PARTY AUTONOMY AND CHOICE OF LAW: IS INTERNATIONAL ARBITRATION LEADING THE WAY OR MARCHING TO THE BEAT OF ITS OWN DRUMMER?

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When a choice of law issue arises, who decides: the parties (*i.e.,* party autonomy) or the adjudicator? If the adjudicator decides, by what rules will the decision be made? As Catherine Walsh described in her 2010 Rand Lecture, party autonomy has been a flashpoint in discussions of domestic choice of law regimes. Over the past few decades, party autonomy has generally expanded, but a variety of limitations remain. If an adjudicator automatically applies the law or rules of law chosen by the parties,[1] it would seem that their rights and interests have been protected. However, acceding to contractual choices of law may harm third parties or contravene the public policy of a country. Accordingly, courts have restricted party autonomy in choice of law. The advisability of such restrictions has led to deep philosophical debates about the interests that choice of law should serve and to earnest discussions of the proper scope of party autonomy. Party autonomy may be on the march, but it continues to face opposition.

International arbitration provides an interesting counterpoint. One might think that similarly earnest discussions and deep debates would have taken place within the international arbitration community. After all, parties to international arbitrations by definition come from different states, and arbitral tribunals are not tied to any particular state. As a result, choice of law is always implicated and there is no default law to serve as a starting point for determinations. Nevertheless, the march of party autonomy in international arbitration has been unhindered. The discussions have not been philosophical but rather practical: how best to promote party autonomy and expand its scope.

National courts have abetted this process in the international arbitration context, even as they have maintained restrictions on party autonomy in choice of law within their own legal systems. This phenomenon, combined with the gradual

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[1] The distinction between "laws" and "rules of law" is discussed below. See *infra* note 14 and accompanying text.

loosening of restrictions on party autonomy in national legal systems, has led some to claim that international arbitration is leading the nations of the world into a global choice of law regime in which party autonomy reigns. Such triumphalists look forward to the day when party autonomy is as unrestricted in national courts as it is in arbitration.

That day is unlikely to arrive. The different pressures and interests that shape national court litigation on the one hand, and international arbitration on the other, are likely to generate different levels of support for party autonomy in choice of law. As a result, regardless of whether more party autonomy in choice of law is preferable in all contexts or whether it ought to have a wider scope in arbitration than in litigation, arbitrators are likely to maintain greater deference to party autonomy than will national legislatures or courts.[2]

Part I considers the choice of law process in international arbitration and how it differs from that prevailing in national courts, with particular attention to party autonomy. Part II proposes some reasons why international arbitral tribunals and national courts have accepted party autonomy to different degrees, and why this disparate treatment is likely to continue. Part III concludes and suggests a few lessons that national courts and international arbitral tribunals might learn from each other.

I PARTY AUTONOMY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION

International arbitral tribunals have no inherent *lex fori*. Therefore, they have no inbuilt predisposition toward any particular national law and no nationally generated choice of law regime. They begin the choice of law process from the expectations of the parties, rather than from the point of view of any national system of law. If the contract contains a clear choice of law clause, the tribunal will respect that choice. The rules of procedure of most arbitral institutions require the tribunal to apply any laws or rules of law chosen by the parties.[3] There are only two generally applicable exceptions: first, choices *in fraudem legis*, that is, made only to circumvent an undesired law, will not necessarily be enforced. Second, even when the parties have chosen a particular national law, some tribunals have also applied other national laws

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[2] There are practical reasons why party autonomy ought to have wider scope in arbitrations than in litigation. These are not the primary focus of this article, but a few are discussed in Part III.

[3] ICC Rules art. 17(1); *London Court of International Arbitration Rules* ("LCIA Rules") art. 22.3; *International Center for Dispute Resolution of the American Arbitration Association Dispute Resolution Procedures* ("ICDR Rules") art. 28(1); *United Nations Commission on International Trade Law Rules of Arbitration* ("UNCITRAL Rules") art. 33(1).

that claim extraterritorial effect.[4] By contrast, as Professor Walsh has explained with respect to Canada, national courts continue refuse to enforce choice of law clauses in a variety of situations.

The doctrine that parties to arbitrations have freedom to choose the governing substantive law is fairly recent. Under the traditional theory, sometimes called the "*lex fori*," "*siege*," or "jurisdictional" doctrine, by selecting a particular country as the site of an arbitration, the parties also impliedly chose that country's law to govern the merits of the dispute. This doctrine is now all but abandoned; however, as recently as 1968, English courts took the position that the choice of England as the site of arbitration constituted the choice of English law.[5] The *lex fori* doctrine found adherents among arbitral tribunals even into the 1990s.[6]

If the contract does not designate the governing substantive law, current arbitral rules empower the tribunal to select the choice of law rule it considers most appropriate, and then to apply that rule to determine the governing law. Moreover, the tribunal need not choose any particular choice of law and, indeed, need not even apply a choice of law rule. Instead, most arbitral rules of procedure permit the tribunal to designate an applicable law directly, a doctrine usually called *voie directe*.[7] For example, the *Rules of Arbitration of the International Chamber of Commerce* ("ICC Rules") permit the tribunal, in the absence of a choice by the parties, to "apply the rules of law which it determines to be appropriate."[8] This power is regularly exercised and, when exercised, will not render the award unenforceable in national courts.[9] In short, arbitral tribunals will enforce a contractual choice of substantive law and, if no clear choice is made, often avoid the (allegedly) complex and uncertain choice of law process by applying *voie directe*.

Voie directe gives an arbitral tribunal "an almost unlimited freedom in the choice of rules of substantive law."[10] In practice, however, *voie directe* most often "consists in finding a significant connecting factor between the contract and the law which the arbitrator decides to apply."[11] Accordingly, choice of law under *voie directe*

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[4] M. Blessing, "Choice of Substantive Law in International Arbitration" (1997) 14:2 J. Int'l Arb. 39 at 39-40.

[5] *Tzortzis & Sykias v. Monarch Lines* [1968] 1 Lloyd's L. Rep. 337 (C.A.).

[6] ICC Case No. 6527 of 1991, (1993) XVIII Ybk. Comm. Arb. 44.

[7] Literally, "direct route."

[8] Art. 17(1). See also LCIA Rules art. 22(3); ICDR Rules art. 28(1); UNCITRAL Rules art. 33(1).

[9] S.C. Symeonides, "Contracts Subject to Non-State Norms" (2006) 54 Am. J. Comp. L. 209 at 213.

[10] N. Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration" (1996) 7 Am. Rev. Int'l Arb. 319 at 341.

[11] Y. Derains, "Jurisprudence of International Commercial Arbitrators Concerning the Determination of the Proper Law of the Contract" [1996] Int'l Bus. L. J. 514 at 521.

frequently yields the same law that application of a country's choice of law rules would provide. However, *voie directe* has also been employed in a manner designed to give voice to party autonomy in cases where the parties have not agreed on an applicable law. A 1984 ICC award provides an example.[12] There, the contract did not specify the governing law, and the law of Switzerland and of another country were the only laws connected to the contract. The tribunal directly applied Swiss law, on the ground that:

> ...the law of country X might partially or totally affect the validity of the agreement.
>
> It is then reasonable to assume that from two possible laws, the parties would choose the law which would uphold the validity of the agreement....
>
> In these circumstances, the arbitrators definitely decided to choose Swiss law as the applicable law, assuming that this choice corresponds to what the parties had in mind.[13]

The tribunal used its power to make a direct choice of the governing substantive law in order to enforce the parties' reasonable expectations at the time that they entered into the contract. (Of course, one of the parties might well have wished to have the contract declared invalid after the dispute arose.) In this way, choice of law under *voie directe* is more likely than application of choice of law rules to accord with the parties' presumed intentions.

Party autonomy manifests itself in arbitral choice of law in another important way. Rules of law are frequently applied in arbitration that are either unavailable or unlikely to be applied in national courts. In the context of international private law, "rules of law" must be distinguished from "laws." The latter means the laws applicable in a state, whatever their source—statute, case law, or treaty. Rules of law, on the other hand, are any statements of principle that do not have the force of law in any state.[14] Rules of law cannot be applied in any national court, but are regularly applied as the governing law in arbitrations. The two most prominent sources of

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[12] ICC Case No. 4145 of 1984, (1987) XII Ybk. Comm. Arb. 97.

[13] In ICC Case No. 7154 of 1993, [1994] Journal de droit international 1059, the tribunal reached a similar result for the same reason.

[14] See J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (The Hague: Kluwer, 1991) at 226-227, noting that, in the drafting of UNCITRAL Rules art. 33(1), "law" was specifically chosen, as opposed to "rules of law," in order to preclude the application of non-state rules. By contrast, ICC Rules art. 17(1) was drafted utilizing the term "rules of law" specifically to permit the parties to choose to be governed by non-state rules. L.W. Craig, W.W. Park, and J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed. (Oxford: Oxford U.P., 2001) at 320.

rules of law are international contract law instruments and "general principles" of international private law.

International contract law instruments take one of two forms: conventions that mimic domestic statutes[15] or compilations of principles in the manner of the American Restatements.[16] The conventions constitute "rules of law" until they are ratified, whereupon they become "laws" and are equally applicable in state courts and in international arbitrations. Parties may choose to be governed by one of the conventions by including an express term in their contracts applying it, regardless of whether they are domiciled in states that have ratified the convention. More commonly, however, the conventions apply when the parties are domiciled in different states that have each ratified the convention and choice of law analysis leads to the law of one of those states; by ratifying the convention, each state agrees that it will apply to contracts between parties from that state and parties from another state party.[17]

The most prominent example of this type of international instrument is the *U.N. Convention on Contracts for the International Sale of Goods* ("CISG"),[18] a convention that applies to all contracts for the sale of goods concluded between parties situated in different signatory states. There are now 74 states party to the CISG, including every major trading nation except the United Kingdom and Turkey.[19] The CISG is therefore applicable to a huge number of contracts; in practice, however, most lawyers and judges are not aware of the CISG, so it seldom appears in the decisions of national courts.[20] At least with respect to common law jurisdictions, if a party does not

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[15] Most notably, the *United Nations Convention on the International Sale of Goods* (adopted 11 April 1980, entered into force 1 January 1988) ("CISG").

[16] Most notably, the *UNIDROIT Principles of International Commercial Contracts* ("UNIDROIT Principles") and the *Principles of European Contract Law* ("PECL"). See *infra*, notes 22-26 and accompanying text.

[17] CISG art. 1(1).

[18] It also applies to contracts that have both sales and non-sales aspects, so long as the sales aspects form the "preponderant part" of the seller's obligations. CISG art. 3(2). For example, in a contract for the delivery and installation of a piece of complex machinery, the CISG would apply to the entire contract. However, if the contract also required the seller to provide maintenance services for the machinery over a period of time, an adjudicator might conclude that the contract was predominantly one for services, rather than for goods.

[19] Current status of the CISG available online at the United Nations Commission on International Trade Law: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

[20] See J. Ziegel, "The Scope of the Convention: Reaching out to Article One and Beyond" (2005) 25 J. Law & Comm. 59. In the United States, Canada, Australia, and New Zealand combined, there are only 79 published decisions under the CISG in the 17 years from 1988, when the CISG entered into force, until 2005. In the same time period, seven Western European civil law countries surveyed by Ziegel published decisions under the CISG in 765 cases. *Ibid.* at 68. The only states in which the CISG is frequently applied by the courts are Germany and China.

submit that the CISG (or indeed, any foreign law) applies, the court will—wrongly—apply domestic law. Arbitrators, on the other hand, tend to be aware of the CISG and even to apply it when the parties make no reference to it.[21]

The second type of international contract law instrument—the compilations of principles—are usually drafted by representatives of states but are not conventions to be ratified. The two best known are the *UNIDROIT Principles of International Commercial Contracts* ("UNIDROIT Principles")[22] and the *Principles of European Contract Law* ("PECL"),[23] both of which were drafted by groups of academics and have not been adopted by any official body. These instruments are usually applied to contracts indirectly because tribunals invoke them as embodiments of general principles of international private law.[24] For example, the UNIDROIT Principles are often applied to fill gaps in the CISG.[25] In international arbitrations, the UNIDROIT Principles and PECL will govern a dispute if the parties choose them as the governing law.[26]

The compilations of principles cannot have the status of governing law in national court proceedings, even if the contract contains a clause choosing them as the governing law. For example, under the 1980 *EC Convention on the Law Applicable to Contractual Obligations* ("Rome Convention")[27] and under the *Rome I Regulation* (applicable to contracts concluded after 17 December 2009),[28] courts of EU member states may not apply rules of law like the UNDROIT Principles or PECL. Under the Rome Convention, a contract may be governed by "the law chosen by the parties," or, in the absence of such choice, by "the law of the country with which [the contract] is

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[21] See, *e.g.*, the cases surveyed in J. Karton, "Contract Law in International Commercial Arbitration: The Case of Suspension of Performance" (2009) 58:4 Int'l & Comp. L. Q. 863 at 886-896.

[22] UNIDROIT-International Institute for the Unification of Private Law, *Principles of International Commercial Contracts* (Rome: UNIDROIT, 1994)

[23] O. Lando & H. Beale (eds.), *The Principles of European Contract Law Parts I and II, prepared by the Commission on European Contract Law* (The Hague: Kluwer, 1999).

[24] E.A. Farnsworth, "An International Restatement: The UNIDROIT Principles of International Commercial Contracts" (1997) 26 U. Balt. L. Rev. 1 at 3. PECL art. 1:101(3) is indicative; it states that the PECL may be applied when the parties "have agreed that their contract is to be governed by 'general principles of law,' the 'lex mercatoria' or the like; or have not chosen any system or rules of law to govern their contract."

[25] See A. Garro, "The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG" (1995) 69 Tul. L. Rev. 1149.

[26] Such a choice is rare in practice. C.R. Drahozal, "Contracting Out of National Law: An Empirical Look at the New Law Merchant" (2005) 80 Notre Dame L. Rev. 523 at 538-539.

[27] *Convention on the Law Applicable to Contractual Obligations* art. 4, 19 June 1980 (80/934/EEC).

[28] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (*Rome I*) (OJ no. L 177, p. 6 ff.).

most closely connected." Similar rules obtain under the *Rome I Regulation*.[29] State courts have interpreted the words "the law" to require application of a national law, even if the parties have explicitly chosen to be governed by rules of law. Thus, if a contract contains an express choice of rules of law in a proceeding before an EU state court, the court will disregard that choice and apply the national law designated by the *Rome I Regulation*.[30] Canadian courts have not squarely addressed the issue[31] but are likely to take a similar position.[32]

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[29] *Rome I Regulation,* art 4. The *Rome I Regulation* sets up a series of presumptions as to what law is applicable to different types of contracts. See below, notes 93-96 and accompanying text.

[30] See, e.g., *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain*, [2004] EWCA Civ 19, in which the English Court of Appeal refused to apply the part of a contractual choice of law provision that described the contract as governed by Islamic legal principles ("subject to the principles of the Glorious Sharia'a").

[31] This is not particularly surprising, given the rarity of contracts expressly applying rules of law. The only contractual disputes since Confederation in which Canadian courts have self-consciously applied "*lex mercatoria*" or "general principles of international private law" have involved maritime disputes. Some recent examples include *Richardson International Ltd. v. Zao RPK "Starodubskoe" Bering Trawlers Ltd.*, 2002 FCA 97, [2002] 4 F.C. 80 at para. 3; *Holt Cargo Systems Inc. v. ABC Containerline N.V*, 2001 SCC 90, [2001] 3 S.C.R. 907 at para. 25; *Re: Canada 3000 Inc.* (2002), 33 C.B.R. (4th) 184, 2002 CarswellOnt 1598 at para. 38. The references in these cases to *lex mercatoria* both come in quotations from the same passage in W. Tetley, *Maritime Liens and Claims, 2nd ed.* (Montreal: Yvon Blais, 1998), which refers to maritime liens as being part of the *lex mercatoria.* There are two pre-Confederation judgments of the New Brunswick Supreme Court, both of which involved the interpretation of a bill of exchange that turned on the content of what the judge called the *lex mercatoria. Allison v. Central Bank* (1859), 9 N.B.R. 270; *Cazet v. Kirk* (1860), 9 N.B.R. 543.

[32] Section 28(1) of the (Federal) *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.) provides that "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties ...." Provincial statutes employ similar language; for example, s. 31(1) of the Ontario *Arbitration Act*, S.O. 1991, c. 17, provides, "an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances." Canadian statutes thus embrace the notion of arbitral awards governed by non-state "rules of law." On the other hand, statutes that do not deal specifically with arbitration universally refer to "laws" not "rules of law." For example, the Uniform Law Conference of Canada's *Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts* provide that the parties "may agree in writing that *the law of a particular jurisdiction* will apply to their consumer contract" [emphasis added]. Canadian case law exclusively uses the terminology of "laws" rather than "rules of law." It is therefore reasonable to conclude that Canadian courts are likely to act the same way as foreign (in particular, English) courts have done and refuse to enforce a choice of law agreement choosing the UNIDROIT Principles or other non-state rules.

Some countries have considered permitting their courts to apply international contract law instruments like the UNIDROIT Principles and PECL.[33] However, another category of rules of law remains the exclusive province of arbitration: general principles of international private law. Also called *lex mercatoria* or "transnational commercial law," these are the putative laws of global commerce.[34] They are closely tied to international arbitration and have generally been identified and promoted by arbitrators and by certain influential academics involved in arbitration.[35]

The very existence of such principles, let alone their application to resolve actual disputes, is controversial. Moreover, only a small percentage of international contracts provide for the application of general principles[36] and, when parties do choose them, it is frequently to "supplement rather than displace national law."[37] However, the parties' express right to choose to have their contract governed by general principles and arbitral tribunals' right to apply them (in the absence of a choice by the parties) are nearly universally accepted in arbitration. Arbitral rules of procedure generally permit tribunals to apply "rules of law," not just "laws."[38]

However, it is insufficient for the arbitral rules of procedure to recognize a right of parties to choose to be governed by rules of law. Under the *U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention"),[39] courts can refuse to recognize or enforce arbitral awards that are contrary to the public

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[33] The European Commission proposed that the *Rome I Regulation* permit the application of non-state bodies of law, *i.e.*, rules of law. However, this proposal was not accepted. See Commission of the European Communities, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual relations (Rome I)* (2005/0621 (COD).

[34] "General principles," "*lex mercatoria*," and "transnational commercial law" are not identical concepts, but here I include them all of them under the rubric of "general principles." They all refer to principles of contract law detached from the law of any nation which purport to represent truly international principles of substantive law applicable to all international commercial relationships.

[35] The seminal text is B. Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux* (Paris: Clunet, 1979).

[36] A survey of arbitration clauses in proceedings filed with the ICC between 1987 and 1989 found fewer than 1% of contracts that referred to general principles. Stephen R. Bond, "How to Draft an Arbitration Clause (Revisited) (1990) (2), 1 ICC Bull. 14. A more recent study surveying ICC arbitrations initiated between 2000 and 2003 made similar findings. Drahozal, *supra* note 26 at 538-539.

[37] *Ibid.* at 526.

[38] See, e.g., *ICC Rules* art. 17(1); *LCIA Rules* art. 22(3); *ICDR Rules* art. 28(1). The only major exception is the *UNICTRAL Arbitration Rules*, which only permit tribunals to apply "the law," not rules of law. *UNCITRAL Rules* art. 33(1).

[39] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June, 1958), U.N. Treaty Series, vol. 330, no. 4739

policy of the state where recognition or enforcement was sought.[40] Similarly, national arbitration laws generally permit courts in the country that is the site of the arbitration to set aside the award on public policy grounds.[41] Consequently, if states were to adopt the position that application of non-national rules of law were against their public policy, all applications of rules of law would cease. Thus, for parties truly to enjoy the autonomy to choose rules of law, courts must agree to uphold arbitral awards based on rules of law.

Before the 1970s, arbitration awards based on general principles of law were considered unenforceable.[42] It is therefore significant that modern national arbitration laws have also adopted the "rules of law" terminology.[43] For example, under article 187(1) of the Swiss *Private International Law Statute* (adopted 1987), arbitral tribunals may apply the "rules of law with which the case has the closest connection," a provision chosen specifically to permit application of *lex mercatoria* in arbitrations.[44] Similarly, article 1496 of the French *National Code of Civil Procedure* (adopted 1975) provides for the application of the "rules of law" considered "appropriate" by a tribunal.[45] As a result of the spread of such provisions, arbitration awards applying general principles as the substantive law governing the contract will now be enforced by the majority of national courts.[46] In effect, national courts now uphold the freedom of parties to arbitration to choose to be governed by rules of law, even as they have prevented parties to litigation from making the same choice. This has held true with respect to Canada. For example, in the 2008 case *Coderre c. Coderre*, the Quebec Court of Appeal upheld the award of a sole arbitrator acting as *amiable compositeur* that was based on principles of *lex mercatoria*.[47]

In sum, therefore, party autonomy is granted wider scope in choice of law in arbitration than in national court litigation. Contractual choice of law clauses (or subsequent agreements between the parties) are generally enforced by arbitral

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[40] *Ibid.* at Art. V(2)(b).

[41] See, e.g., art. 34(2)(b)(ii) of the *UNCITRAL Model Law on International Commercial Arbitration* ("UNCITRAL Model Law"), permitting the setting aside of awards "in conflict with the public policy of the State."

[42] D.W. Rivkin, "Enforceability of Awards Based on Lex Mercatoria" (1993) 9:1 Arb. Int'l 67 at 72.

[43] M.A. Petsche, *The Growing Autonomy of International Commercial Arbitration* (Frankfurt: QUADIS, 2005) at 62, citing, *inter alia*, statutes passed in France, the Netherlands, Italy, Germany, and Switzerland, as well as the *UNCITRAL Model Law*.

[44] *Ibid.* An unofficial translation of the statute is available online at Umbricht Attorneys at Law: <http://www.umbricht.ch/pdf/SwissPIL.pdf>.

[45] When it was adopted, the French Code of Civil Procedure was unusual for permitting the application of "rules of law" in arbitration. Official translation available online at Legifrance: <http://www.legifrance.gouv.fr/home.jsp>.

[46] Rivkin, *supra* note 40 at 73-74; see also J.D.M. Lew, *Applicable Law in International Commercial Arbitration* (The Hague: Kluwer, 1978) at 123.

[47] J.E. 2008-1126, 2008 QCCA 888.

tribunals no matter what law the parties have agreed to—national laws or non-national rules of law.

II. PARTY AUTONOMY IN INTERNATIONAL ARBITRATION AND IN NATIONAL COURTS

Here, we are concerned with party autonomy as it relates to choice of law, but the principle is so important to international arbitration that its impact must be considered more broadly. Party autonomy is the legal and ideological core of international arbitration. Arbitrators, in their academic writings and awards, frequently praise the soundness of this principle and affirm its importance: party autonomy is "fundamental"[48] to and "archetypical"[49] of arbitration. In cases of doubt, it is the "guiding principle"[50] and "general rule."[51] It "reigns supreme" among the principles of private law to which international arbitration is subject.[52]

At the most basic level, party autonomy is a characteristic of the arbitral system. Arbitral tribunals exist only when and to the extent that parties cause them to exist; for an arbitration to occur and a tribunal to have any authority, the parties must have freely chosen arbitration. Accordingly, Redfern and Hunter refer to party autonomy as the "foundation stone" of arbitration generally, and of international arbitration in particular.[53]

Party autonomy is also a legal principle that extends beyond the jurisdiction of the tribunal to pervade every stage of arbitration, from the choice of applicable procedural and substantive rules, to the composition of the tribunal, to the conduct of the proceedings, to the form of the award. In other words, in nearly every aspect of the arbitration, the parties can decide for themselves and the tribunal will follow any agreement made by the parties.

Perhaps most importantly, party autonomy is a normative goal of arbitrators. It is now so well and so widely entrenched that it is difficult to remember that the expansion of party autonomy is a relatively recent phenomenon. Party autonomy might

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[48] K.-H. Böckstiegel, "The Role of Party Autonomy in International Arbitration" (1997) 62 Disp. Resol. J. 24 at 25.

[49] G. Blanke, "International Arbitration in EC Merger Control: a 'supranational' lesson to be learnt" (2006) 27 Eur. Competition L. Rev. 324 at 335-336.

[50] A. Redfern & M. Hunter, *Law and Practice of Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004) at 315.

[51] A. Kaushal, "Reconciling the Public Interest: Third-Party Participation, Confidentiality and Privacy in NAFTA Chapter 11 Arbitrations" (2006) 9:6 Int'l Arb. L. Rev. 172 at 183.

[52] G. Van Harten & M. Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17:1 Eur. J. Int'l L. 121 at 140.

[53] Redfern & Hunter, *supra* note 47 at 135.

necessarily be relevant to some aspects of international arbitration, but the extension of the principle to all aspects of arbitration law and practice was neither necessary nor accidental. Rather, it has come about because of a concerted and prolonged effort by proponents of arbitration—including arbitrators, commercial lawyers, and the business community—to enshrine party autonomy within the treaties, national arbitration laws, rules of procedure, court judgments, and arbitral awards that collectively constitute the body of international arbitration law. Party autonomy can only be understood in the context of arbitrators' ideological commitment to it.

The philosophical attachment of arbitrators to party autonomy has yielded a body of writings in which arbitrators contrast their own "enlightened" respect for party autonomy with the "parochialism" of national courts. For example, Georges Delaume, a well-known international arbitrator and commentator, sees the expansion of legal support for party autonomy as an unambiguous victory for arbitration and a capitulation by national courts:

> In recent years the consensual character of arbitration has become recognized and party autonomy has conquered new grounds heretofore denied to it under the judicial approach to the problem. Modern statutes and treaty provisions, together with enlightened judicial decisions, increasingly and relentlessly have given new dimensions to party autonomy in an effort to cope with the needs of transnational commerce and eradicate from national systems a former parochialism out of context with the necessities of contemporary economic and commercial relations.

We seldom see such cheerleading for party autonomy from national court judges or legislatures. This is not to say that states are hostile to party autonomy in choice of law—the expansion of party autonomy in recent decades proves otherwise; however, there is no equivalent to arbitrators' passionate devotion. In the eyes of many arbitrators, the evolution of national and international laws toward greater party autonomy is a function of the "recognition" by national adjudicators and legislators that the interests of international commerce are served by a robust doctrine of party autonomy.[54] Consequently, they tend to see the total victory of party autonomy as inevitable.

It would be tempting to attribute the different scope of party autonomy in choice of law in arbitration and litigation purely to such philosophical distinctions. However, such an account leads us to tautology: arbitrators defer to party autonomy in choice of law because arbitrators defer to party autonomy generally. The question is: how did these differences in philosophy arise? Do they stem from inherent differences between arbitration and litigation or are they contingent on historical happenstance? If

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[54] *Ibid.*

the former, then the differences are likely to persist; if the latter, then a unified doctrine is likely eventually to be adopted by both courts and arbitral tribunals.

The different attitudes of international arbitrators and national court judges to party autonomy can be traced to the different interests with which arbitrators and judges are institutionally concerned: arbitrators are specifically attuned to the interests of the parties in front of them, while national court judges must serve both private and public constituencies.

The following sections each explore one aspect of this divergent orientation. The differences between litigation and arbitration discussed here are not meant to comprise an exhaustive comparison of litigation and arbitration but they do represent some of the core characteristics that make arbitral justice distinct from litigation in national courts. The relationship between arbitrators and the parties is fundamentally different from that between judges and the parties (A). In addition, arbitrators see their role as serving the needs of international commerce, rather than the needs of society generally (B). Finally, arbitrators have an institutional concern with neutrality that goes beyond the concerns of judges, and which affects the degree of deference they show to party autonomy (C).

(A) The Adjudicators' Relationship with the Parties

The most fundamental difference between arbitrators and judges is that judges are officers of state—they derive their authority ultimately from the coercive power of their respective governments—while arbitrators are private contractors—they derive their authority from the will of parties who conclude arbitration agreements.[55] Thus, arbitrators' and judges' obligations flow in different directions. "Unlike the state official or politician, whose duty is to the national interest, the lawyer-diplomat can develop an intellectual capital which transcends particular national legal fields."[56]

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[55] The extent to which arbitration is a function of party autonomy is disputed. Some arbitration maintain that international arbitration derives its force *entirely* from the parties' choice—the so-called "consensual" school. A classic example is J. Robert, "De la place de la loi dans l'arbitrage" in P. Sanders (ed.) *International Arbitration : Liber Amicorum for Martin Domke* (The Hague: Martinus Nijoff, 1967). The opposing, "jurisdictional," school of thought emphasizes that arbitration cannot exist without national laws and national courts, at least as an enforcement system. The fundamental text is F.A. Mann, "Lex Facit Arbitrum" in *ibid.* Recent commentators have emphasized that arbitration exists as part of a plural system, in which states are still the primary actors but choose to relinquish direct control. See, e.g., R. Wai, "Transnational Private Law and Private Ordering in a Contested Global Society" (2005) 46 Harv. Int'l L.J. 471 at 475. For an overview of the different theories of arbitral authority, see H.-L. Yu, "Explore the Void – an evaluation of arbitration theories" (2004) 7:6 Int'l. Arb. L. R. 180 (Part 1) and (2005) 8:1 Int'l Arb. L. R. 14 (Part 2).

[56] S. Picciotto, "Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism" (1997) 17 Nw. J. Int'l L. & Bus. 1014 at 1021.

More concretely, the difference in who "employs" judges and arbitrators affects how they are selected and remunerated. Judges are paid by the government, and therefore ultimately by an entire society, whereas arbitrators are paid directly the parties who appear before them.[57] As a "leading member of the pioneering generation" put it, to be "really independent," an arbitrator must be older than seventy-five and so not dependent on further arbitration business.[58]

There is significant literature on arbitral bias, but it focuses on whether a party-appointed arbitrator can be independent from the party that appointed her. Menkel-Meadow argues that conflicts of interests are "systemic" and "inherent" in international arbitration;[59] others, such as Franck, argue that, in the abstract, the fact that an arbitrator has been appointed by one of the parties "should not affect an adjudicator's capacity and willingness to render impartial decisions."[60]

However, much of this literature ignores the question of whether arbitrators unduly identify with the interests of the parties collectively in relation to the interests of third parties or the public. For example, arbitral institutions continue to defer to the interests of all parties to keep arbitral awards confidential, despite the facts that greater publication of awards would yield benefits for the arbitration system and that most arbitrators would prefer to publish their awards.[61] It is reasonable to conclude that the institutional difference in sources of authority makes arbitrators more likely than judges to see matters from the point of view of the parties and to be more attuned to the interests of the parties than to the interests of the legal system and the society as a whole. This orientation toward the interests of the parties is not in the same class as the kind of bias that concerns commentators, but it nevertheless affects arbitral decision making.

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[57] S.D. Franck, "The Role of International Arbitrators" (2006) 12 ILSA J. Int'l & Comp. L. 499 at 509.

[58] Y. Dezalay & B.G. Garth, *Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: U. Chicago P., 1996) at 35 fn 3.

[59] C. Menkel-Meadow, "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not" (2002) 56 U. Miami L. Rev. 949 at 956.

[60] Franck, *supra* note 55 at 508-09 (citations omitted).

[61] The arbitration literature has described a variety of benefits that greater transparency would yield. See, e.g., M.P. Daly, "Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration" (2007) 62 U. Miami L. Rev. 95 at 125; T. Ginsburg, "The Culture of Arbitration" (2003) 36 Vand. J. Transnat'l L. 1335 at 1344; A.C. Brown, "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration" (2001) 16 Am. U. Int'l L. Rev. 969 at 1014-17; C.B. Kaczmarek, "Public Law Deserves Public Justice: Why Public Law Arbitrators Should be Required to Issue Written, Publishable Opinions" (2000) 4 Employee Rts. & Employment Pol'y J. 285 at 314; W.W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in Arbitration" (1989) 63 Tul. L. Rev. 647 at 673-75; H. Smit, "The Future of International Commercial Arbitration: A Single, Transnational Institution?" (1986) 25 Colum. J. Transnat'l L. 9 at 31-32.

Court decisions are appealable and are publicly available. Arbitral awards are not appealable on the merits and are generally disclosed only to the parties. Thus, there are no institutional sanctions to prevent arbitrators from going against the wishes of the parties. However, the international arbitration community is small and "clubby."[62] The top arbitrators, advocates, and scholars tend to know each other personally—indeed, the membership of these three groups overlap significantly. Professional reputations harden quickly. Moreover, as Garth notes, "the world of international commercial arbitration operates to a great extent as a 'favor bank'. Those who can provide a favor for the individuals at the core tend to get rewarded with referrals and recognition."[63] There is thus a strong incentive to cooperate with the other participants in an arbitration.

At its heart, arbitration is a service industry, with the arbitrators providing to their clients the service of resolving a dispute. As Sir Michael Kerr, a renowned advocate, judge, and arbitrator put it, "Unlike judges, arbitrators must inevitably treat the parties and their lawyers as having something of the aura of a clientele, whose goodwill, understanding and respect for the tribunal's authority must be cultivated and preserved."[64] Like shopkeepers who adhere to the maxim, "the customer is always right," such a service mentality encourages arbitrators to accede to the expressed preferences of the parties, including with respect to choice of law. As one arbitrator put it, "The idea that ... the arbitrator is bound to respect the parties' will in exercising his or her role and, more generally, in discharging his or her duties, has prevailed for a long time. That the arbitrator is the servant of the parties is ... a widespread view."[65]

It should be noted that there is no evidence that party-appointed arbitrators systematically favour the parties who appoint them over the opposing parties. Perhaps more importantly, a reputation for overt partisanship will harm an arbitrator's career prospects in the long run, as she will lose influence over her fellow arbitrators.[66] For this reason, experienced advocates tend to appoint arbitrators who have a reputation for strict impartiality when assessing the facts and legal issues in a given dispute.[67] In this

[62] Dezalay & Garth, *supra* note 56 at 10 (quoting a "well-informed New York partner"). See also Menkel-Meadow, *supra* note 57 at 958-59; D. Ridgway, "International Arbitration: The Next Growth Industry" (1999) 54 Disp. Resol. J. 50 at 51.

[63] B.G. Garth, "How to Become an International Commercial Arbitrator" (1997) 8 World Arb. & Mediation Rep. 10 at 11. It should be noted that the "favours" referred to do not include deciding the merits of a dispute in a way favourable to a particular party, but rather such benefits as appointments as an arbitrator in future disputes, work as a consultant or expert witness, invitations to conferences, and election to the governing bodies of arbitral institutions.

[64] M. Kerr, "Concord and Conflict in International Arbitration" (1997) 13 Arb. Int'l 121 at 124.

[65] P. Bernardini, "The Role of the International Arbitrator" (2004) 20 Arb. Int'l 113 at 114.

[66] This sentiment has been expressed by a variety of commentators. See, e.g., Franck, *supra* note 55 at 517; J. Paulsson, "Ethics, Elitism, Eligibility" (1997) 14:4 J. Int'l Arb. 13 at 14; T.H. Webster, "Party Control in International Arbitration" (2003) 19 Arb. Int'l 119 at 129-30.

[67] Redfern & Hunter, *supra* note 47 at 237.

way, the competitive market for arbitration services disciplines individual arbitrators to avoid overt partisanship. However, even as market pressures encourage arbitrators to treat opposing parties even-handedly, a professional interest in maintaining the favour of the parties and their counsel clearly encourages arbitrators to accede to the mutual desires of the parties. Such orientation toward the parties' interests may not include rendering a decision on the merits according to the desires of the parties, but it does include deferring to the parties' agreement on matters such as choice of law, the procedures by which the hearing will be conducted, and the types of evidence that will be admitted.

(B) Arbitration as Justice in the Service of Business

Judges are state officials, officers of the court. In most civil law countries, they spend their careers as members of the broader civil service. In common law countries, practicing lawyers appointed to the bench are expected to set aside their previous affiliations and serve the public interest. Their duty is to the law itself; court justice is public justice. Arbitrators, on the other hand, are private individuals. They provide a service—resolution of disputes—and are compensated for the service by their clients—the disputing parties. Arbitration is also justice, but it is justice in the service of business. As Gélinas puts it, "international arbitration exists to serve the needs of international business."[68] Lord Mustill takes the argument a step further: "Commercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study."[69]

The previous section discussed the fundamental difference in the relationship between judges and disputing parties, on the one hand, and arbitrators and disputing parties, on the other. There is more to this difference than the simple fact that judges are public officials while arbitrators are private service providers. The distinct nature of arbitrators' position relative to the parties also affects arbitrators' thinking in an inchoate way: international arbitration as a field is orientated toward the interests of international commerce.

In a much-quoted passage, Justice White of the United States Supreme Court wrote that arbitrators should not be held to the standards of "judicial decorum" of judges; it is because arbitrators "are men of affairs, not apart from the marketplace, that they are effective in their adjudicatory function."[70] It is no accident that most of

[68] F. Gélinas, "Arbitration and the Challenge of Globalization" (2000) 17 J. Int'l Arb. 117 at 117.

[69] M. Mustill, "Arbitration: History and Background" (1989) 6 J. Int'l Arb. 43 at 86. See also L.Y. Fortier, "The New, New *Lex Mercatoria*, or, Back to the Future" (2001) 17 Arb. Int'l 121 at 121, characterizing Mustill's statement as "the essential creed of the commercial arbitrator."

[70] *Commonwealth Coatings Corp. v. Cont'l Cas. Corp.*, 393 U.S. 145, 150 (1968), reh'g denied, 393 U.S. 1112 (1969).

the world's international arbitral institutions (and nearly all of those located in civil law jurisdictions) are attached to chambers of commerce. Indeed, such institutions benefit from "a double sponsorship—that of the world of business, since the parent organization remains a major business group, and that of the world of learned jurists"[71] Arbitrators have come to see themselves as actors not just in an international legal system, but in international commerce as well.

Many arbitrators take the position that arbitration has played a role in the creation of the modern international commercial system. Robert Briner, President of the Iran-United States Claims Tribunal from 1989 to 1991 and still an active arbitrator, writes:

> [A]rbitration accompanied the growth of international commerce. It saw its role as offering the tools best suited to international business to resolve disputes whenever they arose. The major institutions especially see their role in facilitating the growth of international business by offering the necessary tools to resolve the disputes arising in international business.[72]

Moreover, it is a small step from seeing oneself as an integral part of a system to seeing oneself as indispensable to the system's functioning. Proponents of international arbitration are apt to engage in a kind of arbitral apologetics, proclaiming arbitration's virtues in every possible forum. Such writings are, to an extent, mere marketing: if fewer parties choose arbitration, then arbitrators as a group will lose business. For judges, on the other hand, if fewer commercial parties choose to litigate, there will still be ample cases to fill their dockets.[73] However, many arbitrators believe both genuinely and passionately in the essential role of arbitration within international

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[71] Dezalay & Garth, *supra* note 56 at 45 (referring specifically to the ICC).

[72] R. Briner, "Globalization and the Future of Courts of Arbitration" (2000) 2 Eur. J. L. Reform 439 at 444.

[73] That said, judges have cited institutional concerns regarding the migration of commercial cases out of the courts and into arbitration. In particular, some have worried that the diminishing number of commercial disputes that go to trial (either because the parties settle or because they resort to alternative dispute resolution) means that commercial law is not developing properly or evolving to reflect changing commercial circumstances. However, this again demonstrates that judges primary concerns are systemic, while arbitrators' primary concerns are with the parties.

business and, in particular, in arbitration's superiority over litigation for the resolution of international commercial disputes.[74]

Arguments for arbitration's indispensability often take the form of a list of the general deficiencies of litigation, such as its purported slowness and expense in comparison with arbitration. However, arbitrators are most likely to cite the "inability [of litigation] to respond to the 'specific needs' of international commercial dispute resolution."[75] Indeed, the writings of arbitrator-scholars are rife with arguments to the effect that international commerce has specific needs and that arbitration ought to—and does—fulfill those needs.[76]

The parties who participate in international arbitrations are sophisticated consumers of dispute resolution services. Guided by experienced legal counsel, they are aware of the benefits and risks presented by different arbitrators, different procedures, and different applicable laws. In short, they know what they want. Consequently, the ability to control various aspects of the dispute resolution process is a key factor drawing disputing parties to arbitration. For example, despite the risk of bias presented by the use of party-appointed arbitrators, and despite the greater cost of employing three arbitrators rather than one, three-member tribunals remain the norm for major disputes.[77] Carter concludes that the sense of control that accompanies

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[74] See, e.g., W.W. Park, "The Specificity of International Arbitration" (2003) 36 Vand. J. Transnat'l L. 1241 at 1254-55 ("In a world lacking any neutral courts of mandatory jurisdiction over transactions that cross national borders, arbitration usually does impose itself on international transactions *faute de mieux*, bringing to mind Churchill's famous observation about democracy."); Ridgway, *supra* note 60 at 52 ("In the years to come, international arbitration will play an increasingly important role in the administration of justice worldwide."); Drahozal, *supra* note 26 at 523 (the first sentence of this article proclaims: "Arbitration is the dispute resolution mechanism of choice in international commerce."); Franck, *supra* note 55 at 521 (arbitrators "are the guardians of a system that is imperative for the flourishing of international trade and investment.").

[75] Petsche, *supra* note 41 at 10.

[76] See, e.g., J. Lew, "Achieving the Dream: Autonomous Arbitration" (2006) 22 Arb. Int'l 179 at 180; L.E. Trakman, "'Legal Traditions' and International Commercial Arbitration" (2006) 17 Am. Rev. Int'l Arb. 1 at 29; Park, *supra* note 72 at 1254-55; Briner, *supra* note 70 at 444; B.M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration" in S.N. Frommel & B.A.K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration* (London: Kluwer, 1999) at 167; C.M. Schmitthoff, "The Codification of the Law of International Trade" [1985] J. Bus. L. 23.

[77] J.H. Carter, "Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for Non-Neutrals" (2000) 11 Am. Rev. Int'l Arb. 295 at 295, stating that "tripartite panels are not withering away."

the act of choosing one's own adjudicator outweighs cost and bias concerns.[78] It is therefore unsurprising that arbitrators see party autonomy as a—perhaps *the*—core desire of international commercial actors with respect to the resolution of disputes.[79]

(C) Choice of Law and Neutrality

Neutrality as between the parties is an essential aspect of any legitimate system of adjudication, but is a particular concern of arbitrators. Like party autonomy, it is both a core characteristic and a normative goal of arbitration. Redfern and Hunter assert that the neutrality of the arbitral forum is one of the two most important reasons (along with enforceability) that parties choose arbitration over litigation.[80]

An international arbitral tribunal is more neutral as between the parties than any national court. In contrast to cross-border litigation, an arbitration does not take place in the home court of either party.[81] Neither party is more familiar with the procedures than the other; neither is put at a linguistic disadvantage; neither takes the risk that the judge will be a xenophobe.[82] Even when outright xenophobia is not implicated, parties often face difficulties when litigating in foreign courts, a phenomenon that has been acknowledged by national court judges.[83] Resolution of international commercial disputes by arbitration means that neither party is a "foreign" party.[84] Such neutrality is particularly important when, as is common in international arbitrations, states or state entities are parties to the disputes.

The desire to promote neutrality affects the way arbitrators think about the governing law. After all, a party is disadvantaged by having to work with unfamiliar

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[78] *Ibid.* Other reasons for the continued popularity of three-member tribunals have been suggested. For example, the presence of a party-appointed arbitrator reassures the parties that at least one arbitrator is a known quantity, reducing the risk of a "runaway tribunal." Paulsson, *supra* note 64 at 14. In addition, the presence of party-appointed arbitrators is said to improve the legitimacy of arbitration as a whole by making awards more acceptable to the losing party. R.M. Mosk, "The Role of Party-Appointed Arbitrators in International Arbitration" (1988) 1 Transnat'l L. 253 at 254.

[79] Böckstiegel, *supra* note 45 at 25 ("The business community has a strong interest in shaping its relationships to its need and advantage and in selecting its own systems of dispute settlement.").

[80] Redfern & Hunter, *supra* note 47 at 26; see also J. Fellas, "A Fair and Efficient International Arbitration Process" (2004) 69 Disp. Resol. J. 78 at 79-80.

[81] Franck, *supra* note 55 at 501.

[82] See Park, *supra* note 72 at 1256 ("Absent reliable arbitration, judicial proceedings might go forward in a foreign language and perhaps before a xenophobic judge in a country lacking a tradition of judicial independence.")

[83] *Fiona Trust & Holding Corp. v. Privalov*, [2008] 1 Lloyd's Rep. 254, 256 (H.L.) ("Particularly in the case of international contracts, [parties] do not want to take risks of ... partiality in proceedings before a national jurisdiction." (Speech of Lord Reid)).

[84] Franck, *supra* note 55 at 501 (referring to arbitration as a "geographical half-way house").

foreign substantive law in the same way that it is disadvantaged by having to work with unfamiliar foreign procedures. As a result, arbitrators may prefer rules of substantive law that are neutral.

Substantive neutrality means that the applicable rules of law must be derived from neither party's domestic law. In other words, substantive neutrality often calls for the application of a law that has no direct relationship with the parties' domiciles or the place of performance of the contract—a fact that might prevent national courts from applying that law. The law of a third country could be selected, and sometimes the parties agree among themselves that a third country's law will apply. (For example, English law is frequently chosen in shipping contracts, regardless of the nationality of the parties.) However, choice of a third national law by the tribunal is considered an "undesirable compromise," since instead of unequal familiarity, it usually engenders equal ignorance.[85] International contract law instruments or general principles present a more promising avenue for ensuring substantive neutrality.[86]

Arbitrators also pursue substantive neutrality in individual disputes, by applying rules of substantive law common to the legal systems of the parties' home states (*tronc commun*) or by applying general principles directly.[87] Such methodology is also said to accord with party autonomy since the provisions of home law of one contracting party would not necessarily be known to—let alone consented to—by the other party, but both parties "can be expected to be conversant with the provisions of the law common to both of them."[88]

In sum, the promotion of substantive neutrality encourages arbitral respect for party autonomy in several ways. It encourages arbitrators to apply the laws of third countries that national courts might refuse to apply. It encourages arbitrators to apply rules of law that no national court will currently apply. Finally, it encourages

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[85] Petsche, *supra* note 41 at 14. Traditionally, many countries' courts refused to apply the law chosen by the parties if that law bore no relationship to the parties or to the transaction. Today, however, parties' right to choose the law of a country with no connection to the contract is generally acknowledged. For example, the 1980 *Rome Convention* recognizes this right.

[86] *Ibid.* See, e.g., ICC Case 2886 of 1977, [1978] Journal de droit international 996.

[87] Both have occurred in a variety of arbitral awards. Cases where the tribunal cumulatively applied the laws of the parties' domiciles include: ICC Case No. 6281 of 1989, (1990) XV Ybk. Comm. Arb. 96; ICC Case No. 5103 of 1988, [1988] Journal de droit international 1207; ICC Case No. 4145 of 1984 (second interim award), (1987) XII Ybk. Comm. Arb. 97. Cases where the tribunal directly applied general principles without having been empowered to decide as *amiable compositeur* include: ICC Case No. 5065 of 1986, [1987] Journal de droit international 1039; ICC Case No. 3267 of 1979, (1982) VII Ybk. Comm. Arb. 96.

[88] B. Ancel, "The *Tronc Commun* Doctrine: Logic and Experience in International Arbitration" (1990) 7 J. Int'l Arb. 3 at 67.

arbitrators to apply the laws of multiple states concurrently, an exercise that national courts are unlikely to engage in.

III. CONCLUSION

Arbitrators are likely to maintain a higher level of deference to party autonomy in choice of law than are national legislatures or judges. This is so primarily because of the institutional characteristics described above, and not because of any legal or practical justifications for deferring to party autonomy. In particular, international arbitrators' deference to party autonomy is driven by their sense of themselves as service providers, their identification with the interests of international commerce, and their concern for neutrality.

To be sure, justifications do exist for maintaining wider party autonomy in choice of law in arbitration than in litigation. There is much to be said for the proposition that if knowledgeable parties with equal bargaining power have agreed to resolve future disputes under a certain set of rules, then barring exceptional circumstances, justice would be best served by honouring that agreement. In addition, agreements on the applicable law are usually made at the time the contract is concluded[89] but arbitrators are not typically chosen until the dispute actually arises.[90] The parties typically select arbitrators who are knowledgeable in the law that they have chosen to govern their dispute. If the arbitrators were then to reject the parties' choice of law, the parties' autonomy and their goal of selecting an expert panel would be thwarted.[91]

If the parties are certain *ex ante* what law will apply to an eventual dispute, they can more easily determine how they ought to act and how to price contract rights and duties.[92] Moreover, certainty about the applicable law also serves what has been

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[89] There are some cases where the parties agree to the applicable law only after a dispute arises. See, e.g., ICC case no. 7626 of 1995, (1997) XXII Ybk. Comm. Arb. 132.

[90] In some cases, arbitration agreements in the parties' contract may specify particular arbitrators to be appointed should a dispute arise, or at least specify certain characteristics that arbitrators in an eventual disputes must possess—characteristics that may narrow the pool of potential arbitrators to a few individuals. This practice is most common in the drafting of shipping, commodities, and insurance and reinsurance contracts, and clauses of this sort appear in standard form contracts used in those fields. Courts generally uphold such restrictions, providing that they are not too vague to be enforced. Redfern & Hunter, *supra* note 47 at 230-31.

[91] There are, of course, exceptions. In the infamous *Klöckner* arbitration, the tribunal's award was annulled by an *ad hoc* annulment committee in part because of the tribunal's blithe misstatements of French law. *Klöckner Industrie-Anlagen GmbH (F.R. Germany) v. United Republic of Cameroon*, (1994) 2 ICSID Rep. 95 (original decision); (1986) XI Ybk. Comm. Arb. 162 (annulment decision).

[92] L.E. Ribstein, "Choosing Law by Contract" (1993) 18 J. Corp. L. 245 at 253.

called a "channeling function."[93] The fewer issues in a dispute that must be resolved by the adjudicator, the better the parties can predict what they will gain in seeing the litigation to the end.

There are some aspects of party autonomy in choice of law as applied international arbitration that merit reconsideration by national courts and legislatures. The extent to which traditional domestic choice of law processes are complex and uncertain is debatable, but an increased deference to party autonomy would create greater certainty. The more the parties can be certain what law will apply to their disputes, the better they can predict the results of litigation; settlements would be more frequent and more accurate, reducing the costs of litigation and easing crowded dockets.[94] State courts could achieve this predictability in part by expanding their deference to party autonomy in choice of law.

Of course, greater certainty in the applicable law can be achieved in other ways. In the EU, the *Rome I Regulation* does enshrine party autonomy in choice of law;[95] however, its most significant innovation is a series of presumptions that determine the applicable law in the absence of a choice by the parties.[96] These presumptions cover a wide range of circumstances; only if a contract does not fall into one of several broad categories[97] does the traditional analysis apply that leads to the law of the domicile of the party "required to effect the characteristic performance of the contract."[98]

In addition, the arbitral experience suggests that little harm would result if state courts abided by contractual provisions that choose rules of law.[99] Indeed, national courts already have experience applying transnational rules. If the parties include a choice of law clause applying the CISG, international arbitral tribunals

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[93] A term used by Farnsworth, among others. E.A. Farnsworth, *Contracts*, 3rd ed. (New York: Aspen Law and Business, 1999) at 387-88 (referring to the *Statute of Frauds*).

[94] Ribstein, *supra* note 90 at 254.

[95] *Rome I Regulation*, Art. 3.

[96] *Ibid.*, Art. 4(1).

[97] Included within the presumptions set out in article 4(1) are contracts for the sale of goods (Art. 4(1)(a)); provision of services (Art. 4(1)(b)); rights in immovable property (Art. 4(1)(c-d)); franchises (Art. 4(1)(e)); distribution (Art. 4(1)(f)); sale of goods by auction (Art. 4(1)(g)); and financial instruments (Art. 4(1)(h)).

[98] Art. 4(2).

[99] No national law other than that of the state party to the contract may have any connection with the dispute, and a state would understandably be reluctant to have its contract governed by the law of a different state. On the other hand, the non-state party may legitimately be concerned that it will be stuck in an unfair fight if the law of the opposing party governs the contract. At least one tribunal has held that the application of general principles of international private law is justified solely on the grounds that one of the parties to the arbitration is a sovereign state. ICC Case No. 5030 of 1992, [1993] Journal de droit international 1004.

defer to such contractual choices of the convention. However, national courts will only consider the CISG when it applies by virtue of the litigants being domiciled in different states, each of which has ratified the convention. Since national courts already apply the CISG in this context, it is reasonable to conclude that no injustice would result if they were to enforce choice of law clauses choosing the CISG in cases where it would not otherwise apply.

For the same reasons, national courts should not be afraid to apply general principles of international private law, especially compilations of transnational rules like the UNIDROIT Principles and PECL, when the parties choose to be governed by them. Such rules of law can be both vague and incomplete and for that reason give rise to disagreements about which principles apply and whether a relevant general principle even exists. However, courts could—as tribunals have done—apply such instruments or the more vague general principles to the extent that they are determinable. Issues that are not addressed by any general principle can be determined according to the national law that would otherwise apply.[100] In any event, the difficulty of determining the content of rules of law is minimal when dealing with the UNIDROIT Principles or PECL; to the extent that these are incomplete, they too can be supplemented with national laws.

Arbitrators also have something to learn from national choice of law regimes. Faced as they are with disputes between large, sophisticated entities, arbitrators seldom question whether choice of law agreements were freely arrived-at. At the jurisdictional stage, arbitral tribunals must satisfy themselves that both parties have truly consented to arbitration; arbitrators therefore routinely consider whether one party imposed the arbitration agreement upon the other. However, once jurisdiction is established, tribunals tend not to question whether any specific terms in the contract, such as a choice of law clause, were understood by both parties or whether consent to those terms was vitiated by fraud or duress. Given the fact that many disputes are settled after the forum and applicable law are determined, arbitrators should exercise the kind of vigilance that national courts do to ensure that the parties have genuinely agreed on the applicable law.

Finally, international arbitration is often described as private justice. Arbitrators and parties in arbitration consider the resolution of their disputes to be an entirely private matter. However, third parties are often affected by the results of arbitral decisions.[101] This can be so even with respect to choice of law. For example, if the parties choose to be governed by a law that abrogates the rights of third parties in some way, and the resulting award is enforced in a jurisdiction the law of which

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[100] As occurred (at the parties' behest) in ICC Case 5730 of 1988, [1990] Journal de droit international 1029.

[101] See generally S. Brekoulakis, "The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room" (2009) 113 Penn St. L. Rev. 1165.

would have granted additional rights to third parties, then the tribunal's deference to the parties' choice of law has had the effect of harming those third parties. Arbitrators therefore ought to take more care to consider the consequences of their decisions; in some cases, protecting the rights of third parties or the general public may justify overruling party autonomy in choice of law.[102]

[102] G.R. Delaume, *Law and Practice of Transnational Contracts* (New York: Oceana, 1988) at 282.