LIMITATIONS ON PARTY CHOICE OF THE GOVERNING LAW: DO THEY EXIST FOR INTERNATIONAL COMMERCIAL ARBITRATION?

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I

In the decades since the end of World War II international commercial arbitration has grown dramatically in importance. The reasons are manifold for this wide-spread acceptance of a private dispute resolution process for international commercial activities. Arbitration is seen as more expeditious and less costly than judicial adjudication and offers the advantage of confidentiality.

However, the basic explanation for the popularity of international commercial arbitration lies in the dilemma that transnational transactions often pose for the parties. When they are from different legal systems, each can understandably be reluctant to entrust adjudication of future disputes to the other party's system. To do so upsets the balance of convenience as only one party can have the benefit of local and familiar rules, institution, and facilities. Moreover, the outsider may-rightly or wrongly-fear prejudice; neither access to local political processes nor the presence of natural allies in the community re-enforces his claim to fair and impartial treatment by the executive, judicial, and legislative branches of government.

These difficulties can be reduced or eliminated by party stipulation for a neutral forum. Such a forum eliminates the possibility of prejudice in favor of local parties and-except to the extent that the chosen forum is more accessible as a matter of language or legal tradition to one party than to the other-denies both parties equally the advantages that local parties enjoy.

But in many transnational transactions recourse to arbitration is preferred. Parties enjoy much greater control over both the procedural and substantive aspects of the arbitral process than they can exercise over the judicial process. For example, in matters of procedure the parties can agree upon a process that combines elements drawn from both civil and common-law tradition. Of even greater importance is the high degree of control that the parties have over the substantive propositions under which their controversy will be adjudicated.

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Parties to important commercial transactions typically stipulate for the governing law. The content and effectiveness of their stipulation may well, however, depend upon whether disputes that arise in the future are to be resolved through arbitral or judicial proceedings. Party control over governing law is significantly greater in arbitration proceedings than is usually the case in judicial proceedings. How great are the differences and why is the arbitral process more permissive than the judicial? This talk addresses these topics.

II

Although the positions taken vary, where a matter is litigated in a national court limits are set to the parties' control over the applicable law. The minimalist proposition that the "law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to the issue"[1] is widely accepted.

However, where mandatory rules of law (jus cogens) are in question, many legal orders set significant limits to the parties' control over the applicable law. Some national systems require that the chosen law have a substantial relationship to the parties or the transaction[2] or that there be some "other reasonable basis for the parties' choice"[3]. Other systems by invoking such doctrines as "lois d'application-immediates,"[4] "lois de police" and "ordre public,"[5] preclude application of the law chosen where that law provides a result that is contrary to a fundamental policy of the forum.

Furthermore, the public policy of third States is taken into account by some forums. The American Restatement Second of Conflict of Laws considers applicable the mandatory rules of a State "which has a materially

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[1] Restatement of the Law Second, Conflict of Laws 2d (1971) sec. 187(1). Article 3 (Freedom of Choice) (1) of the EEC Convention on the Law Applicable to Contractual Obligations (Rome Convention) of 19 June 1980 uses less qualified language: "A contract shall be governed by the law chosen by the parties."

[2] Cf. Restatement Second, sec. 187 (2) (a). French law does not recongnize a comparable restriction. See II H. BATIFFOL & P. LAGARDE, DRIOT INTERNATIONAL PRIVE, No. 547 (7th ed. 1983); P. MAYER, DROIT INTERNAITONAL PRIVE; Nos. 687, 692 (2nd ed. 1983).

[3] Restatement Second, sec. 187(2) (a). Compare article 3 (Freedom of choice) of the Rome Convention, which takes a less restrictive position. The discussion of the article in the Report on the Convention (M. Giuliano and P. Lagarde, 23 Officail Journal of the European Communities, C 282 [31 Oct. 1980]) makes it clear that a "choice of a foreign law by the parties" can be "fully justified, although there was apparently no other foreign element in the situation." Id. C 282/18, No. 8.

[4] For example, article 7 (Mandatory rules) (2) of the Rome Convention.

[5] O. Lando generalizes to the effect that the " 'directly' applicable rules of the forum always govern". THE PROPER LAW OF THE CONTRACT, No. 200 (1976) (Ch. 24 of 111 International Encyclopaedia of Comparative Law, K. Lipstain, ed.).

greater interest than the chosen state in the determination of the particular issue and which, under [the forum's choice of law rule] ...; would be the state of the applicable law in the absence of an effective choice of law by the parties."[6]

The EEC Convention on the Law Applicable to Contractual Obligations goes rather farther than the Restatement by allowing the forum to give effect to the mandatory rules of a State that is not the forum and whose law would not, in the absence of party choice, have been the proper law of the contract. Article 7 (Mandatory rules) of the Convention provides in its paragraph 1 that:

> [E]ffect may be given to the mandatory rules of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. (Emphasis supplied.)

Article 7(1) of the EEC Convention, even though it speaks in permissive and qualified terms, is much debated and by no means generally accepted.[7] Indeed, article 22 of the Convention permits a reservation to article 7(1). The Draft Convention on the Law Applicable to Contracts for the International Sale of Goods - approved on 30 October 1985 by an Extraordinary Session of the Hague Conference on Private International Law - does not contain an article comparable to article 7(1). No provision of this nature was contained in the draft submitted to the Session by a Special Commission[8] and a proposal made in the course of the Extraordinary Session to add one was rejected.[9]

Article 7(1)'s recognition of the public policy concerns of third States operates, of course, to reduce party control over the governing law. The opposite tendency is, however, also to be found in contemporary practice. In considering whether to disregard on public policy grounds party stipulations for governing law, increasingly a distinction is drawn between rules of law that, though mandatory for transactions domestic to the legal order whose public policy is at issue, are not mandatory where international transactions are in question; it is recognized that such transactions have special

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[6] Restatement Second, sec. 187 (2) (b).

[7] O. Lando, who favors taking into consideration mandatory rules found in the law of a third State, recognizes that "There is not much guidance to be found in the reported cases as the law seems to be unsettled in most countries". O. Lando, note 5 supra, No. 209

[8] See A. VON MEHREN, REPORT ON THE DRAFT CONVENTION, Preliminary Document No. 4 of August 1984 for the Attention of the Diplomatic Conference of October 1985.

[9] See Hague Conference, Extraordinary Session Sales - October 1985, Commission I, Minutes No. 13.

requirements because they are significantly connected with more than one legal order. Both paragraphs of article 7 of the EEC Convention recognize a distinction between internal and international ordre public; effect is given only to the latter. A famous application of the distinction was made by the French Cour de cassation in Tresor public v. Galakis[10] by refusing to apply to an international transaction the prohibition of French law against the State agreeing to arbitration.

The scope accorded by national legal systems to party autonomy is thus a function of at least two variables:

(1) the extent to which the relevant legal order requires that the party choice have some 'reasonable basis' – for example, the existence of a substantial relationship between the transaction and the legal order whose law was chosen;

(2) the extent to which the ordre public of the forum and , in some systems, of third States as well ,displaces the law chosen by the parties .

Yet another possible limitation to party autonomy requires consideration: Can the parties provide that their transaction shall be denationalized, that is to say, subjected not to the law of any national legal order but to, for example, general principles of law or the lex mercatoria? National legal systems have only rarely, if at all, considered the question. For a court such stipulations present at least two difficulties. The first is notional; the rules in question are not "based on the municipal law of some country"[11]. The second is practical; accepting party stipulations for general principles of law or for the lex mercatoria could well require courts to undertake difficult and demanding investigations and analyses that may ultimately not produce clear and definite conclusions.[12]

For these reasons, a national legal system might well categorically refuse to give effect to a stipulation requiring the application of rules and principles that do not derive directly from national legal orders. The issue was ventilated in a discussion that occurred at the 1985 Extraordinary Session of the Hague Conference of Private International Law which adopted a Draft

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[10] Cass. civ. , 2 May 1966.575 (note J. Robert). A comparable decision of the Supreme Count of the United States is Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). There the Court held that a mandatory prohibition in the forum's law against private parties submitting to arbitration certain issues arising out of a sale of securities did not apply to an international transaction.

[11] Case of Serbian Loans (1928) Permanent Court of International Justice, Collection of Judgments Series A, Nos. 20/21, Judgment No. 14, p.5 at p.41 (1929) ("Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."). See also F. A. MANN, "LEX FACIT ARBITRUM", IN INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (ed. P. Sanders 1967).

[12] See generally W. Wengler, *Les principes generaux de droit en tant que loi du contract*, 71 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 467 (1982).

Convention of the Law Applicable to the International Sale of Goods. The Convention's articles respecting the determination of the applicable law speak of the "law" "chosen by the parties" (art. 7), the "law of the State where..." (art. 8), and so forth. Article 15 of the Draft Convention then states that "In the Convention 'law' means the law in force in a State other than its choice of law rules."

Hague Conventions have traditionally excluded the use of renvoi. This result is usually accomplished by the convention always referring to the "internal"- as distinguished from the conflictual - law of the State whose law applies.[13] The usual Hague formula may give rise to difficulty, however, where a State has two bodies of non-conflictual law, one of national origin and the other derived from an international convention. Once the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) has come into effect, the contracting States will have two bodies of sales law: the sales law of national origin and the Convention. The fear that the traditional Hague formula could suggest that the expression "law'' in the applicable law convention always meant the sales law of national origin - and thus rendered the United Nations Sales Convention inapplicable - resulted in the use of a new formula. Article 15 accordingly speaks of "the law in force in a State other than its choice of law rules."

A literal reading of article 15 could preclude the parties from stipulating under article 7 for the application of general principles of law or the lex mercatoria. In order to avoid this possible result, revision of article 15 was suggested. Some delegates supported revision on the view that the proposed changes would authorize party choice of a law - for example, general principles of law - not currently in force in a State.[14] Other delegates opposed revision of article 15 because they desired the opposite result.[15] The German delegate expressed his opposition to stipulations for anational bodies of law in forceful terms:[16]

> He did not wish the courts of his country to have to recognize, for example, ancient Roman law or any other law that the parties might choose . . ..

The proposal to resolve the ambiguity that some delegates believed article 15 introduced as to the acceptability of stipulations for "general

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[13] See for example, THE CONVENTION ON THE LAW APPLICABLE TO TRAFFIC ACCIDENTS (1971), arts. 3 and 4; THE CONVENTION CONCERNING THE INTERNATIONAL ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS (1973), arts. 3-5; THE CONVENTION ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS (1973), arts. 4, 6-7; THE CONVENTION ON THE LAW APPLICABLE TO AGENCY (1978), arts. 5 and 6.

[14] See Hague Conference, Extraordinary Session Sales - October 1985, Commission I, Minutes No. 12. (delegates of Sweden, Finland, Austria, and the United States); cf. ibid. (delegate of Denmark).

[15] See ibid. (delegates of Australia and Germany).

[16] Ibid. item 51.

principles of law" or the lex mercatoria lost by a very close vote.[17] The Extraordinary Session thus refrained from taking a position on the issue.[18] This episode strongly suggests that several national legal systems would condemn in principle stipulations for bodies of law that do not derive directly from a national system of law or, where appropriate, from international law considered as a system.

III

With this brief sketch of national court practices as background, we turn now to the effect for arbitral proceedings of party stipulations respecting the governing law. Here two perspectives must be distinguished. In the first place, what effect will the arbitrators give to such stipulations? Secondly, if an arbitration comes before a national court, for example, in a proceeding to set aside - or, alternatively, to enforce - an award, will the court be prepared to apply more restrictive standards to the stipulation than those used by the arbitrators? I shall first consider the scope accorded party autonomy in the arbitral process; after discussing the reasons for the highly permissive stance taken in arbitral proceedings, I shall conclude with some remarks on the extent to which national court systems seized of an award will accept the position taken on these matters by the arbitrators.

In view of the confidentiality of arbitral proceedings and awards, we do not have full information on whether arbitrators recognize limits to exercises of party autonomy. The available information strongly suggests, however, that few, if any, limits are set to party choice of the governing law; arbitrators seem to be fully prepared to adjudicate under "general principles of law" or under the lex mercatoria.

A 1978 study based on an exhaustive search of the International chamber of Commerce's files concludes that it is nearly impossible to find in arbitration practice an award in which national public policy prevails over party agreement:[19]

> National public policy, at least to the extent it is evidenced by imperative legislation, has been considered for different reasons and with varying results by arbitrators. However, in only one award (known to this writer) has such public policy actually been upheld by the arbitrator. In the other awards national public policy has been considered and rejected, either because it was not relevant to the particular circumstances of the case or because it was not relevant to international arbitration generally...

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[17] 14 for, 17 against, with 10 abstentions. Ibid.

[18] See ibid. (Rapporteur and Chairman); Plenary Sess., Minutes No. 4 (delegate of France).

[19] J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION No. 415, p. 541 (1978).

Some commentators urge less permissive practices upon arbitrators. Professor Ole Lando was the principal draftsman of Draft Recommendations on the Law Applicable [in Arbitral Proceedings] to International Contracts.[20] Perhaps Lando's most controversial proposal was contained in the Draft 's article 9, entitled "Mandatory Rules''. This article's basic approach is patterned on article 7(1) of the EEC Convention on the Law Applicable to Contractual Obligations. Lando proposed that the arbitrator should be free to ignore a party stipulation for governing law in order to "give effect to mandatory rules of the law of . . . [a] country if the contract or the parties have a close contact to that country and if and insofar as under its law these rules must be applied whatever be the law applicable to the contract . . . ''.[21]

Professor Lando's Draft Recommendations received little support. Their drafter's hope that they might be adopted by the International Chamber of Commerce was disappointed. For reasons shortly to be discussed, acceptance of article 9 would have seriously undermined the attractiveness and effectiveness of international commercial arbitration. Such freedom as arbitrators should in theory and practice have to disregard the parties' choice of law can only rest on the conception of a truly international public policy. Such a public policy would be derived from international statements such as the Declaration Universelle des droits de l'homme and from quasi universally accepted standards and practices.[22] Realistically speaking, is a governing-law clause that violates the ordre public international so conceived within the bounds of possibility? Certainly no examples have been found in arbitral practice.

It seems safe to conclude, therefore, that in arbitral practice party stipulations for governing law are not subject to constraints derived either from requirements respecting a relationship between the transaction and the chosen law or from limitations resulting from requirements of public policy that are not contained in the chosen law.

We turn now to the acceptability in arbitral practice of stipulations providing for the application of rules and principles that do not derive from any national legal order. This issue was addressed by the Institute de droit international at its fifty-ninth Session held in 1979 at Athens. The discussion dealt only with *"accords entre un Etat et une personne privee etrangere"*. The practical considerations leading parties to stipulate for rules and principles whose sources are non-national are

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[20] Printed as an Appendix to O. Lando, "Choice-of-Law Rules for Arbitrators" in Festschrift fur Konrad Zweigert 157, 173 (H. Bernstein, U. Drobnig and H. Kotz, eds. 1981).

[21] In an alternative version of article 9, the following language is added: "especially when the arbitral award is likely to be enforced" in that country.

[22] See B. Goldman, *"Les conflits de lois dan l'arbitrage international de droit prive"*, in ACADEMIC DE DROIT INTERNATIONAL, 1963-II RECUEIL DES COURS 347, 430-435 (1964).

strongest where one party is a State: The private party may hesitate to accept the law of the State party to the transaction while the Sovereign may be unwilling to submit the transaction to another Sovereign's law. However, there seems no reason in theory to distinguish with respect to this issue between international arbitrations involving only private parties and those to which a State is a party.[23]

Article 2 of the Institute's Athens Resolution should thus apply to arbitral proceedings generally:[24]

> The parties may in particular choose as the proper law of the contract either one or several domestic legal system or the principles common to such system or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of those sources of law.

The best known examples of party stipulations for rules and principles that do not derive directly from any legal system are found in international arbitrations dealing with disputes respecting oil concession agreements. In the 1970's, in three important arbitrations between the Government of the Libyan Arab Republic and foreign oil companies[25] the following choice-of-law clause was applicable:

> This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

In the event, "the general principles of law" were of decisive importance in all three arbitrations. In each, the tribunal accepted the task of deriving

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[23] Indeed, article 1496, added in 1981 to the Nouveau (French) Code de procedure civile, clearly permits the parties to any international arbitration to chose, inter alia, "general principles of law". P. Fourchard, *"L'arbitrage international en France apres le decret du 12 mai 1981"*, 109 JOURNAL DE DROIT INTERNATIONAL 374, 395 (1982); see also P. Bellet and E. Mezger, *"L'arbitrage international dans le nouveau code de procedure civile"*, 70 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 611, 631 (1981).

[24] 58 (11) Annuaire de l'Institute de droit international 195 (English trans.) (1980)

[25] B. P. Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic (1973, 1974), 53 International Law Reports 297 (1979); Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Libya (1975, 1977), 17 International Legal Materials 1 (1978), 53 International Law Reports 389 (1979); Libyan American Oil Company v. The Government of the Libyan Arab Republic (1977), 20 International Legal Materials 1 (1981), 62 International Law Reports 141 (1982). The three awards are discussed in R. von Mehren and P. Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. JOUR. INT'L LAW 476 (1981).

through a comparative analysis from "general principles of law" rules and principles to regulate legally and factually complex situations.

So far as is known, there is no example in contemporary arbitration practice of a tribunal refusing to apply a governing law clause on the ground that the stipulated law did not derive from a national legal system .The limitation on this scare that some national courts may impose in their handling of stipulations for governing law accordingly finds no analogue in international arbitration practice.

Having considered the degree of private autonomy permitted in contemporary arbitral and judicial practice and having noted significant differences, I now explore the theoretical and practical reasons for these differences.

IV

The differences in the treatment accorded party choice of the governing law in arbitral proceedings and in judicial proceedings find their ultimate explanation and justification in the different sources from which the judge and the arbitrator, respectively, derive their authority and legitimacy. A judge's authority and legitimacy flow from his national legal order; that legal order provides a lex fori -including rules of private international law- which the judge is committed to apply. Judicial duty runs first and foremost to a particular legal order; the judge's obligations to the parties arise in the context of that legal order and are subject to such limitations or constraints as it chooses to impose. A given legal order could, of course, directs its judges to give unlimited scope to priority autonomy. However, no legal order is so permissive; at a minimum, a legal order directs its judges to give priority to certain policies that the forum's society considers fundamental. The forum's public policy thus sets limits to party autonomy.

When we turn from judicial to arbitral proceedings the scene changes dramatically. Unless in actual practice international commercial arbitration is a geographically localized dispute-resolution process that a given society tolerates as an alternative to its national courts, arbitrators derive their authority from the parties rather than from an Austinian sovereign. In the past such localization perhaps existed; to the extent it did, the now rejected jurisdictional theory of international arbitration reflected reality.

Notionally the jurisdictional theory rested on the proposition that, in view of law's very nature, an arbitrator's authority necessarily derived from a sovereign. Accordingly, the arbitrator's position was essentially the same as that of a judge; both drew their power and authority from a national sovereign and from that sovereign's law.

For contemporary thinking, the jurisdictional theory has lost explanatory force. In the first place, unlike a court proceeding, an arbitration need not to-day take place in the context of any given, predetermined national legal order. Proceedings can, as the parties' convenience and wishes require,

proceed on the territory of one or more of any number of politically organized societies; indeed, only reasons of convenience stand in the way of arbitration on the high seas. The proceedings could also move from place to place; at least conceptually, hearings might proceed and decisions be reached without the participants ever coming together in any one place.

Contemporary arbitration proceedings are thus ambulatory in the sense that they need not be geographically localized. There is no requirement in practice that the politically organized society on whose territory an arbitration is to proceed accord its prior authorization. Furthermore, though assistance from national court system can be helpful in various ways, usually arbitrations can effectively proceed without such court assistance. Where recognition and enforcement of the award are desired, the Austinian sovereign can impose conditions before affording the requested assistance. However, no sovereign enjoys an exclusive right to deal with the award and one or more sovereigns' denial of recognition or enforcement does not deprive the award of its legitimacy nor necessarily render it worthless.

In the case of judicial proceedings, sovereignty is focussed; in the case of international commercial arbitrations, it is diffuse or distributed. As a result, unlike the judge, the arbitrator has no lex fori[26]. As the Supreme Court of the United States observed in 1985 in the Mitsubishi case, "the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence it has no direct obligation to vindicate their statutory dictates. The tribunal...is bound to effectuate the interests of the parties..."[27] For these reasons, unlike judges, arbitrators "refuse a priori to question (remettre en cause) the parties' choice of the applicable law...".[28]

The proposition that arbitrators are not free to limit or otherwise disregard party stipulations respecting the governing law derives support as well from considerations of quite a different nature. The contrary proposition posits an inherent power in arbitrators to disregard the parties' clearly expressed instructions. Such a claim encounters the difficulty that the only body of rules and principles with a clear claim to guide and discipline the arbitrators' decision is that provided by the parties either directly by stipulation or, indirectly, by arbitral rules referred to in the arbitration clause.

Recourse by arbitrators to rules and principles that the parties have neither explicitly nor implicitly invoked involves the exercise of an essentially uncontrolled and undisciplined adjudicatory authority; the

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[26] "L'arbitre en effect n'a pas de lex fori" P . Mayer , "*Le mythe de l" ordre juridique de base'* (ou Grundlegung)", in *"Le droit des relations economiques internationales: Etudes offertes a Berthold goldman"* 199, at 203 (1982)

[27] Mitsubishi Motor Corporation v. Soler Chyrsler-Plymouth, 105 S. Ct. 3346, 3359 (1985).

[28] Y. Derains, "Les normes d'application immediate dans la jurisprudence arbitrale internationale", in Le droit des relations economiques international: Etudes offertes a Berthold Goldman 29, at 33 (1982)

arbitrators' actions now rest on a lex fori that they have themselves, without party authorization, selected or created. If such a process of selection or creation were publicly undertaken by a defined group of adjudicators and pursued by them over time in resolving a variety of disputes, our legal culture's commitment to the proposition that like cases are to be decided alike would result in the decisional process itself generating standards. In turn, those entrusted with the responsibility of arbitral adjudication would internalize these standards and principles.

Such generation of standards and principles may well occur in the case of arbitral tribunals established and maintained by a trade association or an exchange. However, international commercial arbitration typically occurs in a setting in which the individual arbitrator's participation is episodic and his reasoning and results are confidential. The conditions required for the decisional process itself to generate standards and principles are not present either in ad hoc arbitrations or in arbitrations conducted under the auspices of such institutions as the American Arbitration Association or the International Chamber of Commerce. In these circumstances, only full respect for the parties' instructions can subject the adjudication to the discipline upon which a "principled" dispute-resolution process's legitimacy must ultimately rest.

Inherent differences between judicial and arbitral adjudication thus explain why essentially no limits are set in international commercial arbitration practice to party choice of the governing law. But what will the practical consequences of failure to set limits to party autonomy be should an award later come before a national court, for example, in an enforcement proceeding? I conclude with a brief exploration of this question.

V

Concern for enforceability is one of the arguments made by those who take the view that some significant limitations similar to those to which party stipulations are subject in national courts should apply in arbitral proceedings. Thus, alternative 2 to article 9 (the public policy article) of Professor Lando's Draft Recommendations on the Law Applicable [in Arbitral Proceedings] to International Contracts is to the effect that arbitrators, regardless of party stipulations, should be free to give effect to the mandatory rules of a country "especially when the arbitral award is likely to be enforced there..." The proposition rests on the assumption that the country in question may, where its mandatory rules have been ignored, refuse to give effect to the award.

The implications of this concern for enforceability are somewhat troubling. Whether enforceability may present a problem can be concretely evaluated only after the arbitrator has reached a decision in principle. At this stage certain adjustments that would not fundamentally alter the award but would increase the probability of its enforcement in a given country may be

appropriate. But, unless the party who would be disadvantaged thereby so requests, concern for enforceability can hardly justify a fundamental change in the award.

Furthermore, the importance of national enforceability of arbitral awards should not be overstated. An arbitral award typically has considerable importance even if it cannot be enforced. Also, very often enforcement of an award can be sought in several national legal systems. In any given case, one or more of these national systems are likely to grant enforcement despite public policy objections except when, in the forum's view, its own ordre public international -or, less generously, own ordre public- is at stake.

One can only with difficulty generalize respecting the extent to which an award's enforceability is compromised by the arbitrator's failure to set limits to party autonomy comparable to those that the national court addressed would have applied had the matter been litigated before it. It can be stated with some assurance that arbitral application of a non-national body of law such as general principles of law will probably cause no concern to the court addressed. A national court that refuses to honor such a stipulation in deciding a case before it, does so for notional and practical reasons, in particular, the increased difficulty and uncertainty that application of a body of anational law may imply. Considerations of this order hardly carry over to a proceeding for enforcement of an award. In this connection, it is worth remarking that article 1496 of the New (French) Code of Civil Procedure considers proper an award based on general principles of law.[29]

The possibility that a national system will deny enforcement to an award because the arbitrator did not apply a third State's mandatory rules of law cannot be completely excluded but is probably not great. Indeed, where the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 applies to the enforcement proceeding, consideration of a third State's public policy may be impermissible. Article V(2)(b) of the Convention permits -but does not require- refusal of recognition or enforcement where "it would be contrary to the public policy of" the country where enforcement is sought. This language would seem to exclude consideration by the forum of a third State' s public policy.

The likelihood that an award will be refused enforcement increases significantly where the forum's public policy was ignored. In such cases, the language of article V(2)(b) of the United Nations Convention is broad enough to permit refusal of enforcement. Of course, as has already been noted, many national courts will apply for the purposes of the Convention not their domestic ordre public but rather their ordre public international.[30] However, where the party stipulation has resulted in the exclusion of mandatory rules of principles that would displace party-chosen law under

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[29] See note 23 supra

[30] Compare art. 1498 of the French Nouveau Code de procedure civile.

that court's system of private international law, there is an appreciable risk that the award will not be enforced.

When enforcement is desired but refused on these public-policy grounds, a price will have been exacted from the arbitral process. But the price is a small one for arbitration to pay for the enormous flexibility and adaptability that are possible when the arbitrator's authority and legitimacy are seen as resting on party agreement rather than of sovereign permission. Moreover, the proposition that arbitrators are free to ignore party stipulations in situations where national courts would do so carries with it the corollary that arbitrators have inherent powers that do not depend upon party agreement.

As has already been remarked, the proposition that arbitrators have such powers raises disturbing questions for the integrity of the arbitral process. Such power implies what amounts to a "free arbitration", one in which the adjudicator has authority to decide in terms of his personal views respecting legality and justice. A general authority to decide certain matters under such open-ended standards as "good faith" or "Treu und Glauben" is appropriately given to adjudicators who work within a system that ensures continuity and publicity. Under such conditions, principles will be generated and constraints upon the adjudicators will emerge from the workings of the process itself. However, in the case of international commercial arbitration, where adjudicators are ad hoc and proceedings are typically confidential, the process is not capable of generating such principles or constraints.

Realistically speaking, therefore, in the case of international commercial arbitration, the principles and constraints essential for the legitimacy and reliability of an adjudicatory process can derive only from a charter that the adjudicators are committed to follow. Earlier in this century, the jurisdictional theory provided that charter in the form of the law of the territory where the arbitration had its seat. However, in time the jurisdictional theory came to be seen as unrealistic and as restraining too greatly the development of international commercial arbitration; today, the needed charter can only be grounded on the contractual and autonomous theories of arbitration. So for as the arbitral process - as distinguished from ancillary proceedings in national court systems - is concerned, the resulting charter sets for international commercial arbitration no limitations upon party choice of the governing law.