problems. In modern arbitration practice it may happen that the arbitral tribunal for reasons of convenience meets at different places during the proceedings or that meetings are for cost efficiency kept to a minimum and replaced by written communications at each arbitrator's place of residence. Also, draft awards are often circulated among arbitrators and sometimes the awards are signed at different places. These practices are recognized by certain recent arbitration laws and rules which acknowledge that the place of arbitration should not be so strict that in practical terms the arbitration process would be limited to the boundaries of one country. In this perspective, the arbitration panel might meet, deliberate, hold hearings and hear or see to any evidence outside the country of its seat.[21] In this regard, one might distinguish between the place of arbitration in the geographical sense (*i.e.*, the place where some stages of the arbitral proceedings actually take place) and the place of arbitration in the legal sense (*i.e.*, the place which, from a legal point of view, will be deemed relevant in order to establish a link between the arbitration and a given legal system). In this regard, the arbitration laws and rules analyzed below do not always expressly indicate whether the place of arbitration is used in its geographical or legal sense. This might cause some problems since it has become more and more recognized that the parties, arbitration centers or arbitrators can determine the place of arbitration. In some instances, it might be necessary to interpret any such determination in order to know whether the indication of the place of arbitration was meant to be used in its geographical or legal sense.

As to the legal definition of the place of arbitration which will only be used hereafter for further discussion, various solutions have been proposed. Article 2 of the 1957 Resolution of the Institut de Droit International proposed the place where the arbitral tribunal held its first

published as Mann, Lex Facit Arbitrum, INTERNATIONAL ARBITRATION, LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed. 1967), *reprinted in* ARB. INT'L 241-261 (1986) [hereinafter, Lex Facit Arbitrum]; Mann, *Schiedsrichter und Recht*, in FESTSCHRIFT FÜR WERNER FLUME 598-601 (H. Jakobs ed. 1978) [hereinafter, Schiedsrichter und Recht]; Hirsch, *The Place of Arbitration and the Lex Arbitri*, 34:3 ARB. J. 43-8 (1979).

21 UNCITRAL Model Law, art. 20(2); Dutch Code of Civil Procedure, art. 1037(3).

Regarding arbitration rules, *see* UNCITRAL Arbitration Rules, art. 16(2) and (3), also adopted by the Inter-American Commercial Arbitration Commission, the Regional Centre for International Commercial Arbitration Cairo, the Regional Centre for Arbitration at Kuala Lumpur, the Hong Kong International Arbitration Centre; the London Court of International Arbitration Rules, art 7.2; the International Arbitration Rules of the Zurich Chamber of Commerce, art. 6; the Arbitration Rules of the Ticino Chamber of Commerce, Industry and Handicraft, art. 15; and the I.C.S.I.D.-Additional Facility Rules, art. 21(2).

meeting.[22] Other authors have proposed to locate the place of arbitration at the place where the award is rendered.[23]

Modern arbitration statutes in The Netherlands, Switzerland and in states having adopted the UNCITRAL Model Law on International Commercial Arbitration, have identified this problem and provided practical solutions. These solutions may be described along the following lines. First, it is recognized that the parties may determine the place of arbitration by agreement.[24] Empirical evidence from a study by Mr. Bond, the Secretary-General of the International Court of Arbitration of the International Chamber of Commerce (I.C.C.), suggests that parties frequently add the place of arbitration to boilerplate arbitration clauses. Out of a sample of 237 (1987) and 215 (1989) arbitration clauses which led to I.C.C. arbitration, respectively fifty-seven and sixty-eight percent

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22 47 ANNUAIRE I 481 (1957). This Resolution was influenced by the position of Sauser-Hall on this issue. *See* Sauser-Hall, *L'Arbitrage en Droit International Privé*, 44 ANNUAIRE I 539-41 (1952).

23 Lex Facit Arbitrum, *supra* note 20, at 163.

24 *E.g.*, UNCITRAL Model Law, art. 20; European Convention on International Commercial Arbitration done at Geneva, April 21, 1961, art. IV.1(b)(ii) (484 U.N.T.S. 364) (with regard to *ad hoc* arbitration); Swiss Federal Statute on Conflict of Laws, art. 176(3); Dutch Code of Civil Procedure, art. 1037(1).

International arbitration rules have similar provisions (*e.g.*, UNCITRAL Arbitration Rules, art. 16(1) adopted December 15, 1976 and adopted by the Inter-American Commercial Arbitration Commission the Regional Centre for International Commercial Arbitration Cairo; the Regional Centre for Arbitration at Kuala Lumpur, the Hong Kong International Arbitration Centre; the I.C.C.-Arbitration Rules, art. 12; the London Court of International Arbitration Rules, art. 7.1; and the Règlement de Conciliation, d'Arbitrage et d'Expertise des Chambres de Commerce Euro-Arabes, art. 23-2). Their effect will, however, in this regard depend upon the applicable law.

Some arbitration rules require that the arbitral tribunal approves any such choice (*e.g.*, Arbitration Rules of the Cour d'Arbitrage de l'Europe du Nord, art. 24).

Article 16 of the Arbitration Rules of the Italian Arbitration Association also recognizes the possibility of parties to determine the place of arbitration. Any such choice can be made up to the filing of the statement of defense.

*Cf.* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("C.S.I.D."), done at Washington, March 18, 1965, art. 63(b) (575 U.N.T.S. 160), which provides that the parties may determine the place of the proceedings subject to approval by the arbitration tribunal and after consultation with the Secretary-General of the International Centre for Settlement of Investment Disputes ("I.C.S.I.D.").

National arbitration rules also provide that parties may determine the place of arbitration (*e.g.*, Arbitration Rules Centre Belge pour l'Etude et la Pratique de l'Arbitrage National et International ("CEPANI"), art. 23; Arbitration Rules of the Ticino Chamber of Commerce, Industry and Handicraft, art. 15; Rules of the Board of Arbitration of the Central Chamber of Commerce of Finland, rule 22). One should be cautious with regard to the interpretation of these clauses because it is not always very clear whether they relate to the choice of an arbitration place within the country in which the national arbitration center is located rather than indicating that the parties may choose among various arbitration places located in different countries. The wording or context of some national arbitration rules sometimes show that choice of arbitration places is limited to places within a given country.

provided for the place of arbitration.[25] One might raise the question whether any such party determination may be challenged. In a recent United States case, the Court of Appeals for the Fifth Circuit refused to direct parties to arbitrate in the United States because the arbitration clause provided for arbitration in Iran.[26] In principle, and subject to the applicable law, this decision seems to be correct. A *bona fide* choice of arbitration place should be respected.[27] This will hardly cause any problems in jurisdictions which have adopted the UNCITRAL Model Law, which expressly recognize party determination.

As will be discussed below, the arbitration place is, in certain respects, important for some conflict of laws aspects of the arbitral process. Therefore, the determination of the place of arbitration and arbitration planning are closely related. When parties do not determine the arbitration place, they immediately lose a very important planning tool and consequently may be faced with unpredictabilities at any stage in the arbitration proceedings. Any properly drafted arbitration clause should therefore consider explicitly including the place of arbitration. The practical importance of designating the arbitration place is confirmed by model arbitration clauses suggested by arbitration centers as well as by I.C.C. arbitration practice. These models often provide an optional clause indicating the place of arbitration.[28] These clauses invite the parties to reflect on the place of arbitration and indicate the importance attached by those centers to the place of arbitration.[29] As was already

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25 Bond, *How to Draft an Arbitration Clause (Revisited)*, 1 ICC INT'L CT. ARB. BULL., No. 2, 14 and 18 (1990).

26 *Id.* at 18 (*citing* National Iranian Oil Company (NIOC) v. Ashland Oil. Inc., 817 F.2d 326 (5th Cir. 1987)).

27 One might argue about the more hypothetical case where parties for some reason choose an arbitration place and where, but for that choice, no other links with that place exist or will exist.

Giving full effect to the arbitration clause designating the place of arbitration, does not imply that the arbitration will proceed smoothly. For instance, choice of a place of arbitration in one country in order to escape from mandatory provisions of another law or to avoid the non-arbitrability of the dispute under the law of the latter country, might cause problems if one tries to enforce the award in the latter country.

28 *E.g.*, Recommended arbitration clause of the London Court of International Arbitration; Model arbitration clause subparagraph (c) under the UNCITRAL Arbitration Rules; Model clauses of the Netherlands Arbitration Institute; Standard arbitration clause of the Chamber of National and International Arbitration of Milan; Recommended arbitration clause of the Arbitration Institute of the Stockholm Chamber of Commerce; Model clause of the Arbitration Institute of the Oslo Chamber of Commerce; Model arbitration clause of the Regional Centre for Arbitration Kuala Lumpur; Model arbitration clause of the Regional Centre for International Commercial Arbitration, Cairo; Model arbitration clause of the Inter-American Commercial Arbitration Commission; and Model arbitration agreement of the Australian Centre for International Commercial Arbitration.

29 The importance of model clauses should, on the other hand, not be overestimated. In the study by Mr. Bond, *supra* note 25, at 16-17, it was stated that the I.C.C.-standard arbitration clause was used once in the 1987 survey of arbitration clauses (out of a total of 237) and three times in the

stated, I.C.C. practice also shows that a majority of I.C.C. arbitration clauses tend to determine the place of arbitration.[30]

The arbitration place may also be designated indirectly by the parties. The main example of an indirect choice of arbitration place may be found when parties refer to institutional arbitration rules which contain a procedure for determining the place of arbitration. For instance, Article 12 of the I.C.C. Arbitration Rules[31] provides that the International Court of Arbitration will fix the place of arbitration provided the parties had no agreement on this issue.[32] Through their reference to I.C.C. arbitration, the parties will be deemed to have incorporated the I.C.C. Arbitration Rules into their agreement.[33] Incorporation will thus explain why the determination of the arbitration place by institutional arbitration centers may be qualified as an agreement of the parties. One may question whether the determination of the place of arbitration by institutional arbitration centers may be reviewed by courts. As a matter of principle and subject to the applicable law, obtaining any such review should be extremely difficult. By agreement parties have entrusted the arbitration center with the task of determining the place of arbitration.[34] Similarly to the position under some domestic laws where third-party determination of contractual rights and duties is only reviewable in clear cases of unfairness[35], only very limited review of decisions determining arbitration places may be allowed. This review may even prove to be more difficult if the arbitration rules state that the decision of the arbitration center shall be final and binding.[36] Recent arbitration laws have con-

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1989 survey (out of 215 clauses). Minor variations from the standard wording were found in respectively twenty percent and ten percent of these clauses.

30 *See supra* note 25.

31 I.C.C. publication No. 447 (1987), in force as of January 1, 1988.

32 Other Arbitration Rules have a similar system of determining the place of arbitration, see for instance Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, sec. 14; Arbitration Rules Italian Arbitration Association, art. 16; Arbitration Rules Centre Belge pour l'Etude et la Pratique de l'Arbitrage National et International ("CEPANI"), art. 23.

As to the principles applied by the ICC International Court of Arbitration, *see* Jarvin, *supra* note 7, at 87.

33 *See also* I.C.C. Arbitration Rules, art. 8(1). Theoretical debate exists as to the legal character of arbitration rules. *See* F. DE LY, DE LEX MERCATORIA, INLEIDING OP DE STUDIE VAN HET TRANSNATIONAAL HANDELSRECHT 206-07, 218-19 (1989).

34 For a similar problem regarding review of decisions by arbitral centers, see De Ly, *Judicial Review of Decisions of the I.C.C. Court of International Arbitration*, 7 J. INT'L ARB. 153-156 (1990).

35 Third-party determination is known in the French, Dutch and Belgian Civil Codes with regard to price determination (Code Civil in France and Belgium, art. 1592; Dutch Civil Code, art. 1501(2), which has been deleted from the New Dutch Civil Code of which various articles come into effect on January 1, 1992) and in France and Belgium regarding profit and loss allocation for partnerships (Code Civil, art. 1854; Dutch Civil Code, art. 1671, prohibits any such clause).

36 *Cf.* Section 11 of the Commercial Arbitration Rules of the American Arbitration Association

firmed the existing practice and accept that the place of arbitration is designated by an arbitral institution. One may read this in Article 2(d),(e) and in Article 20 of the UNCITRAL Model Law and more explicitly in Article 176(3) of the Swiss Statute on Conflict of Laws. In these instances, one might even doubt whether any review is at all available.

An analogous situation may be found with regard to some *ad hoc* arbitrations where an appointing authority may have the power to determine the place of arbitration as, for instance, under the 1961 European Convention on International Commercial Arbitration ("European Convention").[37]

Finally, one should check whether the applicable law and arbitration rules do not formulate some requirements as to the substance or the form of the clause which determines the place of arbitration. In modern arbitration laws such as the Dutch and the Swiss, no such requirements exist.[38]

If the place of arbitration has not been determined directly or indirectly by the parties, recent arbitration laws provide that the arbitral tribunal may determine the arbitration place.[39] By delegation of the applicable law, arbitrators are likely to have been given discretionary power to determine the arbitration place. Under such laws, a decision of the arbitral tribunal to determine the arbitration place seems to be immune from attack before domestic courts of a country. The same system may also be found in arbitration rules. Then, the applicable law might determine to what extent any arbitral decision on the place of arbitration might be challenged in court.[40] Since arbitral rules are not a formal

(A.A.A.) which states that the A.A.A.'s decision on the locale where the arbitration is to be held, is final and binding.

Compare more generally Article 3.9 of the Rules of the London Court of International Arbitration which provides that decisions of the Court are final and of an administrative character. In addition, subject to the law of the place of arbitration, parties are taken to have waived any appeal to courts in relation to these decisions. Article 3.9 does not, however, apply to the designation of the arbitration place since the arbitral tribunal and not the Court is entrusted with this task.

37 *E.g.*, European Convention, art. IV, 4(c) which also provides that the arbitrators may fix another place.

38 Article 1037(1) of the Code of Civil Procedure, only requires agreement. This implies that choice might be implicit and should not necessarily be in writing. The same position is taken in Switzerland under Article 176(3) of the Conflict of Laws Statute. *See* P. LALIVE, J.F. POUDRET & C. REYMOND, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 295-96 (1989).

39 *E.g.*, UNCITRAL Model Law, art. 20, referring to the standard that the arbitral tribunal should have regard to the circumstances of the case including the convenience of the parties; Swiss Statute on Conflict of Laws, art. 176(3); Dutch Code of Civil Procedure, art. 1037(1).

40 *E.g.*, UNCITRAL Arbitration Rules, art. 16, also adopted by the Inter-American Commercial Arbitration Commission, the Regional Centre for International Commercial Arbitration Cairo, the Regional Centre for Arbitration at Kuala Lumpur and the Hong Kong International Arbitration

source of law and are thus binding only by virtue of the parties' wills, the provisions as to the arbitrators' power to determine the place of arbitration remain subject to the applicable law which might allow some review.

Absent determination of the place of arbitration by the arbitral tribunal, the place of arbitration is in some cases determined *a posteriori*. In those cases it is fixed at the place stated in the award.[41]

In order to avoid practical problems regarding the application of the various aforementioned elements to the arbitration place, the award is often required to state the place of arbitration as determined above. Also, the award is deemed to have been made at that place.[42]

Clearly, recent developments show that greater care is now being exercised in order to determine the place of arbitration with more precision. To a large extent, this process is achieved by giving parties and arbitration centers the authority to designate the arbitration place either before the dispute has arisen or at the beginning of the arbitral procedure and by imposing upon the arbitrators the obligation to state the arbitral place in the award. Thus, one attempts to avoid the uncertainties related

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Centre; London Court of International Arbitration, art. 7.1 (absent party determination, the place of arbitration is London unless the arbitral tribunal determines in view of all the circumstances of the case that another place is more appropriate); Rules of the Arbitration Institute of the Oslo Chamber of Commerce, art. 10; Rules of the Board of Arbitration of the Central Chamber of Commerce of Finland, rule 22; Règlement de Conciliation, d'Arbitrage et d'Expertise des Chambres de Commerce Euro-Arabes, art. 23-2. Noteworthy in this regard is section 43 of the Rules of Arbitration of the Indian Council of Arbitration which states that the arbitrators may decide to have the arbitration at any place outside India provided one or both parties are from overseas. The interesting point is that such a decision is expressly qualified as being at the discretion of the arbitral tribunal.

By contrast, Article 21(1) of the I.C.S.I.D. Additional Facility Rules provides that the arbitral tribunal shall determine the place of arbitration in consultation with the parties and the Secretary-General of I.C.S.I.D. This seems to imply that the parties themselves cannot determine the place of arbitration. These Additional Facility Rules are available for disputes which do not formally come within the scope of C.S.I.D. because they relate to fact-finding or do not arise directly out of an investment or because one of the parties is a State or a national of a non-Contracting State (Article 2 Rules governing the Additional Facility for the administration of proceedings by the Secretariat of I.C.S.I.D.).

41 *E.g.*, Dutch Code of Civil Procedure, art. 1037(2), if that place has not been stated in the award, the award may be supplemented in this regard according to the procedure outlined in Article 1070 of the Code; Swiss Intercantonal Concordat on arbitration dated March 27, 1969, art. 2, unless agreed otherwise in writing, the Concordat has as of January 1, 1989 been replaced with regard to international arbitration by Chapter 12 of the Swiss Law of December 1987 on Conflict of Laws.

42 *E.g.*, UNCITRAL Model Law, art. 31(3); Dutch Code of Civil Procedure, art. 1037(1).

For arbitration rules, *see* I.C.C. Arbitration Rules, art. 22; UNCITRAL Arbitration Rules, arts. 16(4) and 32(4), also adopted by the Inter-American Commercial Arbitration Commission, the Regional Centre for International Commercial Arbitration Cairo, the Regional Centre for Arbitration at Kuala Lumpur and the Hong Kong International Arbitration Centre; London Court of International Arbitration Rules, art. 7.2; Arbitration Rules Centre Belge Pour l'Etude et la Pratique de l'Arbitrage National et International ("CEPANI"), art. 23; Arbitration Rules Italian Arbitration Association, art. 16; I.C.S.I.D. Additional Facility Rules, art. 21(3).

to the definition of the place of arbitration. Finally, one might interpret these efforts as clear signals that arbitration law and practice are well aware of the relevance of the law at the place of arbitration for the international commercial arbitration process.

In some instances, however, the determination of the arbitration place may be much easier than under the above mentioned principles. For instance, commodities, shipping and insurance arbitration under the auspices of trade organizations are usually[43] but not always[44] held at the place of the trade organization's headquarters. Also, many regional and national arbitration centers attempt to have the place of arbitration fixed at the place where these centers are located.[45] Finally, the fixed arbitral tribunals in Central and Eastern European countries used to have their seat at their place of operation. For instance, Article 6 of the Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce of CMEA Countries[46] limit the range of possible arbitration places to the seat of the Arbitration Court in the capital of each country.[47] Meetings might, however, be held in other places when necessary. A similar situation exists in the People's Republic of China.[48]

The place of arbitration has now been defined and the ways in which it may be determined have been described. The following section will discuss the relevance of the arbitral place with regard to the conflict of

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43 *E.g.*, Grain and Feed Trade Association (GAFTA) Arbitration Rules, 1:2 (in principle, London); Federation of Oils, Seeds and Fats Associations (FOSFA) Rules of Arbitration and Appeals (in principle, London); Rule 1(2) of the Netherlands Oils, Fats and Oilseeds Trade Association Rules for Arbitration (1988) (place of arbitration, Rotterdam); London Maritime Arbitrators Association Arbitration Clause (London).

44 *E.g.*, Maritime Arbitration Rules Society of Maritime Arbitrators, sec. 6, states that maritime arbitration shall take place in New York but the parties may provide otherwise.

45 *E.g.*, The 1989 International Arbitration Rules of the Zurich Chamber of Commerce, art. 6 (arbitral seat at the seat of the Zurich Chamber of Commerce); Hamburg Friendly Arbitration, para. 5 (Hamburg); Arbitration Rules Chamber of Commerce Basle, art. 5(2) (in principle, Basle); Arbitration Rules Cour d'Arbitrage de l'Europe du Nord, art. 24 (in principle, the arbitral seat is to be based in Lille); Rules British Columbia International Commercial Arbitration Centre, sec. 20; Commercial Arbitration Rules of the Japan Commercial Arbitration Association, rule 14 (headquarters or a branch office of the Association); Model Clause Hong Kong International Arbitration Centre (Hong Kong).

46 Approved February 28, 1974.

47 *See also* Rules of the Arbitration Court of the Czechoslovak Chamber of Commerce and Industry, sec. 7 (Prague); Rules of the Court of Arbitration at the Hungarian Chamber of Commerce, art. 6 (Budapest); Rules of the Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Economy (Belgrade); Rules of Procedure in the Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry (Moscow); Rules of the International Court of Arbitration for Marine and Inland Navigation in Gdynia, sec. 3 (in principle, the arbitral seat is Gdynia).

48 Rules of Arbitration, China International Economic and Trade Arbitration Commission, arts. 5 and 24; Rules of Arbitration, China Maritime Commission, arts. 5 and 24.

laws problems which might arise in international commercial arbitrations.

## III. The Place of Arbitration in International Commercial Arbitration: To What Extent is There Still a Conflict of Laws Problem?

Traditionally, the place of arbitration has been an important connecting factor to determine: (1) the conflict of laws system which the arbitrators had to apply; (2) the law applicable to the arbitral procedure; (3) the jurisdictions competent to supervise and assist arbitral proceedings; and (4) the domestic or foreign character of arbitral awards with regard to recognition and enforcement proceedings.[49]

This traditional approach has come under attack since the beginning of the 1960s.[50] The attack was primarily based upon the practical difficulties in determining the place of arbitration and, more importantly, upon the fact that the place of arbitration was quite arbitrary as a connecting factor in international commercial arbitration because in many cases neither the parties nor the dispute had significant links with the country in which the arbitral place is located.[51] In various forms, a the-

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[49] *See* Goldstajn, *supra* note 3, at 46-7.

The place of arbitration may also be relevant regarding the law applicable to the agreement to arbitrate, the law applicable to the arbitrability of the dispute matter and, to a minor extent, the law applicable to the merits of the dispute. These issues will not be treated extensively in this article. For further discussion see Jarvin, *supra* note 7, at 89-90. As to the law applicable to the conclusion, the validity and the consequences of the agreement to arbitrate, party autonomy is largely recognized. Failing choice of law, some importance is attached to the place of arbitration (*e.g.*, European Convention, art. VI(2); UNCITRAL Model Law, art. 34(2)(a)(i)). Article 178(2) of the Swiss Statute on Conflict of Laws opts for the law chosen by the parties, the law applicable to the substance of the dispute or the law at the place of arbitration (*i.e.*, Swiss law). As to the arbitrability of the dispute, Article VI(2) of the European Convention and Article 34(2)(b)(i) of the UNCITRAL Model Law have opted for the law at the place of arbitration. Some authors have proposed to connect arbitrability with the law applicable to the substance of the dispute. Since arbitrability is closely related to mandatory law, other laws may also well be applicable. Finally, the minor importance of the place of arbitration for determining the law applicable to the merits of the dispute will be referred to in section III.A. It is in this regard a well established principle that the maxim *Qui elegit judicem, elegit ius* is hardly applicable in international commercial arbitration. Absent a choice of law clause, the place of arbitration will only be one of the connecting points which only in combination with other points might lead to the application to the substance of the dispute of the law of the arbitral seat. *See* Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A., A.C. 572 (House of Lords 1971).

[50] *See also* Iwasaki, *supra* note 12, at 60-3.

[51] Goldman, *Les Conflits de Lois dans l'Arbitrage International de Droit Privé*, 109 Collected Courses of The Hague II 372-73 (1963); Lalive, *Les Règles de Conflit de Lois Appliquées au fond du Litige par l'Arbitre International Siégeant en Suisse*, in L'Arbitrage International Privé et la Suisse 77-86, *reprinted in* Rev. Arb. 155-85 (1976); J. Lew, Applicable Law in International Commercial Arbitration 245-72 (1978).

ory has then been advocated that international commercial arbitration was unbound, delocalized and denationalized from the laws of the place of arbitration. International commercial arbitration would be floating or drifting, detached from municipal laws.[52] In varying degrees, this might imply that arbitrators are not bound by the conflict of laws or procedural rules at the place of arbitration nor that local courts at the arbitral place might intervene with the arbitral process. Also, it was disputed that local courts could scrutinize arbitral awards rendered in another country in the course of recognition or enforcement proceedings on the basis of the laws applicable in that other territory.

These autonomist tendencies which stress the independence of international commercial arbitration from domestic laws, have in turn also been criticized.[53] However, their influence on present day arbitration law and practice cannot be denied. The importance of the debate between proponents of the arbitral seat and autonomous theories has, however, diminished in relation to those jurisdictions which have liberalized their arbitration laws. Under those laws, the autonomy of the parties and of the arbitrators has been largely recognized and modern arbitration rules acceptable to international standards have been introduced. Therefore, the need to escape from domestic laws and take refuge with autonomous rules has become less urgent or at least may now find support in the law of the arbitration place. These developments will be discussed hereafter in greater detail.

### A. The Conflict of Laws Rules Applicable Before International Commercial Arbitral Tribunals

International disputes before domestic courts are resolved through application of a rule of private international law (in most cases a conflict of laws rule). These rules are part of the conflict of laws system of the place having jurisdiction over the case (the *lex fori*). Transposition of this principle to international commercial arbitration would imply that the arbitral panel would have to apply the conflict rules prevailing at the place of arbitration (*lex arbitri*). Traditionally, this position has been de-

52 Paulsson, *Arbitration Unbound: Award Detached From the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358-87 (1981); Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983); Paulsson, *The Extent of Independence of International Arbitration From the Law of the Situs*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 141-48 (J. Lew ed. 1986).

53 Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); Van Houtte, *Rechtsvinding Bij Transnationale Handelsarbitrage* 525 (dissertation, Catholic Univ. Leuven 1977); Bellet, *Un Mythe: La "Delocalisation" de l'Arbitrage*, 1 EURO-ARAB LEGAL NEWSLETTER No. 1, 2-3 (1989).

fended[54] but criticism has been expressed because in some cases it may be hard to determine the place of arbitration and, more important, because the place of arbitration does not always have many links with the issues which have to be decided by the arbitrators.[55] In this regard, authors have proposed not to rely on conflict rules stemming from domestic legal systems, but rather to work with other techniques. These techniques are (1) autonomous conflict rules; (2) general principles of conflict of laws; (3) cumulative application of conflict rules; and (4) the direct approach.

Under the first technique, arbitrators would not be bound by domestic conflict rules but they might apply the conflict rule which they consider most appropriate.[56] The second perspective allows arbitrators to apply a common denominator of conflict rules which functions as a principle of conflict of laws generally accepted in various jurisdictions.[57] The third method looks at the conflict rules applicable in the jurisdictions which are connected to the dispute. To the largest extent possible, this method applies these conflict rules cumulatively.[58] In cases of false conflicts where the conflict rules in the relevant jurisdictions do not differ, one might easily apply the cumulative method. However, when one is faced with true conflicts, the cumulative method does not solve the question as to the applicable conflict rule.[59] Finally, under the direct method,

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54 Schiedsrichter und Recht, *supra* note 20, at 598-601; Lex Facit Arbitrum, *supra* note 20, at 113; Jaffey, *Arbitration of International Commercial Contracts: The Law to Be Applied By the Arbitrators*, in CURRENT ISSUES IN INTERNATIONAL BUSINESS LAW 131 and 140 (D.L. Perrott & I. Pogarny ed. 1988); Hirsch, *supra* note 20, at 43-8; Sandrock, *Zügigkeit und Leichtigkeit versus Gründlichkeit* 375 JZ (1986).

55 Other theories have also been proposed but have been refuted convincingly by scholars, see Lalive, *supra* note 51, at 67-72; J. LEW, *supra* note 51, at 229-245; Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 261-68 (1986).

56 Goldman, *supra* note 51, at 422-85; Lalive, *supra* note 51, at 86-96; P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 378-80 (1965); E. LOQUIN, L'AMIABLE COMPOSITION EN DROIT COMPARÉ ET INTERNATIONAL 252-53 (1980); Von Mehren, *To What Extent is International Commercial Arbitration Autonomous?*, LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES, ETUDES OFFERTES À BERTHOLD GOLDMAN 226-27 (1982).

57 Derains, *L'Application Cumulative par l'Arbitre des Systèmes de Conflit de Lois Intéressés au Litige*, REV. ARB. 99-121 (1972); Derains, *Attente Légitime des Parties et Droit Applicable au Fond en Matière d'Arbitrage Commercial International*, TRAV. COM. FR. DR. INT. PRIVÉ 1984-1985 84-85 (1987).

58 Derains, *L'Application Cumulative par l'Arbitre des Systèmes de Conflit de Lois Intéressés au Litige*, *supra* note 57, at 99-121. For examples in arbitral case law, see Derains, case note I.C.C. arbitration No. 1512, 904 (1974); Jarvin & Derains, case note, I.C.C. arbitration No. 5118, 1027 (1987).

59 Schultsz, *Legislation in the Netherlands and International Arbitration*, in MEDEDELINGEN VAN DE NEDERLANDSE VERENIGING VOOR INTERNATIONAAL RECHT, No. 93, 20 (1986); E. LOQUIN, LES POUVOIRS DES ARBITRES INTERNATIONAUX À LA LUMIÈRE DE L'EVOLUTION RÉCENTE DU DROIT DE L'ARBITRAGE INTERNATIONAL 339 (1983); Tschanz, *Le Nouveau Droit Suisse de l'Arbitrage International*, R.D.A.I. 447 (1988). For an example in arbitral case law, see Derains, case note, I.C.C. arbitration No. 4996, 1132, (1986).

no recourse to a conflict rule is sought but the arbitrators may directly apply the substantive rule that is deemed most appropriate.[60]

To a certain extent, these techniques find support in international treaties, national statutes or arbitration rules. However, this development is at this point primarily limited to the law applicable to the merits of the dispute. The starting point of this support for autonomous tendencies in international commercial arbitration may be found in Article VII(1) of the European Convention which provides that, absent choice of law by the parties, the arbitrators shall apply the proper law applicable to the substance of the dispute under the rule of conflict that they deem applicable. Notwithstanding differing interpretations as to the precise meaning of Article VII(1)[61], it is clear that the bottom line lies with the principle of the arbitrators' freedom to determine the appropriate conflict rule.[62] National codification of arbitration law have gone further. Article 1496 of the French and Article 1054(2) of the Dutch Code of Civil Procedure provide that absent a choice of law by the parties, the arbitrators shall make the award in accordance with the rules of law they consider appropriate. Under these provisions, the arbitral tribunal is no longer under an obligation to look for a conflict rule. On the contrary, the tribunal may rely on the direct approach and apply to the dispute the substantive rules which it deems to be most suited.[63] A go-between position has been adopted by Article 28 of the Uncitral Model Law on International Commercial Arbitration and by Article 187(1) of the Swiss Statute on Con-

60 Derains, *Attente Légitime des Parties et Droit Applicable au Fond en Matière d'Arbitrage Commercial International, supra* note 57, at 85. Some authors have expressed some reservation against this method. *See* Bucher, *Transnationales Recht Im Ipr*, in ACTUELLE FRAGEN AUS DER SICHT IN- UND AUSLÄNDISCHER GELEHRTER 36 ( F. Schwind ed. 1986); Tschanz, *supra* note 59, at 447; Gaillard, *A Foreign View of the New Swiss Law on International Arbitration* 29 ARB. INT'L (1988).

61 According to one school of thought, the applicable law should be the domestic law of a given country. Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 756 (1985); Kopelmanas, *La Place de la Convention Européenne Sur l'Arbitrage Commercial International du 21 avril 1961 Dans l'Evolution du Droit International de l'Arbitrage*, ANN. FR. DR. INT. 340 (1961); J. ROBERT, LA CONVENTION EUROPÉENNE SUR L'ARBITRAGE COMMERCIAL INTERNATIONAL SIGNÉE À GENÈVE LE 21 AVRIL 1961 180 D. (1961). Other authors have taken the position that article VII(1) has opened up the possibility of applying non-national legal standards. B. GOLDMAN, 1 ARBITRAGE (DROIT INTERNATIONAL PRIVÉ), RÉPERTOIRE DE DROIT INTERNATIONAL 131-32 (P. Francescakis ed. 1968); Lalive, *supra* note 51, at 91-2.

62 E. LOQUINE, *supra* note 59, at 303.

63 Paulsson, Craig & Park, *French Codification of a Legal Framework For International Commercial Arbitration: The Decree of May 21, 1981*, D.P.C.I. 596 (1981); Bellet & Mezger, *L'Arbitrage International Dans le Nouveau Code de Procédure Civile*, R.C.D.I.P. 631-32 (1981); P. FOUCHARD, L'ARBITRAGE INTERNATIONAL EN FRANCE APRÈS LE DÉCRET DU 12 MAI 1981 395-96 and 399 (1982); J.P. FRANX, HET ONTWERP BOEK IV VAN HET WETBOEK VAN BURGERLIJKE RECHTSVORDERING 83 (1985); D. KOKKINI-IATRIDOU, HET NEDERLANDSE ARBITRAGEWETSONTWERP 490 (1985).

flict of Laws. While these provisions recognize almost unlimited party autonomy in choosing the law applicable to the substance of the dispute, they still follow a conflict of laws approach when the arbitrators, failing a choice of law by the parties, have to determine the applicable law. Under Article 28(2) of the Uncitral Model Law, the arbitrators shall apply the conflict of laws rules which it considers applicable[64] while under the Swiss Law, the arbitral tribunal shall decide by applying the rules of law with which the dispute has the closest connection. In the latter case, it is also obvious that, absent a choice of law, arbitrators cannot follow the direct approach and that a link should exist between the dispute and the ultimately applicable substantive rules.[65] The intermediate position of the Uncitral Model Law has been criticized for lack of liberalism.[66] This criticism is also reflected in some national legislation implementing the Model Law which has not adopted Article 28(2).[67]

Autonomous tendencies may also be found in arbitration rules. Again, one may notice the influence of Article VII(1) of the European Convention on these arbitration rules. Article 33(1) of the UNCITRAL Arbitration Rules[68] and Article 13(3) of the I.C.C. Arbitration Rules[69] are in this regard clearly modeled after Article VII(1). However, from a perspective of hierarchy of legal rules, arbitration rules cannot be placed on the same footing as international conventions and national legislation. In principle, they are binding by the will of the parties to have the dispute settled through arbitration under the arbitration rules of a given arbitration center or other organization.[70] If one does accept the proposition that contracting parties may generate rights and obligations by virtue of and within the boundaries set by the applicable law[71], one may

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64 Jarvin, *La Loi-Type de la C.N.U.D.C.I. sur l'Arbitrage Commercial International*, REV. ARB. 522-23 (1986).

65 A. BUCHER, LE NOUVEL ARBITRAGE INTERNATIONAL EN SUISSE 87 (1988).

66 Derains, *Possible Conflict of Law Rules and the Rules Applicable to the Substance of the Dispute*, in UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 192 (1984).

67 In Canada, legislation in the provinces and the territories has not implemented Article 28(2) of the Model Law but rather substituted it by provisions allowing the direct approach. Broches, *The 1985 Uncitral Model Law on International Commercial Arbitration: An Exercise in International Legislation*, N.Y. BULL. INT'L L. 54 (1987).

68 This paragraph states that the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal should apply the law determined by the conflict of laws rules which it considers applicable.

69 This paragraph provides that the parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator should apply the law designated by the rule of conflict which he deems appropriate.

70 *See supra* section II and note 33.

71 This proposition used to be challenged by proponents of an individualistic jurisprudence who

conclude that arbitration rules incorporated into an agreement to arbitrate may not confer more powers to the arbitrators than those allowed by the applicable law. Article 1(2) of the UNCITRAL Arbitration Rules confirms this position. It states that the Arbitration Rules apply to the arbitration except if they conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate. In this regard, one sees that the extent of autonomy of national law is directly determined by that law. Mandatory provisions of the applicable law will have to be taken into account and, therefore, autonomy will primarily exist with regard to those areas of national law in which few mandatory provisions exist.

Express recognition of autonomy does not only encompass statutory authorization but also authorization by established case law. Developments in international arbitration law have shown that in some cases, particularly in France[72] and to a minor extent in the United States,[73] courts have been willing to free arbitrators from local rules and have created specific exceptions to domestic law with regard to international commercial arbitration. This leads to separate rules for domestic and international transactions. The rules for international transactions may in this regard be referred to as transnational substantive rules. If one accepts that courts may engage in a creative process to develop transnational substantive rules, provided this matches the needs of international trade, one should look critically at domestic arbitration rules which seem to be idiosyncracies or outdated in relation to international arbitration tendencies. For instance, case law might create party autonomy or arbi-

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follow the old French maxim, Convenances vainquent loi, according to which contracts would be a primary source of law.

72 The following principles have been developed by French case law in relation to international transactions although a rule to the contrary existed in French statutory law: severability of the arbitral clause (*Gosset* case, May 7 1963, J.C.P.II No. 13405 (French Supreme Court 1963); Goldman, case note, R.C.D.I.P. 615 (1963); Robert, case note, D. 545 (1963); Bredin, case note, Clunet (1964)); Arbitrability of disputes in which the French state is involved (*Galakis* case, May 2, 1966 (French Supreme Court 1967); Goldman, case note, R.C.D.I.P. 553 (1967); Level, case note, Clunet 648 (1966)); Arbitrability of disputes in which both a merchant and a non-merchant are involved (*Hecht* case, July 4, 1972 (French Supreme Court 1972); Oppetit, case note, Clunet 843 (1972); Level, case note, R.C.D.I.P. 82 (1974)).

For a more extensive discussion, see Von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1050-56 (1986).

73 The arbitrability of securities laws issues, Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), and antitrust matters, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 105 S.Ct. 3346 (1985), has been accepted, provided international transactions were involved.

The transnational substantive rules of these two cases may be questioned after Shearson/American Express Inc. v. McMahon, 107 S.Ct. 2332 (1987), where the scope of Scherk was extended to include domestic transactions. *See* Carbonneau, *L'Arbitrage en Droit Américain*, REV. ARB. 40 and 42 (1988).

trator autonomy with regard to some conflict of laws issues which arise in international commercial arbitrations. However, the aforementioned various forms of autonomy at the conflict of laws level have no absolute character since they are directly based upon an international convention, a national statute or on case law.[74] Thus, the question arises whether this autonomy is also available absent any such express authorization from domestic legal systems.

This problem may be tackled from a theoretical and a practical perspective. Theoretically, absolute autonomy may be based primarily upon two arguments. According to a first line of thought, the will of the parties or, failing any such will, the will or decision of the arbitrators may be considered as a primary source of law and is thus capable of creating legal rules without any support of a legal system. It is obvious that this position is greatly indebted to an individualistic legal philosophy but has little support in current law.[75] A second conception would argue that autonomy is not to be found in domestic legal systems nor in international law but in a third legal system applicable to international commercial transactions ("lex mercatoria"). The theory of lex mercatoria has been subject to debate for the last thirty years and a discussion would clearly fall outside the scope of this article.[76] It might in this regard suffice to state that the problem whether conflict rules are part of the lex mercatoria has hardly been analyzed but that great doubt may be expressed as to the existence of sufficient conflict rules within the system of the lex mercatoria.[77]

Under both preceding arguments, one may have serious doubts about the viability of completely autonomous conflict rules. Consequently, failing extensive freedom for the parties or the arbitrators under the applicable law, one is still faced with the problem of localizing the arbitration in order to determine the applicable conflict of laws system. In this regard, the place of arbitration still seems to play an important role. This is confirmed by the national statutes cited above which tend to give parties or arbitrators wide discretion in order to determine the appli-

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74 *See* Sandrock, *Die Fortbildung des Materiellen Rechts Durch die Internationale Schiedsgerichtsbarkeit*, in FORTBILDUNG DURCH DIE INTERNATIONALE SCHIEDSGERICHTSBARKEIT 64 (K.H. Böckstiegel ed. 1989).

75 *See supra* note 71. Current conflict of laws thinking is rather skeptical as to the notion of stateless relations, as for instance with regard to contracts, where the contrat sans loi-theory has by and large been abandoned.

76 *See* F. DE LY, *supra* note 33, at 389; LEX MERCATORIA AND ARBITRATION 227 (T. Carbonneau ed. 1990); F. DASSER, INTERNATIONALE SCHIEDSGERICHTE UND LEX MERCATORIA 408 (1989); A. KAPPUS, LEX MERCATORIA IN EUROPA UND WIENER UN-KAUFRECHTSKONVENTION 1980 232 (1990).

77 F. DE LY, *supra* note 33, at 240-43 and 363.

cable law. In principle, these statutes will apply with regard to arbitrations taking place in these countries.

The conclusion of the preceding paragraph should, however, be qualified if one looks at the practice of international commercial arbitration. Arbitrators, particularly in cases under the I.C.C. Arbitration Rules and regarding the law applicable to the substance of the dispute, apply conflict of laws techniques other than the traditional ones available under the conflict of laws system of the place of arbitration. One might wonder whether this is not highly troublesome in those cases where the law at the place of arbitration is not liberal enough to allow application of other conflict rules than those prevailing at that place. This raises the issue as to what extent violation by the arbitral tribunal of conflict rules applicable at the place of arbitration may be sanctioned by domestic courts at that place. The autonomy of parties and arbitrators will thus by and large be determined by the degree of court intervention and supervision existing at the place of arbitration. Autonomy of the conflict of laws process cannot, therefore, be absolute but will depend upon the domestic law of the place of arbitration. In some cases, as for instance concerning the merits of the dispute, court supervision will generally be very limited or excluded. From a practical point of view, parties and arbitrators thus enjoy great discretion to determine the applicable conflict rules.[78] In the absence of legal sanctions regarding violation of conflict principles, one is thus faced with the question whether it is advisable after all to give parties and arbitrators so much freedom. As far as the parties are concerned, there hardly seems to be any objection as long as mandatory laws are not involved. In relation to the arbitrators, the litigating parties might consider to designate, through a clause in the agreement to arbitrate, the choice of law principles which should be applied by the arbitrators.[79] Such a provision might, to the extent that par-

[78] As an exception to this principle, one might think of the case where the arbitral tribunal would exceed its authority by applying rules other than those chosen by the parties or would act as "amiables compositeurs" or decide *ex aequo et bono* without being authorized to do so by the parties. At this point, it remains unclear whether the applicable law would allow for the award to be set aside or refused enforcement on these grounds. For a further discussion, see F. DE LY, *supra* note 33, at 243-48.

[79] *E.g.*, Rule 26(2) of the Rules of Procedure of the Copenhagen Court of International Arbitration provides that Danish private international law shall apply to the arbitration unless otherwise agreed by the parties.

Similarly, Article 4 of the International Arbitration Rules of the Zurich Chamber of Commerce has departed from the wide discretion given to arbitrators under Article 187(1) of the Swiss Statute on Conflict of Laws. It provides that in general, the arbitral tribunal should decide according to the rules of the Statute on conflict of laws (*i.e.*, according to the conflict of laws system of the arbitral seat). Some authors have endorsed this position, A. SAMUEL, A CRITICAL LOOK AT THE REFORM OF SWISS ARBITRATION LAW 46-47 (1991), while others have doubted its validity since it derogates

ties perceive this as a threat to the arbitral process, protect them against surprises stemming from the choice of law methodology applied by the arbitrators. Second, the aforementioned risk might also be reduced in the process of choosing arbitrators. In this regard, the French proverb "Tant vaut l'arbitre, tant vaut l'arbitrage"[80] still holds much truth. This protective device will not always be available since the arbitrators are sometimes appointed by arbitration centers or other third parties.

### B.. The Law Applicable to the Arbitral Procedure

The place of arbitration is also an important connecting point with regard to the law applicable to the arbitral procedure. In this regard, four different theories have been advocated. According to one theory, the arbitral procedure should be connected to the place of arbitration.[81] Parties and arbitrators would be bound by the mandatory provisions of that law. One practitioner of international arbitration has in this regard suggested to provide expressly in the arbitral clause that the arbitrators should apply the procedural law of the arbitration place.[82]

A second theory has pleaded for the possibility of choice of law regarding the arbitral procedure.[83] From this point of view, parties and arbitrators might choose to apply to the arbitral procedure a law other than the law prevailing at the place of arbitration. As is the case with any choice of law, this would, however, imply that the mandatory provisions of the chosen law would apply to the procedure. This theory might create practical problems since in most countries jurisdiction of the courts at the place of arbitration would not be ousted by such a choice of law. Therefore, these courts might be faced with intervention and super-

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from a provision of the Statute, Lalive, *On the Conflict Rules Applicable by the International Arbitrator*, 7 ASA BULL. 27-37 (1989).

80 David, *L'Avenir de l'Arbitrage, in* INTERNATIONAL ARBITRATION, LIBER AMICORUM FOR MARTIN DOMKE 62 (P. Sanders ed. 1967).

81 Sauser-Hall, *supra* note 22, at 565-70; Lex Facit Arbitrum, *supra* note 20, at 166. This position has been adopted in the Dutch Arbitration Act, Schultsz, *supra* note 59, at 11, and in Article 19 of the UNCITRAL Model Law, J.P. FRANX, *supra* note 63, at 64. This also seems to be the position in England. *See* Bank Mellat v. Helliniki Techniki SA, 3 All E.R. 428, 3 W.L.R. 783 (1983); Navierra Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru, 1 Lloyd's Rep. 119 (1988); and K/S A/S Bani and K/S A/S Havbulk v. Korea Shipbuilding and Engineering Corp., Financial Times Law Reports July 10, 1989 9 (Court of Appeal 1987). *But see* M. MUSTILL & S. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 61 (1982).

82 K. LIONNET, ÜBERLEGUNGEN ZUR VEREINBARUNG DES AUF DAS SCHIEDSRICHTERLICHE VERFAHREN ANWENDBAREN RECHTS, 3 JAHRBUCH FÜR DIE PRAXIS DER SCHIEDSGERICHTSBARKEIT 63 (1990).

83 K.H. SCHWAB, ICC-SCHIEDSGERICHTSBARKEIT AUS DER SICHT DES DEUTSCHEN RECHTS, IN RECHT UND PRAXIS DER SCHIEDSGERICHTSBARKEIT DER INTERNATIONALEN HANDELSKAMMER 59 (K.H. Böckstiegel ed. 1986).

vision regarding arbitral procedures to which foreign procedural rules are applicable.

Party autonomy is taken to its limits in a third theory which supports the proposition that the parties and the arbitrators are the masters of the arbitral procedure without being bound by provisions of domestic procedural laws.[84] Article 11 of the I.C.C. Arbitration Rules[85] has clearly been influenced by this theory.

Finally, a different perspective is present in some recent arbitration laws which depart from the conflict of laws analysis regarding the arbitral procedure. Rather than trying to localize the arbitral procedure, these laws unilaterally provide for rules regarding the procedure. Irrespective of the applicable law, these statutes have transnational procedural rules applicable to arbitral procedures taking place under the regime of those statutes. These rules deregulate arbitral proceedings from the procedural law of the arbitral place and give parties or arbitrators large freedom to determine the applicable rules of procedure.[86]

Differences of opinion with regard to the law applicable to the procedure may explain why controversy exists in relation to the question whether the choice of an arbitration place implies choice of the procedural law of that place.[87]

### C. Assistance and Supervision Over Arbitral Proceedings and Awards

The nature of commercial arbitration has traditionally been disputed. Its mixed contractual and procedural character has led to contractual, procedural and mixed theories about its nature. These discussion are to a large extent irrelevant. For the purposes of our discussion, it suffices to state that in most jurisdictions some degree of judicial intervention and supervision over international commercial

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84 Lando, *supra* note 61, at 762-63; Fouchard, *L'Autonomie de l'Arbitrage Commercial Internationl*, REV. ARB. 103-4 (1965); B. VON HOFFMANN, INTERNATIONALE HANDELSSCHIEDSGERICHTSBARKEIT 81-8 (1970); Schlosser, *Das Internationale an der Internationalen Privaten Schiedsgerichtsbarkeit*, RIW 861 (1982).

85 Article 11 states that gaps in the Arbitration Rules might be filled by the parties or the arbitrators whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration. *See* K.H. BÖCKSTIEGEL, ZU DEN THESEN VON EINER "DELOKALISIERTEN" INTERNATIONALEN SCHIEDSGERICHTSBARKEIT, FESTSCHRIFT FÜR W. OPPENHOFF 3 (1986).

86 France, N.C.P.C., arts. 1493 and 1494; *see* Paulsson, Craig & Park, *supra* note 63, at 596; P. FOUCHARD, *supra* note 63, at 388. Switzerland, Statute on Conflict of Laws, art. 182; *see* P. LALIVE, J.F. POUDRET & C. REYMOND, *supra* note 38, at 350.

87 Van Den Berg, *Non-Domestic Arbitral Awards Under the 1958 New York Convention*, 2 ARB. INT'L 191-219 (1986). *Contra* Jarvin, *supra* note 7, at 85-6.

arbitrations still exists.[88] The contractual aspects of arbitration have hardly been taken so far as to completely exclude court intervention and supervision.

One may therefore wonder what criteria will be used in order to determine which country will have its courts intervene and exercise supervision. In the context of this article, this question may be rephrased as to what role the place of arbitration might have to play in allocating intervention and supervision powers. In this respect, most jurisdictions accept the view that their courts may intervene with arbitral proceedings provided the place of arbitration is located in their country. Sometimes this is associated with the notion of nationality. In this perspective, arbitrations are deemed domestic for a given country if their seat is in that country.[89] One notable exception to this general principle is the German Federal Republic. Notwithstanding some criticism[90], German law takes the position that the connecting factor with regard to court intervention and supervision should not be the place of arbitration but rather the law applicable to the arbitral procedure.[91] In practice, the differences between both positions are minor because in most cases the law applicable to the proceedings will be the law prevailing at the place of arbitration. As has already been noted, party autonomy regarding the procedural law might create rather than solve problems. Therefore, parties and arbitrators will in many cases stick with the procedural law of the place of arbitration.

Some jurisdictions such as France and Switzerland, have departed from the conflict of law approach for localizing arbitrations. In France, a substantive definition of international arbitration is given in Article 1492 of the New Code of Civil Procedure. According to this article, international arbitration should implicate the interests of international commerce. If arbitration meets this criterion, the provisions of the French law regarding international arbitration apply. In some instances, the substantive criterion is supplemented by another factor. With regard to the agreement to arbitrate, the arbitral procedure and award, the pro-

88 For a summary review of English, Belgian, Swedish, Canadian, Franch and Swiss law, see Jarvin, *supra* note 7, at 90-1 and Jarvin, *supra* note 49, at 419-21. *See also* Derains, *supra* note 16, at 112-15.

89 *E.g.*, The Netherlands, Code of Civil Procedure, arts. 1073 and 1074 (para. one); Belgium, Code of Civil Procedure, arts. 1719(1) and 1723; England, RUSSELL, RUSSELL ON THE LAW OF ARBITRATION 377 (1982); F. MANN, ZUR NATIONALITÄT DES SCHIEDSSPRUCHS FESTSCHRIFT FÜR W. OPPENHOFF 215-25 (1985).

90 Sandrock, *Das Gesetz zur Neuregelung des internationalen Privatrechts und die internationale Schiedsgerichtsbarkeit*, RIW 18 (annex 2 1987).

91 Section 1044, II, 1 ZPO; Federal Supreme Court, September 26, 1985, NJW 1436, JZ 401, DB 683 (1986); K.H. BÖCKSTIEGEL, *supra* note 85, at 4-5.

visions of Articles 1442-1480 concerning domestic arbitrations also apply to international arbitrations, provided French law has been chosen as the applicable law.[92] As far as court supervision is concerned, the substantive criterion is complemented by a localizing factor. In these cases, the arbitration should not only be international but the award should also have been rendered in France. Here, the place where the award has been rendered has been chosen as an additional factor to determine the jurisdiction of French courts with respect to setting aside proceedings.[93]

Chapter 12 of the Swiss Statute on Conflict of Laws dealing with international arbitration also chooses a substantive rather than a conflict of laws approach. According to Article 176(1) of the Statute, the provisions of Chapter 12 shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. The jurisdiction of Swiss courts over international arbitration is thus conditional upon fulfillment of both an objective and a subjective criterion.[94] Particularly the objective criterion (*i.e.*, the place of arbitration in Switzerland) is relevant to our analysis. It shows that even with substantive rules applicable only to international arbitrations, the place of arbitration is still considered a very important factor to determine the scope of these substantive rules. This proposition is also confirmed by Article 185 of the Statute which provides that the courts at the place of arbitration may be asked to intervene in the arbitral process when needed. The Articles 179(2), 180(3), 184(2) and 191 of the Statute are examples of this general support function of the courts at the arbitral seat since they provide that these courts may intervene with regard to the composition of the arbitral tribunal, challenge of arbitrators, taking of evidence and setting aside.

One may also wonder whether the jurisdiction of courts to intervene and supervise arbitrations may be ousted. This hardly seems to cause problems if so provided by legislation or case law. Three countries, Belgium, Switzerland and Sweden have in this regard taken the lead. With respect to Belgium, a Statute of March 27, 1985 has ousted jurisdiction of Belgian courts in relation to setting aside proceedings against arbitral awards rendered between parties who are not Belgian nationals or residents or corporations incorporated in Belgium or having a Belgian

92 N.C.P.C., art. 1495; *see also* M. DE BOISSESON, LE DROIT FRANÇAIS DE L'ARBITRAGE 416-17 (1983). These rules may not, however, derogate from some provisions of the section on international arbitration. Also, parties may derogate from the rules on domestic arbitration.

93 N.C.P.C., art. 1504.

94 P. LALIVE, J.F. POUDRET & C. REYMOND, *supra* note 38, at 294-300.

branch or center of activities.[95] Since Belgium follows the traditional rule that Belgian courts are only competent regarding arbitrations having their seat in Belgium, one may add the implicit requirement that the Belgian reform only applies provided the arbitral seat is located in Belgium.[96] Chronologically, the Belgian reform antedates the Swiss Statute on Conflict of Laws but research in the parliamentary history of the Belgian law shows that earlier drafts of the Swiss reform inspired the Belgian law. Both reforms are thus closely related. The Swiss reform provides in Article 192 that the parties may exclude judicial review of awards provided they have no domicile, residence or center of activities in Switzerland.[97] Here also, Article 192 will only apply if the place of arbitration is Switzerland. The main distinction between the Belgian and the Swiss reform relates to the fact that the exclusion is automatic in Belgium while Switzerland requires an explicit agreement to that effect ("explicit exclusion agreement"). This distinction is in practice primarily relevant in those cases where the place of arbitration has not been chosen by the parties but was determined by institutional arbitration centers or by the arbitrators.[98] If so, the Swiss Statute protects parties who might be critical as to exclusion of judicial review, against any such exclusion while the Belgian reform does not provide any such safeguard. As to Sweden, a decision of the Supreme Court dated April 18, 1989 in the so-called *Uganda* case has also recognized the validity of exclusion agreements between non-Swedish parties.[99] However, there still remain

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95 F. DE LY, *supra* note 1, at 1025-50; De Ly, *Internationale arbitrage in België*, TV A. 135-42 (1989); M. STORME, *supra* note 5, at 294-296; Vanderelst, *Increasing the Appeal of Belgium as an International Arbitration Forum?, The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards*, J. INT'L ARB. 77-86 (1986); Nelissen Grade, *The Annulment of Arbitral Awards in Belgium*, INT'L FIN. L. REV. 35-7 (1986); Paulsson, *Arbitration Unbound in Belgium*, 2 ARB. INT'L 86-93 (1986); Gaillard, *Introductory Note: Belgium: Statute on the Setting Aside of Arbitral Awards*, I.L.M. 725-26 (1986); Hampton, *Belgium's Radical Move on Arbitration*, Fin. Times, Aug. 1, 1985, at 29; Hanotiau, *International Commercial Arbitration in Belgium*, AM. REV. INT'L ARB. 1-13 (1990); M. STORME AND B. DEMEULENAERE, INTERNATIONAL COMMERCIAL ARBITRATION IN BELGIUM 306 (1989); Bühler, *Staatsgerichtliche Aufhebungskontrolle am Schiedsort?, Zur Reform Belgiens*, IPRAX 253-257 (1987); Van Houtte, *La Loi Belge du 27 mars 1985 sur l'Arbitrage International*, REV. ARB. 29-42 (1986); Matray, *La Loi Belge du 27 mars 1985 et Ses Répercussions sur l'Arbitrage Commercial International*, REV. DR. INT. COMP. 243-62 (1987); Watte, *Le Sort des Sentences Arbitrales en Droit Belge Depuis la Loi du 27 mars 1985*, R.B.D.I. 496-512 (1988).

96 F. DE LY, *supra* note 1, at 1034-35.

97 On the Swiss reform, *see* Gaillard, *supra* note 60, at 25-31; A. SAMUEL, *supra* note 79, at 27-56; Habscheid, *Das Neue Schweizerische Recht der Internationalen Schiedsgerichtsbarkeit Nach Dem Bundesgesetz Über das Internationale Privatrecht*, RIW 766-72 (1988); W. HABSCHEID, RECHTSSTAATLICHE ASPEKTE DER INTERNATIONALEN SCHIEDSVERFAHRENS MIT RECHTSMITTELVERZICHT NACH DEM IPR-GESETZ, SOLOTHURN, VEREINIGUNG FÜR RECHTSSTAAT UND INDIVIDUALRECHTE 26 (1988).

98 Gaillard, *supra* note 60, at 30.

99 Hober, *Arbitration and the Swedish Courts, Swedish and International Arbitration 1990*, in

doubts as to the precise scope of the decision of the Supreme Court[100] and further case law might develop the rule introduced in the *Uganda* case. Under each of these three reforms, the link between the arbitration and the place of arbitration has been lessened in those cases where the parties have, apart from the place of arbitration, no significant connection with Belgium, Switzerland or Sweden. However, the exclusion of court intervention and supervision is not complete and is limited to setting aside proceedings. This implies that court intervention during the arbitral proceedings remains available. The diminishing role of the place of arbitration which has been recognized by these reforms, has in practice shifted attention to the enforcement stage of the arbitral process. Since awards can no longer be attacked at the place of arbitration, the losing party will have to resort to opposing recognition and enforcement. The consequences of this shift will be discussed in the following section. At this point, it may be noted that judicial review in the course of enforcement proceedings might generally be more limited than review in setting aside proceedings. This is particularly true with regard to Belgium. In practice, the Belgian reform has thus limited the grounds on which awards can be attacked.[101] Switzerland on the other hand has much more limited review under setting aside proceedings. Therefore, the Swiss reform does not so much limit review but is rather primarily aimed at speeding up the arbitral process, if wanted by the parties, by concentrating litigation at only the enforcement place or places.

Finally, one should ask the question whether parties might oust the jurisdiction of domestic courts at the place of arbitration when no specific authorization to do so may be found in the law of that place. This is the issue of arbitrations which have become known as floating, drifting, a-national or denationalized. Three major examples are known in arbitration law. In the oldest case, *Société européenne d'études et d'entreprises (S.E.E.E.) v. Federal Republic of Yugoslavia*[102], an arbitral award was rendered in Switzerland. In the course of setting aside proceedings before the Swiss courts, the Cantonal Court in Lausanne declined jurisdiction based upon the argument that the parties seemed to have agreed on some sort of purely contractual dispute resolution mechanism rather

YEARBOOK OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE 56-59 (1990); Jarvin, *supra* note 7, at 91; J. PAULSSON, ARBITRAGE INTERNATIONAL ET VOIES DE RECOURS: LA COUR SUPRÊME DE SUÈDE DANS LE SILLAGE DES SOLUTIONS BELGE ET HELVÉTIQUE 589-99 (1990).

100 Hober, *supra* note 99, at 58-9.

101 F. DE LY, *supra* note 1, at 1038-43.

102 Clunet 1074 (1959).

than on arbitration.[103] The refusal by the Swiss courts to intervene with the award has led to great difficulties with regard to its enforcement. Basically, the question was raised whether an award which may pass without any control by the courts at the place of arbitration comes under the scope of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). This will be analyzed in the following section. At this point it may be noted that only after about thirty years of litigation in various countries leave for enforcement was granted to the S.E.E.E. award.[104]

French case law also has examples of denationalized awards. In the *Gotaverken* and *Aksa* cases, the Paris Court of Appeals declined jurisdiction with regard to setting aside proceedings in relation to two arbitral awards rendered in Paris under the I.C.C. Arbitration Rules. Given the fact that neither party in the proceedings was French or that the dispute was clearly transnational, the Court concluded that connection with French procedural law was very weak and that parties and arbitrators had resolved the dispute solely on the basis of the I.C.C. Rules. Therefore, interference by French courts with autonomous dispute settlement processes was considered inappropriate.[105] One is thus faced with a hands-off attitude[106] towards judicial review by the courts at the place of arbitration. Theoretically, one may wonder whether, absent authorization by the applicable law, denationalization can be based only on the absence of sufficient connecting points with the place of arbitration and on the agreement of the parties or the decision of arbitrators only to apply Arbitration Rules. From a pragmatic point of view, it is interesting to note that the French legislature has chosen not to follow the *Gotaverken* and *Aksa* approach and yet to provide a minimal control over arbitral awards rendered in France.[107]

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103 District Court Vaud, February 12, 1957, *aff'd* Federal Supreme Court, September 18, 1957; Aubert, case note, R.C.D.I.P. 358 (1958).

104 Court of Appeal Rouen, November 13, 1984; Mayer, case note, R.C.D.I.P. 658 (1985); Oppetit, case note, Clunet 473 (1985).

105 Paris, February 21, 1980, Robert, case note, D. 568 (1980); Level, case note, J.C.P. 19512 (1981); Mezger, case note, R.C.D.I.P. 763 (1980); Fouchard, case note, Clunet 660 (1980); Jeantet, case note, Rev. Arb. 524 (1980); Paris, December 9, 1980, Mezger, case note, R.C.D.I.P. 545 (1981); Jeantet, case note, Rev. Arb. 306 (1981). For a discussion of the Gotaverken case, see Paulsson, *supra* note 52, at 358-387.

106 This expression has been used in Derains, *France As a Place for International Arbitration*, in THE ART OF ARBITRATION, ESSAYS ON INTERNATIONAL ARBITRATION, LIBER AMICORUM PIETER SANDERS 115 (J. Schultsz & A.J. Van Den Berg ed. 1982).

107 N.C.P.C., art. 1504; Report to the Prime Minister, J.C.P., annex, June 3, 1981; *see* Derains, *supra* note 106, at 115.

### D. Recognition and Enforcement

Finally, the role of the place of arbitration for the recognition and enforcement of the award should be discussed. Here, one might distinguish between recognition or enforcement in the country of the place of arbitration or abroad. In the first instance, home country recognition or enforcement rules will apply. In many cases, these rules, which have primarily been written for domestic awards, might prove to be over-restrictive and thus ill-adapted to international arbitration. Modern arbitration laws have sometimes identified this problem and provided for a more liberal system. In connection with limiting the grounds for challenge of the award, the grounds for refusal to enforce in the home country of the award have been restricted.[108] Finally, enforcement in the home country of the award deserves attention regarding those countries where judicial review at the place of arbitration may be excluded. Switzerland clearly has identified this problem. When parties make an explicit exclusion agreement under Article 192(1) of the Swiss Statute, they might still be faced with the enforcement of the award in Switzerland. Article 192(2) of the Statute then states that enforcement problems will be solved through an analogous application of the New York Convention.

The issue of domestic enforcement proceedings has not been treated by the Belgian arbitration reform. Consequently, review in the context of arbitration proceedings seems to be limited to violation of domestic public policy and non-arbitrability of the subject matter. This might be troublesome since the central philosophy of the Act was to shift review over the award from the arbitral place to the enforcement place. Paradoxically, when the enforcement place is Belgium, control is extremely limited.[109] In practice, assets of the losing party in these international arbitrations in which no Belgian interests are involved, will in many cases not be located in Belgium.

In international arbitration, the place of enforcement will more often not be situated in the home country of the award. One will then be confronted with the recognition or enforcement of an arbitral award in a foreign country. In relation to that country, the award will be considered as a foreign award. The place of arbitration is in this respect relevant in order to determine whether the award is domestic or foreign. As has already been analyzed, most jurisdictions have opted for the place of arbitration as the connecting factor in relation to their courts' assistance

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108 *E.g.*, France, N.C.P.C., art. 1502; The Netherlands, Code of Civil Procedure, art. 1062(4).
109 F. DE LY, *supra* note 1, at 1043-44.

and supervision over arbitral proceedings and awards. The same criterion is also used to designate an award's domestic or foreign character for enforcement purposes. Other jurisdictions, notably the German Federal Republic, use the law applicable to the arbitral proceedings as criterion. Both approaches have been recognized in Article I(1) of the New York Convention.[110] Confusion has been introduced into this picture in a United States case, *Bergesen v. Joseph Muller Corp.*[111] where an A.A.A. award rendered in New York was considered non-domestic although neither the place of arbitration nor the applicable procedural rules were foreign. It is submitted that this interpretation which seems to be inspired by reasons of United States law only, may pose a threat to the New York Convention system based in principle upon judicial review in the home country of the award and more limited control in the enforcement country.[112]

A second function may be attributed to the place of arbitration in relation to enforcement proceedings. In these proceedings, the award is generally reviewed on several formal, procedural and substantive grounds. In this respect, one may wonder whether the law of the place of arbitration still has some competence or influence on such review. The answer to this question may be found in domestic law and international conventions. Because all major arbitration countries are party to one or more multilateral convention on enforcement of awards, the discussion will be limited to these conventions. Under Article V, section 1 of the New York Convention, the place of arbitration may be relevant in three respects. First, Article V, section 1(a) permits the refusal of recognition and enforcement if the agreement to arbitrate is invalid under the law chosen by the parties or, absent choice of law by the parties, under the law of the country where the award was made.[113] Second, under Article V, section 1(d), recognition or enforcement may be refused if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties or, absent such agreement, with the law of the country where the arbitration took place.[114] The meaning of this provision has been highly debated.[115] For some authors, it gives

110 *See also* Article IX(1) of the European Convention. For a further analysis, see Van Den Berg, *supra* note 87, at 191-219.

111 Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983).

112 Van Den Berg, *supra* note 87, at 202-11.

113 A similar provision may be found in Article IX(1)(a) of the European Convention and in Article 36(1)(a)(i) of the UNCITRAL Model Law.

114 A similar provision may be found in Article IX(1)(d) of the European Convention and in Article 36(1)(a)(iv) of the UNCITRAL Model Law.

115 The debate is analogous to the one described in section III, B on the law applicable to the procedure.

complete procedural autonomy so that enforcement must be granted even if the agreement violated mandatory provisions of the law of the place where the arbitration took place or of any other national law.[116] A second opinion reduces Article V, section 1(d) to a choice of law provision. Under this approach, parties may choose the applicable procedural rules among national procedural laws and may derogate from the mandatory provisions of the law of the arbitration place.[117] Both theories thus affirm that the place of arbitration has little value from a procedural perspective if parties want to derogate from that law.

According to a third theory, parties may not derogate from the mandatory provisions of the law at the place of arbitration.[118] Under this third theory as well as absent an agreement by the parties as to procedure, the law of the place where the arbitration took place still remains important because violation of its rules may be a ground to refuse recognition or enforcement. Finally, under Article V, section 1(e), the award may also be refused recognition or enforcement if it has been set aside or suspended by courts in the country in which, or under the law of which, the award was made.[119] This provision is of paramount importance. It implies that suspension or setting aside of the award at the place of arbitration[120] may have absolute effect *vis-à-vis* other countries. Particularities of the domestic law at the place of arbitration which lead to setting aside, might thus bar recognition or enforcement of the award at the place of recognition or enforcement. Article IX(2) of the European Convention has in this regard tempered the system of the 1958 Convention as between its Contracting States. Under the European Convention, setting

116 Motulsky, *L'Evolution Récente en Matière d'Arbitrage International*, in ECRITS, ETUDES ET NOTES SUR L'ARBITRAGE 302 (1974); Fouchard, *supra* note 84, at 103-4; B. VON HOFFMANN, *supra* note 84, at 81-8; Lando, *supra* note 84, at 762-63.

117 F.E. KLEIN, LA CONVENTION DE NEW YORK POUR LA RECONNAISSANCE ET L'EXÉCUTION DES SENTENCES ARBITRALES ETRANGÈRES 247-48 (1961); Klein, *La Convention Européenne sur l'Arbitrage Commercial International*, R.C.D.I.P. 634 (1962); Lalive, *Problèmes Relatifs à l'Arbitrage International Commercial*, in 120 COLLECTED COURSES OF THE HAGUE, ACADEMY OF INTERNATIONAL LAW I 644-45 (1967); Y. LOUSSOUARN & J.D. BREDIN, DROIT DU COMMERCE INTERNATIONAL 104 (1969).

118 Kornmeier & Sandrodck, *Internationale Schiedsgerichtsvereinbarungen*, in 2 HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG 975-76 (O. Sandrock ed. 1980).

119 A similar provision has been adopted in Article 36(1)(a)(v) of the UNCITRAL Model Law, in Article 5 of the Panama Inter-American Convention on International Commercial Arbitration of January 30, 1975 and in Article V(1)(c) of the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Resulting From Relations of Economic and Scientific-Technical Cooperation of May 26, 1972.

120 Article V, section 1(e) also refers to the country under the law of which the award was made in relation to states such as the Federal German Republic which do not follow the majority position of the place of arbitration but rather the law applicable to the arbitral procedure as criterion for judicial review by their courts.

aside the award in the home country will not necessarily lead to refusal of recognition or enforcement. This will only happen when the home country's ground for setting aside the award corresponds to a ground for refusing the award's recognition or enforcement which is stated in Article IX(1) of the Convention. Therefore, the New York Convention's automatic effect of the award's setting aside upon its recognition or enforcement is limited under the scheme of the European Convention to the four grounds for refusal mentioned in Article IX(1). Some national laws have followed the system of the European Convention and have reduced the possible impact of the law of the arbitration place.[121] One may thus note that the impact of the law at the place of arbitration upon enforcement litigation may, in varying degrees, still be quite significant.

## IV. The Place of Arbitration in the Conflict of Laws and Arbitration Planning

The analysis set forth above has indicated that the place of arbitration is still an important connecting factor in relation to many issues of international commercial arbitration. At the same time, international commercial arbitration has become more and more liberalized in major arbitration countries. Developments in the law of these countries have given parties and arbitrators much autonomy to depart from the law of the arbitral place. More recently, substantive rules for international commercial arbitration have been introduced to the same effect. The relevance of the place of arbitration and the tendency to deregulation are not necessarily contradictory. From a theoretical point of view, one might argue that deregulation of international commercial arbitration is to a large extent based upon the law of the place of arbitration which provides for deregulation and sets forth its conditions and limits. More pragmatically, one should also note that many controversies still exist regarding the extent to which deregulation may be achieved by the parties and the arbitrators and the interpretation to be given to domestic laws having liberalized international commercial arbitration. These legal uncertainties may hinder the arbitral process if manipulated for dilatory purposes.

In these respects, arbitration planning at the conflict of laws level remains useful. First, it may relate to the choice of the arbitral place. By choosing a place of arbitration, the parties, arbitration centers or arbitrators may take into consideration that place's conflict of laws rules and

121 *See, e.g.*, N.C.P.C., art. 1502. These national laws may be relevant under the more favourable law provision of the New York Convention (Article VII) and in relation to Contracting States to the European Convention, with respect to arbitrations falling outside the scope of this Convention.

particularly the extent to which these rules allow party autonomy or arbitrator autonomy. Also, the law of a possible arbitration place may not be sufficiently clear as to autonomy or its deregulated arbitration system. If the laws in certain arbitration places are then regarded as too uncertain or too restrictive, this might be a reason to shop around for another place of arbitration having no such restrictions or uncertainties ("place of arbitration shopping"). Any such analysis would have to compare various conflict of laws systems. Second, when a favourable arbitration place has been chosen, various options might be available under the law of that place in relation to the applicable law or the system of deregulation. These two elements will simultaneously be discussed below.

As a preliminary remark, one should stress the importance of indicating the place of arbitration in boilerplate arbitration clauses in order to avoid the uncertainties related to the determination of the arbitral place by arbitration centers, arbitrators or domestic courts.[122] Also, the place of arbitration should be designated in the award.

From the analysis in section III of this article, one may draw the following conclusions. First, in the legal systems discussed, the influence of the conflict rules of the place of arbitration as to the law applicable by the arbitrators to the substance of the dispute has greatly diminished. Parties might, therefore, reflect upon the relevance of the place of arbitration for the rules to be applied by the arbitrators to the substance of the dispute. In relation to contractual matters, the place of arbitration will, to a large extent, be irrelevant since the parties often will have inserted a choice of law clause in their contract.[123] Under most national laws, the arbitrators will be bound by the choice of law clause and, thus, many of the conflict of laws problems discussed in section III, A will be avoided.

For substantive matters other than contractual ones, parties should look at the law of the arbitral place to see whether it authorizes them or the arbitral tribunal to depart from its conflict rules. If so, the parties might consider indicating in the arbitral clause which conflict or substantive rules the arbitrators should apply.[124] In this respect, depending upon the circumstances of each case, predictability of the outcome rather than arbitrators' discretion in adjudicating the case might have to prevail. If not, parties should take into account that the law of major arbi-

122 *See* section II.

123 A recent study indicates that in I.C.C. cases in 1987 and 1989 respectively, seventy-five and sixty-six percent of the contracts which led to arbitration contained a choice of law clause. Bond, *supra* note 25, at 19.

124 Von Breitenstein, *Die Internationale Arbitrage im Französischen Recht*, in SCHIEDSGERICHTSBARKEIT IN FRANKREICH 39-40 (K.H. Böckstiegel ed. 1983).

tration countries would, as a general rule, not allow judicial review over the conflict or substantive rules applied to the merits of the dispute. Paradoxically, one might also consider imposing the conflict or substantive rules upon the arbitrators because review might then be possible on grounds of excess of authority. From a practical point of view, it might, however, be preferable not to arbitrate in these countries if one disapproves of the application of the conflict rules of the law of the place of arbitration.

Second, important differences exist regarding the law applicable to the arbitral procedure. English and Dutch law tend to take the view that their law on civil procedure applies in relation to arbitrations with their seat in respectively England and The Netherlands. Under Belgian law, the same position may be defended. In Germany, opinions differ as to the question whether the law chosen by the parties rather than the law applicable at the arbitral place should control. France and Switzerland have in their recent laws introduced substantive rules which allow parties or arbitrators to determine the applicable procedural rules. From a procedural perspective, one may prefer to go to arbitration in France or Switzerland because of their larger procedural flexibility particularly when there are, but for the place of arbitration, no other links with that country. In other cases, the place of arbitration, because of practical reasons and the lack of unanimity in some jurisdictions as to the issue of party autonomy, remains relevant as a connecting point for determining the law applicable to the arbitral procedure. Therefore, the arbitral clause might provide for the application of the procedural law of the place of arbitration.[125]

Third, court assistance and supervision is in most countries, except for the Federal German Republic, dependent upon the arbitral place situated in that respective country. As to Germany, the law applicable to the arbitral procedure will be determinative, but practically, in most cases German procedural law will apply regarding arbitrations in Germany. The theoretical criterion thus in practice also leads to application of the law of the arbitral seat. Attention should primarily be paid to the degree of court assistance or control. Arbitration planning will here be limited to choosing a hospitable arbitration place because one may doubt whether court assistance and intervention at the place of arbitration may be ousted by contract if not authorized by that law. Within the scope of this article, only those cases are relevant which exclude court supervision

125 *See* note 82.

at the place of arbitration.[126]

Here, the question should be answered whether the Belgian, Swiss and Swedish reforms have resulted in making Belgium, Switzerland and Sweden attractive arbitration countries. As to the differences between Belgium on the one hand and Switzerland and Sweden on the other, it has been noted that when arbitration centers or arbitrators choose the place of arbitration, parties might end up with arbitration in Belgium although they never intended to exclude judicial review at the place of arbitration.[127] In that respect, the Swiss and Swedish reforms have clearly given more credit to the parties' will. Whether the objection is also important in practice will depend upon the wisdom and sense for restraint of arbitration centers and arbitrators. The objection also shows the importance of the parties indicating the place of arbitration and not leaving this to arbitration centers or arbitrators. Other objections have also been raised against these reforms. Some of these are related to enforcement and will hereafter be discussed.

At this point, two problem situations may be mentioned. First, one may be faced with the situation where defective awards rendered in Belgium, Switzerland or Sweden may nowhere be enforced. Since Belgian, Swiss or Swedish courts cannot set aside such an award, parties are still bound by the award and they may hardly insist upon the case being reheard by the arbitral tribunal or before domestic courts.[128] Second, defective awards rendered against the claimant can neither be attacked nor reheard by the arbitrators or domestic courts.[129] These points are well taken. However, the policy decision in Belgium, Switzerland and Sweden has been to prefer finality of the award over its quality. The two objections just mentioned are obviously the price which has to be paid for any such policy decision. The risks attached to such a choice may, however, be minimized to some extent by choosing qualified arbitrators and exercising great care in all stages of the arbitral process. Finally, one may add that the Swiss reform has left it to the parties to determine to what extent they want to opt out of judicial review by the Swiss courts. Parties may exclude judicial review for one, several or all grounds of setting aside provided in Article 192(2) of the Statute.[130]

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126 Comparing court assistance and supervision of major arbitration places is a comparative procedural analysis outside the conflict of laws scope of this article.

127 *See* section III, C, note 98.

128 *See* De Ly, *Internationale Arbitrage in België*, *supra* note 95, at 139-140.

129 Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 695 (1989); Hober, *supra* note 99, at 56.

130 These grounds are (i) defaults in the designation of a single arbitrator or in the composition of the arbitral tribunal, (ii) the decision on jurisdiction or lack of jurisdiction was wrong, (iii) the arbi-

Finally, party autonomy also seems to be limited in relation to the grounds of refusal for recognition or enforcement within the law of the enforcement place. Arbitration planning will thus lie primarily with choosing the place of enforcement rather than within the law of any such place. With regard to the law of the enforcement forum, one should distinguish between recognition and enforcement in the home country of the award and abroad. In the first case, the Belgian reform has drastically reduced review in the course of enforcement proceedings in Belgium regarding awards rendered in Belgium between non-Belgian parties. Switzerland on the other hand has retained the refusal grounds of the New York Convention. France also has a liberal system for domestic enforcement of international awards rendered in France. This can also be said about The Netherlands but for the control of the award with Dutch public policy.

If recognition or enforcement is sought abroad, the analysis may be conducted under the applicable international conventions. First, the Belgian, Swiss and Swedish reforms may be discussed with respect to the problems they might create in the enforcement stage of the arbitral process. As has already been noted, the idea behind these reforms is to shift review over these awards which hardly have any connection with Belgium, Switzerland or Sweden but for the place of arbitration, from the arbitral forum to the enforcement forum. Two objections have in this regard been raised. First, excluding a centralized judicial review at the place of arbitration decentralizes any review left and might lead to enforcement shopping. To a certain extent, this risk definitely exists. The question is, however, whether such risk is significant since the defendant may easily circulate information on the defectiveness of the award from one jurisdiction to another. The problem thus seems to be primarily a practical one involving costs and pains to oppose enforcement in various jurisdictions. This disadvantage should, however, be offset against the advantages of speed and finality under the law of the arbitration place.

Second, it has been doubted whether Belgian, Swiss and Swedish awards which are non-reviewable at the place of arbitration, come within the scope of the New York Convention. The analogy may in this regard be made with anational awards where the parties did not want to have domestic rules of procedure apply to the arbitration.[131] However, this

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tral tribunal decided matters beyond the submission to arbitration or failed to decide on matters within the submission, (iv) procedural due process has been violated, and (v) the award is contrary to public policy.

131 *See generally* Van Den Berg, *supra* note 87, at 212-18; Van Den Berg, *Recent Enforcement Problems Under the New York and ICSID Conventions*, 5 ARB. INT'L 5-11 (1989).

analogy must fail since, in the latter case, the parties attempt to escape from the application of domestic laws while under the Belgian, Swiss and Swedish reforms, the basis for the hands-off attitude of courts is to be found in the law of these three countries. Therefore, the correct view seems to be that awards rendered in Belgium, Switzerland and Sweden under the deregulated system still qualify under the New York Convention[132] since Article V, section 1(e) of that Convention might be interpreted to state that setting aside in the home country may be a ground for refusal of enforcement only if that setting aside is available under the law of the home country. This implies that Article V, section 1(e) does not require countries to have some sort of review but only gives effect to any such review, if at all. One might add another practical objection. It may be expected that enforcement judges will take a somewhat closer look at awards coming from Belgium, Switzerland or Sweden since no other control mechanisms are available against such awards. From a theoretical point, this seems to be unjustified but in practice it might well be a factor. However, this argument does not seem to be decisive since the standards of review remain the ones provided for in international conventions. From the foregoing arguments, one might generally conclude that they do not raise fundamental objections against arbitration in Belgium, Switzerland or Sweden under the deregulated systems of these countries. Rather the main issue remains whether parties prefer finality and speed over the quality of the award.

As to enforcement of foreign arbitral awards, many countries are contracting parties to the New York Convention, but major arbitration countries such as England, Switzerland, Sweden and The Netherlands are not a party to the European Convention. The more limited enforcement review of Article IX of the European Convention will thus often not be applicable. In other cases, the more favourable rights provision of Article VII of the New York Convention might come into play. This might be particularly relevant with regard to France which recently introduced more liberal enforcement rules for foreign awards. In this respect, one notes that Article V, section 1(e) does not find a parallel in Article 1502 of the N.C.P.C. If neither the European Convention nor a favourable rights provision apply, the place of arbitration will remain relevant under the Article V, sections 1(a),(d) and (e) of the New York Convention.

Therefore, in order to limit enforcement review regarding the effect of setting aside proceedings, one might consider enforcing the award in France or in a country which is a party to the European Convention

132 *See also* Jarvin, *supra* note 7, at 91; Jarvin, *supra* note 7, at 420.

provided the arbitration comes within the scope of the European Convention. In cases relating to Article V, section 1(a) of the New York Convention, the impact of the law of the place of arbitration will still be considerable. As to Article V, section 1(d), the possible impact of the law of the arbitral place will be dependent upon the interpretation of this provision at the place of enforcement. If Article V, section 1(d) is interpreted as giving parties absolute autonomy or autonomy to choose a procedural law different from that of the arbitration place, the latter law will not have any bearing upon the enforcement process. However, if Article V, section 1(d) is deemed to mean that parties may only derogate from non-mandatory provisions of the procedural law of the arbitration place, violation of mandatory rules of that law may well result in a refusal to recognize or enforce the award. Arbitration planning may in these regards be quite difficult because it may be hard to determine the enforcement place.

## V. CONCLUSION

The place of arbitration has lost some of its importance in the conflict of laws of international commercial arbitration, basically because of perceived needs to deregulate arbitration from the law of the arbitral place and the fact that the place of arbitration is often the only connecting point between the state of the arbitral seat and the arbitration. However, the place of arbitration remains, for practical and pragmatic reasons, relevant in other respects. Arbitration planning may take this into account with regard to both the choice of the arbitral place and the planning devices within the law of that place. Given the multitude of possible arbitration places and the diverging legal rules prevailing at these places, no single best arbitration place can be identified.[133]

133 Lalive, *The New Swiss Law on International Arbitration*, ARB. INT'L 20 (1988).