FORBIDDING DÉPEÇAGE:
LAW GOVERNING INVESTMENT TREATY ARBITRATION

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I. Introduction

The law governing international arbitration has been a field of considerable conceptual controversy. The debate goes back to the 1960's and 1970's, when distinguished scholars such as F.A. Mann, Berthold Goldman, Philippe Fouchard and others argued whether international arbitration should be considered an autonomous system of law, a new *lex mercatoria*, or whether it ultimately remained subject to the applicable local legal system.1 As is well known, the former view was shared by many

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French arbitration scholars, whereas the latter, more "conservative" view tended to dominate in the United Kingdom and other common law jurisdictions.

While no consensus was reached in this debate, it did not remain inconsequential in that it clarified a number of the conceptual issues at stake, including those relating to the various meanings of the term "governing law." Indeed, it turned out that at least some of the conceptual confusion was explained by the fact that the various parties to the debate were in part addressing different issues. While F.A. Mann and others who sided with him were more concerned with the *lex arbitri*, or the "curial" law governing the arbitral tribunal rather than other aspects of the concept of governing law, the proponents of *lex mercatoria* were more interested in the substantive law of international arbitration. Consequently, as a result of the debate, a distinction came to be made, perhaps more consistently than before, between the law governing the arbitral tribunal (*lex arbitri*) and the law applicable to the merits (*lex mercatoria*).2

While the *lex arbitri* v. *lex mercatoria* debate was conducted largely against the background and in the context of the quickly developing practice of international commercial arbitration, a parallel debate emerged around a related but separate issue—the law applicable to state contracts. Unlike the *lex mercatoria* debate, which was dominated by private international law scholars and international commercial arbitration practitioners, the debate about state contracts also attracted the attention of leading public international law scholars such as Robert Jennings and Prosper Weil, as well as, of course, the omnipresent F.A. Mann. The focus of this parallel debate was on the various issues raised by the participation of the state in international contracts and in international arbitration, including issues such as whether the state's agreement to arbitrate constituted a waiver of immunity, the existence of a public international law of contracts, the law

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governing the arbitration, and the limitations on the applicability of the host state’s law on the contract.\(^3\)

The two grand debates of the 1960’s and 1970’s reflected an emerging distinction between international commercial arbitration and international investment arbitration—a distinction that is now taken virtually for granted, but was nothing but obvious at the time. This should not be considered surprising since at the time foreign investment usually took the form of direct contractual arrangements between the state and the foreign investor. As a result, both commercial arbitral tribunals and investment arbitration tribunals drew their jurisdiction from contractual arbitration clauses, negotiated at arm’s length between the contracting parties. This contractual thinking was incorporated into, and is still reflected in the ICSID Convention, the great intellectual product of the era of state contracts.\(^4\) The ICSID Convention more or less implicitly assumes that foreign investment will typically take the form of an investment contract entered into between a foreign investor and the host state, or an entity controlled by the state.\(^5\)

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5. Id., art. 25, para. 1 (referring to consent of parties to submit dispute to Centre, stressing that “when the parties have given their consent, no party may withdraw its consent unilaterally”). This assumes that, unlike in investment treaty arbitration, both parties have given their consent to arbitrate before the dispute has arisen. See id. art. 25, para. 2(b) (referring to agreement of parties, i.e. State and foreign investor, to treat juridical person having nationality of State party as national of another contracting State for purposes of ICSID Convention, which similarly assumes there is pre-existing contractual relationship between investor and State); id. art. 42, para. 1
However, while the debates of the 1960's and 1970's reflected a growing interest in international arbitration as a process of resolving cross-border commercial disputes, and the parallel interest in developing alternative methods for the resolution of investment disputes (and the corresponding displacement of diplomatic protection as a method of dealing with these disputes), it remained, in the end, less than clear which theory or position in fact "prevailed" in these debates. By the 1980's, most international arbitration lawyers, or at least international arbitration practitioners, tended to take the view that the debates about lex mercatoria and state contracts in particular were mainly of academic or historical interest and, as such, of limited practical relevance.

Indeed, by the 1980's, a new but analogous debate had emerged in the field of international arbitration—this time between prominent arbitration practitioners rather than academics. Now the controversy was about "a-national arbitration"—about whether parties to arbitration agreements would or should be able to "delocalize" the arbitration and have the arbitration conducted without regard to the mandatory rules of the seat or, in any event, have the arbitral award recognized and enforced even if it had been aside by the court of the seat of arbitration. Unlike the debates in the 1960's and 1970's, the discussion about a-national or delocalized arbitration focused mainly on international commercial arbitration rather than investment arbitration. This reflected the remarkable development in the field of international commercial arbitration that took place during the 1970's and 1980's. In particular, private rules of international arbitration developed such as the rules of the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of Ar-

International commercial arbitration (LCIA) and the American Arbitration Association (AAA), as well as quasi-private rules such as those developed by the United Nations Commission on International Trade Law (UNCITRAL). As a result of these developments, parties less frequently designated the procedural law of a particular country as the law governing the arbitration proceedings because of increased use of privatized international arbitration rules.

But the focus on the legal framework of international commercial arbitration also belied another, parallel “development”: The relative stagnation of international investment arbitration, as reflected in the statistics of ICSID. By the late 1980’s, it had become increasingly clear that despite the impressive number of states parties to the ICSID Convention, state contracts would not be capable serving as the engine of foreign investment nor, it seemed, capable of generating a sufficient number of disputes to justify the continuing existence of an arbitration service provider dedicated exclusively to investment arbitration.

However, beginning in the early 1990’s, there were new developments that swung the pendulum of intellectual interest back to international investment arbitration. This time the debate was not about state contracts. It was, as aptly and famously captured by Jan Paulsson, about “arbitration without privity,” that is, arbitration of investment disputes under investment treaties without a direct contractual relationship between the state

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7. “Quasi private” in the sense that, although they were developed by UNCITRAL, a United Nations body, their actual use remains dependent on the choice of the parties.

8. The conception that arbitral proceedings may be conducted under the procedural law of a selected jurisdiction other than the procedural law of the seat of the arbitral tribunal is still reflected in article 5(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5(1)(e), June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention]. The New York Convention provides that recognition and enforcement of an arbitral award may be refused if it “has been set aside or suspended by competent authority of the country in which, or under the law of which, that award was made.” Id. (emphasis added).

9. During the period from its inception until the end of 1989, ICSID had only received and registered 26 cases. See International Centre for Settlement of Investment Disputes, List of Concluded Cases (2009) available at http://www.worldbank.org/icsid (click “cases” tab, then “List of Cases” tab, then “Concluded Cases” hyperlink) (listing 26 cases registered before 1989).
and the foreign investor. These developments reflected the fundamental changes in the political-economic environment of international investment arbitration that had taken place in the late 1980's and early 1990's, in particular the end of the Cold War and the resulting quasi-global adoption of neoliberal economic policies. As part of these developments, which gathered momentum in the course of the 1990's, states increasingly withdrew from their role as market participants and owners or managers of business enterprises, and adopted the role of regulator—which made them indirect rather than direct market participants. As a result of these developments, state contracts lost their function as the main vehicle of foreign investment and source of disputes and were replaced, to a rapidly increasing degree, by investment treaties, in particular bilateral investment treaties, and to a lesser degree, foreign investment laws.

Investment treaties substantially modified the legal framework within which foreign investment was undertaken. Unlike in the case of a state contract, there is no direct contractual relationship—or “privity” of contract—between the state and the foreign investor under an investment treaty. The state’s consent to arbitrate is given in a treaty, to which the foreign investor is not a party, and on an anonymous basis to a class of foreign inves-


12. See Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties, xxii (1995) (discussing the radical increase in bilateral investment treaties). Rudolf Dolzer and Margrete Stevens estimate that fewer than a dozen bilateral investment treaties were concluded per year in the course of the 1970s. Id. In the 1980s, the number increased to an average of about 24 treaties per year, whereas in 1990 alone the figure was 55. Id. In 1991, 1992 and 1993, the figures were 80, 99 and 83, respectively. Id. By September 1994, which was the reference date of their study, the total number of bilateral investment treaties had exceeded 700. Id. The growth has continued since then, and by the end of 2007, some 179 countries had entered into more than 2,600 bilateral investment treaties. United Nations Conference on Trade and Development, World Investment Report 14, U.N. Doc. UNCTAD/WIR/2008 (Sept. 24, 2008).

13. See Southern Pacific Properties (Middle East) Ltd. v. Egypt, Decision on Jurisdiction, ICSID Case No. ARB/84/03, 3 ICSID Rep. 131, Decision on Jurisdiction, para. 71 (Apr. 14, 1988) (upholding tribunal's jurisdiction to hear dispute). This was the first case where the investor invoked the State's consent to arbitrate expressed in a foreign investment law.
tors as a whole rather than to any particular individual investor.\textsuperscript{14} In other words, the state is in a sense acting in its regulatory (or statutory) capacity rather than as privy to a contract. Moreover, since the state's consent is expressed in a treaty, and a treaty is a source of public international law, when expressing its consent to arbitrate in the form of such an undertaking, the state is in fact acting in the sphere of public international law—on the "international plane"—and, accordingly, in its capacity as a sovereign. As an anonymous addressee of the state's consent to arbitrate, the foreign investor expresses its acceptance of the state's offer only after the fact, i.e., after the dispute has already arisen, in the request for arbitration.

In such a legal construction, the agreement to arbitrate is not part and parcel of an arm's length transaction. It is expressed in two independent consents—or an "offer" and an "acceptance"—that remain separated by the invisible sovereign veil of the state, which is never pierced by the handshake of the parties. But this strange transnational transaction is not only separated in terms of jurisdictional space. It is also separated in terms of time, since at the time when the foreign investor accepts the state's offer to arbitrate, the dispute between the parties has already arisen. In other words, unlike in the case of an arbitration clause embedded in a contract, in the case of investment treaty arbitration the dispute between the parties precedes the conclusion of the agreement to arbitrate. In this sense, the resulting arbitration agreement is analogous to a submission agreement, except that this applies only to one of the parties,

\textsuperscript{14} This is also reflected in the cause of action created by an investment treaty, which is not a breach of contract but a breach of an international obligation of the State or, in terms of the International Law Commission's Articles on State Responsibility—an "international wrong." See International Law Commission, Draft Articles on State Responsibility, arts. 1-3, U.N. Doc. A/56/49(Vol.1)/Corr.4 (Dec. 12, 2001) (defining the concept of "internationally wrongful act"). As noted by Robert Jennings, such a cause of action is analogous to tort in domestic law: while in contract the duty is fixed by the parties themselves and the resulting duty is owed to a specific person or persons, in tort the duty is fixed by law and is owed towards persons generally. See Jennings, supra note 3, at 164 & 164 n.2 (citing Winfold, The Province of the Law of Tort 40 (1931) (discussing difference between contracts and torts)).

The fact that the State's consent is addressed to an anonymous class of investors also explains why it has the potential of triggering a mass claims process. See Veijo Heiskanen, Arbitrating Mass Investor Claims: Lessons of International Claims Commissions, in Multiple Party Actions in International Arbitration 297 (Oxford University Press, 2009).
the investor, as the consent of the state has been given before
the dispute arises, when it entered into the treaty.\textsuperscript{15}

II. THE CONCEPT OF GOVERNING LAW

Writing in the early 1960's, Professor R.Y. Jennings (as he
then was) noted that the particular topic of state contracts “im-
pinges upon some of the hardest questions of international
law.”\textsuperscript{16} This was because this topic “cannot be considered apart
from the relationship of international and municipal law; the re-
lationship of public international law and private international
law . . . and the limits of domestic jurisdiction and the reserved
domain.”\textsuperscript{17}

These observations remain largely valid today. However,
recent developments in international investment arbitra-
tion—and in particular the emergence of investment treaty arbi-
tration—appear to have clarified at least some of the conceptual
issues at stake, including those identified by Jennings. Accord-
ingly, the time now seems ripe to take a fresh look at the age-old
controversy surrounding the concept of governing law in inter-
national arbitration—a controversy that, as outlined above, in va-

\textsuperscript{15} Thus the resulting agreement effectively cuts neither in terms of space nor in
terms of time: both parties remain in their own jurisdictional space (international/
domestic jurisdiction) and separated by an interval of time between their respective
consent and acceptance (before/after the dispute). See Paulsson, \textit{supra} note 10, at 256
(“What is already clear is that this [i.e., arbitration without privity] is not a subgenre
of an existing discipline. It is dramatically different from anything previously known
in the international sphere.”)

As a transnational transaction that, like Solomon's judgment, cuts across the do-
meric and international spheres (but without cutting the sovereign jurisdictional veil
or the interval of time that separates the parties), an arbitration agreement based on
an investment treaty uncannily resembles Michelangelo's famous fresco “The Crea-
tion of Adam,” which similarly draws on two separate consents. Like God, the State
extends its consent from another jurisdiction—the international plane—whereas, like
Adam, the foreign investor expresses his consent only after the fact. In the case of
Adam, this is after his own creation, while in the case of the foreign investor, the
consent is given only after the dispute has already arisen. As illustrated by Michelan-
gelo, there is no “privity” or no shaking of hands between the State and the foreign
investor; only the gesture of consent and the corresponding gesture of acceptance,
from a distance and from another time. \textit{See infra} Annex: Illustration of Agreement to
Arbitrate in Investment Treaty Arbitration.

\textsuperscript{16} Jennings, \textit{supra} note 3, at 156.

\textsuperscript{17} \textit{Id}.
rious forms stretches back to the early 1960’s, and even beyond.18

The purpose of this paper is to tackle the concept of governing law by focusing on one particular aspect of the issue—the law governing the agreement to arbitrate in investment treaty arbitration. This is not to suggest that the concept of governing law has no other aspects or meanings; indeed, a large part of the conceptual confusion surrounding international arbitration appears to stem from the fact that the term “governing law” is often employed without taking into account the context in which it is being used. However, as is well known, the term has several different meanings, depending on the context. Thus, one must distinguish between:

(a) the law governing the arbitration agreement;
(b) the law governing the arbitral proceedings;
(c) the law governing the arbitral tribunal;
(d) the law governing the merits of the claim, or the subject matter of the dispute;19 and
(e) the law governing the recognition, enforcement and execution of the award.

As noted above, it turns out that the great debates of the 1960’s, 1970’s and 1980’s relate to different aspects of the concept of governing law. The controversy about the *lex mercatoria* was largely about the law governing the merits of the claim (or the subject matter the dispute),20 whereas the debate about the *lex arbitri* (or the curial law) was mainly about the law governing the arbitral tribunal.21 The discussion about “a-national” or “delocalized” arbitration, in turn, was mainly about the law governing the arbitral proceedings—the extent to which, if any, the parties to an arbitration agreement might be able to “delocal-

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19. In an even more refined approach, one would distinguish between the law governing the claim and the law governing the defense. It is indeed this distinction that creates the potential for conflicts of laws on the merits and the need for rules designed to deal with such conflicts. See infra notes 88-89 and accompanying text (discussing transnational conflict rules).


21. This is implicit in the many writings of F.A. Mann. See Mann, supra note 1, at 161 (“The *lex arbitri* cannot be the law of any country other than that of the arbitration tribunal’s seat.”).
ize" the proceedings by submitting them to private arbitration rules such as those adopted by the ICC, LCIA, or AAA. In other words, the issue was the extent, if any, to which the parties to such an arbitration agreement might be able to escape the mandatory rules of law governing the arbitral proceedings, in particular at the stage of recognition and enforcement of the award.22

Similarly, the most recent debate—the debate about "arbitration without privity"—is again, about something else. It is neither about the law governing the merits, or the subject matter of the dispute, nor about the law governing the arbitral tribunal. Nor is it about the law governing the arbitration proceedings. It is rather about the very source or basis of the institution of arbitration—the law governing the arbitration agreement. As such, it raises fresh issues not previously addressed in international legal scholarship, private or public, and deserves a closer conceptual scrutiny. While recognizing that issues relating to the other aspects or meanings of the concept of governing law are far from exhausted, this paper will focus on the conceptual and practical issues at stake in this latest development, in light of recent case law.

III. Law Governing the Arbitration Agreement

A. The Severability of the Arbitration Clause

The law governing the arbitration agreement has not attracted much attention among commentators and practitioners of international commercial arbitration and, it appears, even less among those involved in investment treaty arbitration. Indeed, in the context of international commercial arbitration, the law governing the arbitration agreement is often considered to be the same as the law governing the contract of which it forms a part. However, this is not necessarily always the case, in particular when the arbitration agreement is concluded in a separate "submission agreement." But even in the typical case where the agreement to arbitrate is contained in an arbitration clause forming part of the main contract, such an agreement is, concep-

22. See Delocalisation of International Commercial Arbitration, supra note 6, at 57 ("[T]he point is that a delocalized award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin.").
tually and legally, independent and severable from the main contract.

The severability (or "separability" or "autonomy") of the arbitration clause or, more generally, of a jurisdictional clause, is generally accepted in both public and private international law. The principle is also incorporated in many modern inter-


For case law see, e.g., Losinger & Cie, S.A. v. Kingdom of Yugoslavia, Arbitral Award, 1936 P.C.I.J. (ser. C) No. 78, at 105, 111 (Oct. 30) ("lorsqu'un contrat prévoit que les difficultés auxquelles son interprétation ou son exécution pourront donner lieu seront soumise à un arbitrage, cette clause reste valable alors même que le contrat serait annulé pour des causes étrangères à la volonté réelle des parties de saisir un arbitre") (emphasis in original); Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 53-54, 64-65 (Aug. 18) (rejecting argument that India terminated treaty so jurisdictional clause is invalid). Allowing jurisdictional clauses to be annulled by the unilateral termination of a relevant treaty would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purposes of contesting the validity of the termination or suspension—whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable.

ICAO Council (India v. Pak.) 1972 I.C.J. at 64-65; see also Libyan American Oil Company (LIAMCO) v. Gov't of the Libyan Arab Republic, 62 Int'l L. Rep. 141, 178 (Apr. 12, 1977) ("It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the State of the contract in which it is inserted and continues in force even after that termination . . . [because this creates] a favorable climate for foreign investment"); BP Exploration Company (Libya) Ltd. v. Gov't of the Libyan Arab Republic, 53 Int'l L. Rep. 297, 354 (1978)(holding invalidity of agreement does not invalidate its arbitration clause, because arbitration clause . . . "forms the basis of the jurisdiction of the Tribunal and of the right of the Claimant to claim damages from the Respondent before the Tribunal."); Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Gov't of the Libyan Arab Republic, 53 Int'l L. Rep. 389, paras. 16-17 (1978) (upholding the principle of the "autonomy or the independence of the arbitration clause . . . which has the consequence of permitting the arbitration clause to escape the fate of the contract which contains it").

The severability of the arbitration clause is specifically confirmed in article 178(3) of the Swiss Private International Law Act. Loi fédérale sur le droit international privé, Bundesgesetz über das Internationale Privatrecht, Dec. 18, 1987, art. 178(3) (Switz.) [hereinafter Swiss Private International Law Act] ("It is no defense to the arbitration agreement to plead that the principal contract is invalid or that the
national arbitration rules as well as in the UNCITRAL Model Law on International Commercial Arbitration. In practice, two types of issues tend to arise in international commercial arbitration in relation to the arbitration agreement: those relating to the capacity of a party to enter into an arbitration agreement and those relating to the validity, interpretation and effect of the arbitration agreement itself. While under the private international arbitration agreement applies to a dispute which has not yet arisen.

Id.; see also Werner Wenger, Commentary on Article 178, in INTERNATIONAL ARBITRATION IN SWITZERLAND: AN INTRODUCTION TO AND A COMMENTARY ON ARTICLES 176-194 OF THE SWISS PRIVATE INTERNATIONAL LAW STATUTE 327, 358-59 (Stephen V. Berti et al. eds., 2000) [hereinafter INTERNATIONAL ARBITRATION IN SWITZERLAND].

24. See UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 21(2), U.N. Doc. A/31/17 (Dec. 15, 1976). The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Id.; see also International Chamber of Commerce, ICC RULES OF ARBITRATION, ICC Pub. No. 808 (Jan. 1, 1998) (stipulating that if the arbitration clause is valid—even if the contract is not—then "[t]he Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties . . . unless the parties otherwise agreed"); LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, art. 23(1) (treating arbitration clauses as "independent" agreements apart from contract allowing Arbitral Tribunal to determine its jurisdiction); SWISS CHAMBERS' COURT OF ARBITRATION AND MEDIATION, SWISS RULES OF INTERNATIONAL ARBITRATION, art. 21(2) (Jan. 2006) (providing "an arbitration clause which forms part of a contract . . . under these Rules shall be treated as an agreement independent of the other terms of the contract."). In the United States, the severability of the arbitration clause was endorsed by the Supreme Court in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding arbitrator determines claim of fraud in inducement of entire contract under contract's arbitration clause). It was recently confirmed by the Supreme Court in Buckeye Check Cashing, Inc. v. John Cardenga, 546 U.S. 440 (2006) (holding arbitrator determined if arbitration clause was void for illegality, not Court).

25. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Model Law on International Commerce Arbitration, art. 16(1), Sales No. E.08.V.4 (2006)[hereinafter UN-CITRAL Model Law]. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
tional law of some jurisdictions, such as England, the presumption is that the law governing the arbitration clause is the same as that applicable to the main contract,26 and while this seems the appropriate approach to resolve issues relating to the validity, interpretation and effect of the arbitration agreement, it is not necessarily an appropriate approach to resolve issues relating to the capacity of a party to enter into an arbitration agreement. Indeed, issues such as capacity seem more appropriately resolved by reference to the “personal law” of the party in question, i.e., the law governing the party’s nationality or domicile (in case of a natural person) or the place of incorporation or principal place of business (in case of a legal entity) or, in case where a state is a party to the arbitration, the public law (including the constitution) of the state in question.27 In each case, this is a matter of determining the applicable rule of private international law, taking into account the terms of the arbitration agreement between the parties.28

26. See Sumitomo Heavy Indus. Ltd. v. Oil & Natural Gas Comm’n, 1 Lloyd’s Rep. 45, 57 (1993) (noting that the express choice of law of the governing law of the contract “will usually be decisive” as to the law governing the agreement to arbitrate); Sonatrach Petroleum Corp. v. Ferrell Int’l Ltd., 2001 WL 1476318, para. 32 (Q.B.D. Commercial Court Oct. 4, 2001) (“Where the substantive contract contains an express choice of law, but the agreement contains no separate choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract”); Joseph, supra note 23, at 174 (discussing common practice to regard arbitration clause governed by law controlling contract); Redfern et al., supra note 23, at 124-30 (citing Sonatrach Petroleum Corp. v. Ferrell Int’l Ltd. as example of presumption); Dicey et al., The Conflict of Laws 712, 718 (Lawrence Collins ed., Sweet & Maxwell 2006) (1896) (noting “[i]f there is an express choice of law to govern the arbitration agreement, that choice will be effective, irrespective of the law applicable to the contract as a whole.” Otherwise, “the arbitration agreement will . . . normally be governed by [the law governing the contract]”) (internal footnotes omitted).

27. See, e.g., ICC Case No. 13176, Partial Award (2005) (applying personal law of state to determine disputes relating to its constitution name) (on file with author) (the names of the parties are confidential and cannot be cited); Dicey et al., supra note 26, at 721-22 (discussing the treatment of capacity issues under English and French law); P.M. North & J.J. Fawcett, Cheshire’s and North’s Private International Law 138-75 (12th ed. 1992); Pierre Mayer & Vincent Heuze, Droit International Prive 342, 663, 670-71 (7th ed. 2001) (discussing relationship between international law and private individuals in France); Yvon Loussouarn & Pierre Bourel, Droit International Prive 331, 746-49 (6th ed. 1999)

28. The applicable private international law rule may be lex arbitri, that is, the law of the seat of arbitration, or the appropriate conflict rule determined by the arbitral tribunal to be applicable. The terms of the arbitration clause may also affect the determination of the law governing the arbitration agreement. If the arbitration clause excludes the conflict of laws rules of the applicable law—which they frequently
These distinctions are reflected, *inter alia*, in the UNICTRAL Model Law on International Commercial Arbitration\(^\text{29}\) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\(^\text{30}\) Article 34(2)(i) of the UNICTRAL Model Law provides that an arbitral award may be set aside by the court of the seat of arbitration, *inter alia*, if the party making the application furnishes proof that a party to an arbitration agreement was "under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state [i.e., under the law of the country in which the arbitral tribunal has its seat]."\(^\text{31}\) Thus the UNCITRAL Model Law envisages that three different laws may apply to the arbitration agreement: (a) the law governing the capacity of a party to enter into an arbitration agreement; (b) the law to which the parties have subjected the arbitration agreement; or, failing such designation, (3) the law of the jurisdiction where the arbitral tribunal has its seat. The approach adopted in the UNCITRAL Model Law reflects the fundamental distinction, noted above, between the law governing issues such as capacity, which are, as a matter of principle, governed by the law governing the person in question, and issues relating to the validity, interpretation and effect of the arbitration agreement itself, which are governed by the law designated by the parties. In the absence of such a designation, the validity of the arbitration agreement is determined on the basis of the law of the seat. Because the UNCITRAL Model Law applies to setting aside proceedings before the courts of the seat, this is a logical default rule since, in the absence of any indication by the Parties, the courts of the seat are simply expected to apply their own law.

Similarly, Article V(1)(a) of the New York Convention provides that recognition and enforcement of a foreign arbitral award may be refused if the party against whom the award is invoked furnishes proof that the parties to the arbitration agreement were, "under the law applicable to them, under some inca-

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29. See UNCITRAL Model Law, supra note 25.
30. See supra note 8 (noting that the New York Convention refers to the procedural law of a country other than the seat).
31. New York Convention, supra note 8, art. 34(2)(i).
pacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." 32 Thus the New York Convention reflects, in even clearer terms, the distinction between the law governing the parties, applicable to issues such as capacity to enter into an arbitration agreement, and the law governing the validity of the arbitration agreement. 33 Moreover, even though the New York Convention applies to proceedings before the court of a jurisdiction where recognition and enforcement is sought, which is often different from the seat of the arbitral tribunal, it nonetheless adopts the same default rule in the absence of a designation of the applicable law by the parties. It is the law of the country where the award was made that applies and not, for instance, the law of the country where recognition and enforcement is sought. 34

The question arises whether the UNCITRAL Model Law and the New York Convention contradict the rule adopted in jurisdictions such as England where, in cases in which the parties have specified the law governing the contract, this law also governs the arbitration agreement unless otherwise specified. 35 However, this does not seem to be the case since the two positions can be reconciled: if the parties have specified the law governing the contract, this law also governs the arbitration agreement unless otherwise specified; however, if the parties have not specified the law governing the contract, the arbitration agreement may be considered to be governed by the law of the country where the award is made and its validity is determined according to this law. 36

As to the law governing a party's capacity to enter into an arbitration agreement, both the UNCITRAL Model Law and

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32. Id. art. VI (1)(a).
33. Unlike the UNCITRAL Model Law, the New York Convention specifically refers to "the law applicable" to each party in arbitration.
34. The law of the latter jurisdiction is relevant only with respect to certain fundamental issues such as arbitrability and public policy. See New York Convention, supra note 8, art. V(2) (stating additional grounds for refusal to recognize and enforce an arbitral award).
36. In practice, this may lead to a dépeçage between the law governing the contract and the law governing the arbitration agreement, depending on the conflict rule applied to the former. See infra note 49 and accompanying text (discussing instances of "systemic" dépeçage).
the New York Convention envisage that the governing law will be the law applicable to the party in question.

B. Dallal v. Bank Mellat

The validity, or indeed the existence, of an arbitration agreement arose as an issue for the first time in a context analogous to investment treaty arbitration in Dallal v. Bank Mellat, which involved a challenge before English courts of an arbitral award rendered by the Iran-United States Claims Tribunal. While the Algiers Accords, which established the Tribunal, cannot be considered an ordinary investment treaty in the sense that they were concluded only after the claims which fell within the Tribunal’s jurisdiction had already arisen, the jurisdictional, procedural and substantive aspects of the Tribunal process are in many respects similar to investment treaty arbitration. Like a modern bilateral investment treaty, the Algiers Accords provide for the arbitration of private claims against a foreign state before an international tribunal to which private parties have direct access. They also provide for arbitration under UNCTRAL Arbitration Rules (as amended by the Tribunal)—a set of arbitration rules often available under both multilateral and bilateral investment treaties. And finally, the Algiers Accords establish causes of action that are similar to those available under modern investment treaties. In these circumstances, it is hardly surprising that the Tribunal’s awards are frequently referred to as precedents in modern investment treaty arbitration.

38. Id. at 441.
40. The principal difference being that the Algiers Accords provided retroactive investment protection, in that the State parties entered into the Accords only after the disputes had already arisen.
41. See generally Christopher Gibson & Christopher Drahozal, The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration (2007) (discussing Tribunal precedents relevant for investment arbitration); Maurizio Brunetti, The Iran-United States Claims Tribunal, NAFTA Chapter 11 and the Doctrine of Indirect Expro-
Dallal v. Bank Mellat involved an action brought before English courts by a plaintiff who had seen his claim for damages in respect to two dishonored checks dismissed by the Tribunal.\(^4\) The Tribunal had concluded that the checks constituted an "exchange contract," and because the contracts did not comply with Iranian foreign exchange regulations, the Tribunal found them invalid under Article VIII, section 2(b) of the Articles of Agreement of the International Monetary Fund.\(^5\) The plaintiff then commenced proceedings before English courts against Bank Mellat, the successor of the International Bank of Iran, which had been, together with the Islamic Republic of Iran, the defendant before the Tribunal. The issue before the English courts was whether the Tribunal’s award should be recognized as res judicata before English courts and, accordingly, whether the plaintiff’s action constituted an abuse of process.

The Court noted that the answer to this question depended in the first place on whether there was a valid agreement to arbitrate, which in turn depended on the law applicable to the arbitration agreement. The defendant sought to argue that this law was the law of the Netherlands since the claimant had requested that the dispute be referred to arbitration by the Tribunal, which effectively amounted to an arbitration agreement. The Court did not reject this argument out of hand, noting that the proper law of any arbitration agreement in the proper sense would have been Dutch law. However, the Court noted that this approach was problematic because, under Dutch law, the agreement would have to be considered null and void for failure to comply with Article 623 of the Dutch Code of Civil Procedure.\(^6\) The

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5. See International Monetary Fund [IMF], Agreement of the International Monetary Fund, art. VIII, § 2(b), Dec. 27, 1945, www.imf.org/external/pubs/ft/aa/index.htm. “Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.” Id.

Court dismissed the defendant's further argument that the arbitration agreement was governed by public international law:

The defendants sought to argue further that the proper law of the arbitration agreement might be public international law. But what I am concerned with here at this point of the argument is not an agreement between states but an agreement between private law individuals who are nationals of those states. If private law rights are to exist they must exist as part of some municipal legal system and public international law is not such a system. If public international law is to play a role in providing the governing law which gives an agreement between private law individuals legal force, it has to do so by having been absorbed into some system of municipal law. Therefore the defendant's argument did not provide them with an escape from the necessity to identify the municipal legal system which was the proper law of the agreement to arbitrate.45

The Court also dismissed the plaintiff's argument that the Algiers Accords established a scheme for consensual private law arbitration. In the Court's view, the arbitration process set up by the state parties bore, in origin, "a closer resemblance to what in municipal law would be described as statutory arbitration."46 In such arbitration, the arbitral tribunal and its jurisdiction are not defined by an agreement between the parties but by the statute itself, and this is what the Court considered was in fact the case with the Hague Tribunal. Indeed, the arbitration proceedings in The Hague were recognized as competent not only by the Algiers Accords—an international treaty—but also by the municipal laws of the states parties to the treaty.47 In these circumstances, the traditional rule of English private international law (to the effect that, in the absence of a designation by the parties, the law governing the arbitration agreement was the law of the seat of the arbitral tribunal) could not apply:

It is a fallacy to suppose that arbitral proceedings must take their authority from the local municipal law of the country within which they take place. It is of course overwhelmingly the normal position that they do acquire their validity and competence from that source. The curial law is normally but not necessarily the law of the place where the arbitration proceedings are held . . . Whilst English law, like most foreign legal systems, may seek to exercise some measure of control over arbitration proceedings taking place in this country whatever their curial law, English law does not deny the possibility of a different curial law. There is no reason in principle why the curial law of a

45. Id.
46. Id. at 460.
47. Id.
tribunal cannot derive concurrently from more than one system of municipal law. There may be problems involved in the municipal law recognition as between private parties of proceedings which exist solely at a supra-national level and have no relationship at all to any system of municipal law . . . In the present case there are two systems of municipal law with the requisite international competence which give validity to the arbitration proceedings. There is no reason in principle why that validity should not be recognized by the English courts.48

The Court effectively considered that the agreement to arbitrate was governed by two different laws—by U.S. law regarding the claimant and by Iranian law regarding the respondent. Thus it was implicit in the Court’s reasoning that this was a case of splitting or bifurcation of applicable laws or, in more technical private international law terms, a case of dépeçage.49

48. Id. at 461 (citations omitted).

49. See BLACK’S LAW DICTIONARY (6th ed. 1990) (defining “depeçage” as the “process whereby different issues in a single case arising out of a single set of facts are decided according to the law of different states.”) Also known as “picking and choosing” in the United States, dépeçage entails a consideration of “issues on which there is disagreement among the contact states over which rule of law is applicable to each issue.” Id. (citations omitted); see, e.g., Willis L.M. Reese, Dépeçage: A Common Phenomenon in Choice of Law, 73 COL L. REV. 58 (1973).

Th[e] process of applying the rules of different states to determine different issues has the forbidding name of dépeçage, although it is sometimes more colloquially referred to as ‘picking-and-choosing’ . . . Dépeçage can be defined broadly to cover all situations where the rules of different states are applied to govern different issues in the same case. It can be defined more narrowly to be present only when the rules of different states are applied to govern different substantive issues, and the most restrictive definition would confine the term to situations where by applying the rules of different states to different issues a result is reached which could not be obtained by exclusive application of the law of any of the states concerned.

Reese, supra, at 58.

These, the “forbidding name” of dépeçage, in particular in its most restrictive definition, reflects its equally forbidding substance—a sort of Frankensteinian figure composed of body parts originating from different jurisdictions and imbued with life only after its creation.

Dépeçage is accepted in the Rome Convention on the Law Applicable to Contractual Obligations and considered as an aspect of the parties’ freedom of choosing the applicable law. See Rome Convention on the Law Applicable to Contractual Obligations, art. 3(1), June 19, 1980, 19 I.L.M. 1492 (stating a “contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.”) (emphasis added)). The Convention further states that “[t]o the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely
The Court concluded that, by submitting his claim to the Tribunal, Mr. Dallal had drawn on that treaty, as transformed into the municipal law of the United States, and had thus voluntarily submitted himself to the jurisdiction of the Tribunal "with the consent of his sovereign."  

In the present case Mr. Dallal chose to resort to The Hague Tribunal and thereby submitted to its jurisdiction. It is not now open to him to say that it was incompetent. It was Mr. Dallal's voluntary act to commence the proceedings before The Hague Tribunal. It is true that he may have had no other alternative under the law of the United States if he wished to pursue his rights as he saw them. But that does not make it any the less a voluntary act.

C. Occidental Exploration & Production Co. v. Ecuador

The law governing the arbitration agreement in the context of investment treaty arbitration came up again in the setting aside proceedings relating to Occidental Exploration & Production Co. v. Ecuador, an UNCITRAL arbitration that had been conducted in London to hear Occidental's claims arising out of the Ecuador-U.S. Bilateral Investment Treaty (Ecuador-U.S. BIT). Following Ecuador's challenge to the arbitral award before English courts, Occidental opposed the action mainly on the basis that it raised non-justiciable issues because it required English courts to interpret and enforce the terms of an international treaty to which the United Kingdom was not a party. The High Court quickly disposed of the issue of the law governing the arbitration agreement, noting that this agreement was "contained in the BIT itself," and that it was logical that "the arbitration agreement which is based on the BIT is also governed by the same law." This "same law" was, evidently, public international law.

On appeal, the Court of Appeal noted that the law governing the arbitration agreement was in issue before it, although

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51. Id. at 460-461.
52. Occidental Exploration & Production Co. v. Ecuador, UNCITRAL Case No. UN 3467, Final Award (July 1, 2004).
53. See id.
neither side suggested that the answer was “crucial” to its case.\textsuperscript{55} Turning to the substance of the question, the court noted that the agreement to arbitrate which resulted from the treaty “is not itself a treaty” but rather “an agreement between a private investor on the one side and the relevant state on the other.”\textsuperscript{56} The Court went on to analyze the implications of this construction:

The question may then arise: under what law is that agreement to arbitrate to be regarded as subject, applying the principles of private international law of the English forum? Mr. Lloyd Jones [counsel for Ecuador] argues that the arbitration agreement coming into existence between Occidental and Ecuador is subject to Ecuadorian law (with matters of procedure being subject to the law of England as the place of arbitration). His proposition is that Ecuadorian law has the closest and most real connection with any agreement to arbitrate between a U.S. investor and Ecuador . . . . He points out that UNCITRAL article 1(2) contemplates that there may be ‘provisions of the law applicable to the arbitration from which the parties cannot derogate,’ and that the normal position with arbitration agreements is that they are subject to some national law. But, dramatic though the expansion has been in recent years in the number of bilateral investment treaties, there is very limited authority anywhere on the nature or effect of arbitrations under such treaties. It is common ground that English private international law recognises an agreement to arbitrate substantive issues such as the present according to international law . . . and it is also clear that the present is such . . . All this being so, we would be minded to accept that, under English private international law principles, the agreement to arbitrate may itself be subject to international law, as it may be subject to foreign law.\textsuperscript{57}

The Court noted that, in the present case, the agreement to arbitrate was “closely connected with the international Treaty which contemplated its making, and which contain[ed] the provisions defining the scope of the arbitrators’ jurisdiction.”\textsuperscript{58} Moreover, in the Court’s view, “the protection of investors at which the whole scheme is aimed at is likely to be better served if the agreement to arbitrate is subject to international law, rather than to the law of the state against which an investor is arbitrating.”\textsuperscript{59} All this pointed towards accepting international law as the law governing the arbitration agreement.

\textsuperscript{56} Id. para. 33.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
The Court then went on to consider the implications of Dal-lal v. Bank Mellat.60 The Court indicated that it had "reserva-
tions" about the judgment inasmuch as it had suggested that any
agreement to arbitrate must be subject to municipal law. In the
Court's view, an agreement to arbitrate could also be subject to
international law, in particular in the context of investment
treaty arbitration. However, the court eventually hesitated as to
whether this conclusion was justified in the circumstances:

[I]f [making an agreement to arbitrate subject to international law
was] not possible and under any such agreement must, under English
private international law, be subject to a municipal law, then, since
the present agreement was clearly intended to be binding, it must be
subject to Ecuadorian or U.S. law. There is no reason to doubt that it
would be valid and enforceable as intended under either or both of
these laws. But, bearing in mind that it would be an agreement by a
U.S. investor relating to an investment in Ecuador and to an alleged
breach of duty by Ecuador towards the investor in Ecuador, we
would (on the present hypothesis) accept Mr Lloyd's submission that
the governing law would be that of Ecuador.61

The Court concluded that "ultimately" it did not matter
what law governed the agreement to arbitrate since the issue
before the Court was whether it could entertain a challenge to
the Arbitral Tribunal's jurisdiction, and this issue did not de-
pend "critically" on whether or not the agreement to arbitrate
was subject to international law or Ecuadorian law. The Court
did stress however that its "preferred view" was that the agree-
ment to arbitrate was subject to international law.62

While the Court did not elaborate on the legal basis of its
"preferred view," simply noting that it appeared "clear" that the
arbitration agreement was governed by international law, it ap-
ppears to have applied the presumption under English law to the
effect that, if the parties have specified the law governing the
contract, this law also governs the arbitration agreement. In the
present case, although the dispute arose under an investment
treaty and not a contract, and although the state parties to the
treaty had not designated the law governing the treaty, it was
evident that the treaty--a source of public international law--was
governed by public international law. Applying by analogy the

62. Id. para. 41.
English law presumption, this would lead to the conclusion that, in the absence of any indication by the parties to the contrary, the agreement to arbitrate was also governed by international law. However, the Court hesitated to take a firm view on the matter and eventually left the issue open. Perhaps rightly so, since as the Court noted, whereas the agreement to arbitrate was between a private investor and a state, one of them—the private investor—was not a party to the treaty.\(^{63}\) Accordingly, as the Court also noted, in these circumstances the agreement to arbitrate which resulted by following the Treaty could not itself be a treaty.\(^{64}\) In other words, the agreement to arbitrate was not only *severable* but in fact *severed—dépecé*—from the main "contract," that is, the treaty.

Unlike the treaty, the agreement to arbitrate was not negotiated at arm's length between the parties but consisted of two distinct and separate legal acts: the consent of the state as expressed in the Ecuador-U.S. BIT, and the acceptance of that consent by the investor in its request for arbitration. In other words, there was no privity of contract between the parties and accordingly no agreement to arbitrate in any contractual sense; the agreement to arbitrate was a construction or an understanding rather than a negotiated contract. While it appears rather obvious, as noted above, that the state's consent in this construction, expressed as it was in a treaty, is governed by public international law, it is less than obvious which law governs the investor's acceptance of that consent. A request for arbitration can hardly be considered a source or evidence of public international law and the arbitration procedure it triggers is, as a procedure, a private rather than public dispute settlement proceeding.

It is indeed the uncertainty about the law governing the investor's consent to arbitrate that might explain the Court's hesitation between international law and the law of Ecuador as alternative governing laws. While the Court did not deal with the law governing the investor's consent explicitly, it did acknowledge that an alternative analysis focusing on the law governing the investor might be available under English private international law. In the Court's view, under such an alternative analysis the proper law of the arbitration agreement would have to be Ecuadorian law because such an agreement "would be an

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63. *Id.* para. 33.
64. *Id.*
agreement by a United States investor relating to an investment in Ecuador and to an alleged breach of duty by Ecuador towards the investor in Ecuador.”

However, while this analysis seems on its face plausible, it does not necessarily stand closer scrutiny, for two different reasons. First, it seems based on the ultimately untenable presumption that the agreement to arbitrate between Occidental and Ecuador already existed at the time when Occidental made its investment in Ecuador, and when the alleged breach of the treaty by the state occurred. But, as a matter of fact, this could not have been the case, because there was no agreement to arbitrate between the state and the investor until the state’s offer to arbitrate was accepted by the investor, which, as noted above, occurred only when the request for arbitration was filed. Accordingly, it seems less than plausible that the determination of the law governing the investor’s consent, as expressed in the request for arbitration, can be based on criteria such as the place of the investment or locus of the breach, except by way of a retrospective construction. Second, and in more substantive terms, such an analysis also seems based on a mischaracterization of the issue at hand. Namely, it is arguable that the issue before the Court, if properly characterized, was not the validity, interpretation or effect of the arbitration agreement, but rather the capacity of the investor to draw on a foreign state’s consent to arbitrate pursuant to a bilateral investment treaty. While the state has the sovereign capacity to express its consent to ar-

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65. Id. para. 35.
66. It is a standard construction that the investor’s consent to arbitrate is given in the request for arbitration. This approach was adopted for the first time in Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, paras. 18-24 (27 June 1990). See also Ceskoslovensko Obchodni Banka, A.S. v. Slovakia, ICSID Case No. ARB/97/4, Jurisdiction, para. 18 (May 24, 1999).

Since the Claimant by its Request for Arbitration, dated April 18, 1997, submitted the instant dispute to ICSID, Claimant would be deemed to have accepted ICSID jurisdiction on that date, Respondent having already unequivocally consented to it. The exchange of consents in this form would satisfy the requirement of a ‘written consent’ under Article 25(1) of the ICSID Convention. This type of consent has been accepted as a valid submission to the Centre’s jurisdiction in the first case brought by an investor under a bilateral investment treaty, and has found acceptance in subsequent practice.

Id.
67. See BLACK’S LAW DICTIONARY (6th ed.) (defining “capacity” as legal qualification (i.e. legal age), competency, power or fitness). “Capacity to sue” is defined as
bitrate in a treaty, a private investor is neither a party to the treaty nor, as a matter of principle, capable of acting as a subject of public international law. From where, then, does such capacity come?

As noted above, it is generally accepted in private international law that a party's capacity to enter into an arbitration agreement is governed by the personal law of the party in question. While different jurisdictions have adopted different rules of private international law to deal with the issue, the personal law is usually the law governing the party's nationality, or domicile in the case of natural persons, or the place of incorporation or principal place of business (siège social) in cases of legal entities. Based on such a proper law analysis, it is arguable and indeed evident that, in the circumstances of Occidental, the law governing the investor's consent to arbitrate could not have been the law of Ecuador. The governing law could only have been U.S. law because Occidental was incorporated and had its principal place of business in the United States. On the other hand, the U.S. law that arguably established the investor's capacity to enter into an arbitration agreement with Ecuador pursuant to the Ecuador-U.S. BIT, could only have been the Ecuador-U.S. BIT itself, as ratified by the U.S. government and implemented as domestic U.S. law, following the proper legislative procedure, including the advice and consent of the Senate. Like any other U.S. national, Occidental could validly invoke Ecuador's consent to arbitrate as expressed in the Ecuador-U.S. BIT only if this treaty was first ratified and implemented as the investor's proper, U.S. law. If the U.S. government had not ratified the treaty, and, accordingly, the treaty had not become part of U.S. law, it would hardly be arguable that the investor could

"the legal ability of a particular individual or entity to sue in, or to be brought into, the courts of a forum." Id.

68. See supra note 27 and accompanying text (noting personal law governs a party's capacity).

69. See supra note 27 and accompanying text.


71. For the purposes of this analysis, it does not matter whether bilateral investment treaties are considered "self-executing" under U.S. law.
have validly brought an arbitration claim against Ecuador under the treaty, that is, without the “consent of [its] sovereign.”

The Court addressed these issues, albeit indirectly, when it considered whether the investment treaty created “direct rights” for private parties to bring an action on the international plane. The Court concluded that they did, noting that “[the] language [of the treaty] makes clear that injured nationals or companies are to have a direct claim for their own benefit in respect of all three types of [investment disputes specified in the treaty].” However, the question of whether an investment treaty creates a direct right for an investor to bring an international law claim is not the same issue as its capacity to enter into an arbitration agreement and, consequently, the validity, interpretation and effect of its consent to arbitrate. In other words, the investor’s standing to bring such a direct claim is a consequence of its capacity to enter into a valid arbitration agreement, and whether the investor’s consent to arbitrate is valid depends in turn on the law governing its capacity to enter into an arbitration agreement. This reasoning leads to the conclusion that, unlike the state’s consent, the investor’s consent to arbitrate is arguably always given under domestic law. This is effectively what the court concluded in Dallal v. Bank Mellat.

This is the case even when the treaty is interpreted so as to create a direct right for a private party to bring an international

72. Dallal v. Bank Mellat, [1986] Q.B. 441, 551; see also supra note 50 and accompanying text. Art. XII of the Ecuador-United States Bilateral Treaty provides that it “shall enter into force thirty days after the date of exchange instruments of ratification.” Ecuador Bilateral Investment Treaty, U.S.-Ecuador, art. XII, May 11, 1997, S. Treaty Doc. No. 103-15. The vast majority of bilateral investment treaties enter into force when domestic requirements are completed. Some treaties provide, however, that they enter into force upon signature. See United Nations Conference on Trade and Development: The Entry into Force of Bilateral Investment Treaties (BITs), IIA Monitor No. 3, UNCTAD/WEB/ITE/IIA/2006/9, available at http://www.unctad.org. Compare this with Ceskoslovensko Obchodni Banka, where the Arbitral Tribunal did not allow the claim to proceed under the bilateral investment treaty because the exchange of notices between States parties to the treaty concerning the completion of the constitutional formalities required for the treaty to enter into force had not taken place. ICSID Case No. ARB/97/04, Decision on Jurisdiction, para. 43 (May 24, 1999). The Tribunal concluded the entry into force of the treaty had not been proven. Id.


74. See supra notes 49-51 and accompanying text (summarizing holding of Dallal v. Bank Mellat).
FORBIDDING DÉPEÇAGE

law claim, regardless of whether the treaty in question requires transformation into the private party's own proper law in order to become effective. It is precisely the direct effect of such a treaty—that is, its being part of the investor's proper law without transformation—that establishes the capacity of the investor to bring an international claim. Accordingly, the investor's consent to arbitrate is given, in this instance as well, under its own law rather than directly under international law. Consequently, there is, in such a case, another type of dépeçage in the narrow sense of the term, that is, in the sense of dépeçage of the law governing the agreement to arbitrate itself.\footnote{See supra note 49 (defining dépeçage).} While the state's consent to arbitrate is governed by international law, the investor's acceptance of that consent is, as a matter of principle, governed by its own proper or personal law.

Obviously, such an analysis remains in the end conceptual, that is, methodological, rather than an exposition of positive law. The question of whether such a dépeçage of the law governing the arbitration agreement may be accepted in practice, that is, in the context of any particular case, ultimately depends on the applicable rules of private international law. As to the particular case of Occidental, it is understood that dépeçage, as a matter of principle, is available and accepted under English private international law.\footnote{See Dicey et al., supra note 26, at 1555-58; North & Fawcett, supra note 27, at 56-57. In a broader sense, dépeçage is a reflection of the principle of party autonomy and as such may be considered the "source" of private international law. See Institut de Droit Int'l, The Autonomy of the Parties in International Contracts Between Private Persons or Entities art. 7 (1991) ("The parties may choose the law to be applied to the whole or to one or more parts of the contract.").} However, as the Court in Occidental noted, the law governing the agreement to arbitrate was in that case not critical for the outcome—no doubt a principal reason the Court did not delve into the issue at length or in depth. The above analysis of the Court's reasoning must be understood in this light—as a pretext rather than as a context for elaborating on a theory of the law governing a private investor's consent to arbitrate pursuant to an investment treaty.

D. Arbitral Jurisprudence

The law governing the arbitration agreement has not frequently arisen as an issue before international arbitral tribunals,
presumably because, in the absence of privity, very little in terms of the circumstances of the conclusion of the agreement can be presented as evidence to challenge the validity of the arbitration agreement or the capacity of the investor to enter into such an agreement. The author is aware of only one case (unpublished) where the issue might have come up, and this was because the ad hoc investment treaty that was concluded by the respective state parties to protect the particular investment agreement at issue was not ratified by the investor’s home state. However, because the investment was also protected by way of a direct contractual arrangement between the investor and the host state which also contained an arbitration clause, any dispute relating to the law governing the investor’s agreement to arbitrate was effectively pre-empted.77

Generally, investment arbitration tribunals have hardly commented on the issue, except by way of obiter dictum.78 Among the published cases, the sole exception appears to have been Amco v. Indonesia,79 the resubmitted case, where the respondent objected to the jurisdiction ratione personae of the Arbitral Tribunal on the basis that Amco Asia, the company that appeared as the claimant in the first phase of the arbitration, had been dissolved under the laws of Delaware (which was the company’s personal law) after the rendering of the first award.80 A different company, bearing the name of Amco Asia Corporation, had then been incorporated under the laws of the same state, and the respondent contended that it was this company that now appeared as the claimant in the second phase of the arbitration. The claimant denied that this was the case, and that it was the same claimant that continued to exist for the purposes of the arbitration.

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77. See supra note 27 (discussing and citing to unpublished case). The author acted as counsel for the host State in the arbitration, which was conducted under the ICC Arbitration Rules. See supra note 27 (describing the case).

78. See Ceskoslovensko Obchodni Banka, A.S. v. Slovakia, ICSID Case No. ARB/97/04, Decision on Jurisdiction, para. 35 (May 24, 1999). “The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out on Article 25(1) of the ICSID Convention.” Id.


80. Id. para. 99.
However, while the parties agreed that the law that governed Amco Asia’s dissolution was the law of Delaware, they disagreed on the effect of the claimant’s dissolution on the arbitration. Indonesia suggested that a distinction should be made between the dissolution of the claimant company and the legal effect of such dissolution on the holder of rights and duties under the arbitration agreement, and that the latter issue was governed by Indonesian law under Article 42(1) of the ICSID Convention. The Arbitral Tribunal disagreed stating:

The Tribunal does not believe that the distinction put forward by Indonesia leads to the conclusion that Indonesian law should apply. Nor does the Tribunal find it necessary to pronounce upon the respective place of Indonesian law and international law in Article 42(1) of the ICSID Convention . . . Indonesia stated in its Supplementary Submissions on Jurisdiction of February 23, 1988, at p. 17: “Generally speaking, the question of whether a corporation has been terminated or suspended is determined by the local law of the state of incorporation . . . . The analysis would not be different under Indonesian law.” In the view of the Tribunal, the same rule applies to the question of whether that corporation is still an existing legal entity for a particular purpose. The rule as it applies to the effect of dissolution should not be different from the rule applied, in international contracts, to the effect of creation of such a corporation. When a company enters into an agreement with a foreign legal person, the legal status and capacity of that company is determined by the law of the state of incorporation. Similarly, one should apply the law of the state of incorporation to determine whether such a company, though dissolved, is still an existing legal entity for any specified legal purpose.81

Thus the Arbitral Tribunal confirmed that the private investor’s legal status and capacity are governed by its personal law, in this particular case by the law of its incorporation. On this basis, the Arbitral Tribunal found that the claimant company continued to exist for the purpose of arbitration and that the Tribunal accordingly had jurisdiction ratione personae over the dissolved claimant.

IV. THE RELEVANCE OF DÉPEÇAGE IN INTERNATIONAL INVESTMENT ARBITRATION

The relevance of dépeçage in investment treaty arbitration is by no means limited to the law governing the arbitration agreement. Indeed, international arbitration, as a field of legal practice, is based on a certain “systemic” dépeçage: the laws ap-

81. Id. paras. 103-04 (emphasis added).
 applicable to the arbitration agreement, the arbitral proceedings, the arbitral tribunal, and finally, the merits of the claim or the subject matter of the dispute are frequently different in one respect, if not in several respects. In other words, dépeçage in the broad sense is inherent in the very nature of international arbitration as a legal practice. This is in particular the case with respect to international investment arbitration, which usually raises a mixed set of issues under both public and private international law.82

But quite apart from such “systemic” dépeçage, the bifurcation or splitting of applicable laws also tends to arise as an issue within each of these fields. For example, it arises not only within the law governing the arbitration agreement, but also within the law governing the arbitral proceedings, the law governing the arbitral tribunal, and the law governing the merits of the claim, or the subject matter of the dispute.

As the above analysis of Dallal and Occidental suggests, dépeçage tends to arise as an issue in the context of the law governing the arbitration agreement. Similarly, it also tends to arise as an issue in the context of the arbitral proceedings. Depending on the parties’ choice of the law governing the arbitral proceedings—or rather, depending on the investor’s selection of the arbitration rules under which it chooses to bring its case against the host state (which typically involves a choice between the ICSID option and ad hoc arbitration under the UNCITRAL Arbitration Rules)—the arbitration proceedings may or may not be subject to the mandatory rules of the seat of the arbitral tribunal. If the investor chooses ICSID arbitration, the arbitration will be effectively subject to public international law, since all the relevant players, including the Centre, its property and assets, the arbitrators, members of the ad hoc committee, the officers and employees of the Secretariat, and others involved in the process, enjoy immunity from legal process in relation to the exercise of their functions.83 In these circumstances the arbitra-

82. See Zachary Douglas, The Hybrid Foundations of Investment Treaty Arbitration, 74 BRIT. YB. INT’L L. 151, 152 (2004) (“The analytical challenge presented by the investment treaty regime for the arbitration of investment disputes is that it cannot be adequately rationalized either as a form of public international or private transnational dispute resolution.” (footnote omitted)).

83. ICSID Convention, supra note 4, arts. 19-21; see also State Contracts and International Arbitration, supra note 3, at 13 (“[An ICSID tribunal] is a truly international tribunal which the contracting States have created for themselves and their
tion law of the seat will be of no relevance in the proceedings. If, however, the investor chooses any of the other alternatives, such as arbitration under the UNCITRAL Arbitration Rules, the arbitration law of the seat will form part of the procedural law that the arbitral tribunal is called upon to consider when conducting the proceedings. As a result, depending on the investor's choice of the applicable arbitration rules, the proceedings will be bifurcated accordingly (procedural dépeçage).

Similarly, depending on the investor's choice of the applicable arbitration rules, the arbitral tribunal itself may or may not be subject to the supervisory powers of the courts of the seat. Again, if the investor chooses to initiate an ICSID arbitration, the arbitral tribunal will operate as a quasi-international tribunal and accordingly the arbitral award may be challenged only before an ICSID annulment committee; no recourse is available to the courts of the seat. On the other hand, if the investor chooses to bring the arbitration under the UNCITRAL Arbitration Rules or any other non-ICSID arbitration rules, recent practice suggests that the courts of the seat will consider themselves competent to review the arbitral award within the limits of the local international arbitration law. Again, depending on the choice of the investor, there will be a jurisdictional dépeçage, i.e., separation between international and domestic jurisdiction.

Finally, a dépeçage of the governing law may also arise in the context of the merits of the claim. Indeed, this is implicit, for instance, in the language of Article 42(1) of the ICSID Convention, which sets out the substantive law applicable before an ICSID tribunal:

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85. See ICSID Convention, supra note 4, art. 53(1) (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”)

86. In recent years, courts in the United States, Canada, England, Sweden, Switzerland, and France have considered themselves competent to review non-ICSID investment treaty awards. See Matthias Scherer, Veijo Heiskanen & Sam Moss, Domestic Review of Investment Treaty Arbitrations: The Swiss Experience, 27 ASA BULLETIN (forthcoming 2009).
The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.87

While the language of Article 42 of the ICSID Convention (inasmuch as it refers to “such rules of law as may be agreed by the parties”) reflects the paradigm of foreign investment that was current at the time of its drafting (one based on arm’s length investment contracts between the state and the foreign investor), it envisages that, in the absence of an agreement on the applicable law between the parties, two different laws—the law of the host state and international law—may apply. Thus, the provision also reflects the context of investment treaty arbitration, where typically there are no “rules of law as may be agreed by the parties;” the only relevant laws are international law (specifically the investment treaty) and the law of the host state.

While Article 42 of the ICSID Convention does not explicitly say so, it implies that there may be conflicts not only between the law of the host state and the rules of law as agreed to be applicable by the parties—which typically tend to arise in the context of state contract arbitration—but also between international law and the law of the host state. It is the latter types of conflicts that are typical in the context of investment treaty arbitration. In practice, such conflicts tend to arise between the state’s international law obligations under the investment treaty in question and the state’s own domestic law because of the way in which the parties tend to argue their case. While the investor’s claims are typically based on the standards of investment protection embodied in the applicable investment treaty, this does not necessarily mean that the arbitral tribunal will always be able to resolve the investor’s claims solely on the basis of the relevant provisions of the treaty. Respondent states typically raise as defenses arguments based on their own domestic law, which may result in a conflict of laws between the provisions of the treaty and the law of the host state. Thus, another form of dépeçage—that between applicable substantive laws—may arise in such a context. Moreover, unlike the dépeçage of the law governing the arbitration agreement and the other forms of dépeçage outlined above, such a substantive dépeçage is more

87. ICSID Convention, supra note 4, art. 42(1).
problematic in that it rarely amounts to a "false conflict." In other words, it tends to create a conflict of laws that must be resolved by the arbitral tribunal for it to be able to adjudicate the merits of the claim and to settle the subject matter of dispute.

Both state contract arbitrations and investment treaty arbitrations tend to raise such conflict of laws issues; if anything, the emergence of investment treaty arbitration has augmented the incidence of such conflicts rather than reduced it. What is noteworthy, conceptually speaking, about these conflicts is that they do not arise before a local court. They are conflicts arising before an international tribunal, or perhaps more accurately, given the dépeçage of the law governing the arbitration agreement, before quasi-international or transnational tribunals. The conflict rules applicable before such tribunals are, by definition, not part of any domestic law and accordingly constitute a regime of conflict rules that is separate from private international law.

It would go beyond the scope of the present paper to consider in detail such conflict rules. Let me take just one—but important—example of such a conflict rule. This rule has been expressed in different terms in different contexts, perhaps the broadest version stating that a state cannot invoke its own domestic law in order to avoid its international obligations. In its

88. See North & Fawcett, supra note 27, at 32 (false conflict exists when different applicable laws produce same result).

89. Such a tribunal may be appropriately characterized as "quasi-international" or "transnational" in the sense that the consent to arbitrate of one of the parties—the investor—is subject to the personal law (i.e. domestic law) of that party.

90. I have elsewhere tried to elaborate these rules and, in that context, termed this regime as "transnational law," borrowing a term coined by Philip Jessup and using it in a narrower and more technical sense. See Veijo Heiskanen, International Legal Topics 102-27 (1992). Reflecting the time when the book was written and published (before the emergence of investment treaty arbitration), I concluded that:

[t]he rules of transnational law typically operate as a regime of rules which determine the competence of international arbitral tribunals in settling claims and disputes arising out of the performance of international (or 'transnational') economic obligations, both between states and states and other international actors, private and public (so called 'state contracts').

Id. at 123 n.119.

general form the rule dates back to the dawn of international arbitration in the late 19th and the early 20th century. The rule was endorsed, apparently for the first time in international arbitration, in the Alabama Claims Arbitration\textsuperscript{92} between the United States and the Great Britain in 1872.\textsuperscript{93} It was subsequently cited in a number of other well-known international ad hoc arbitrations such as Affaire des réclamations françaises contre le Pérou,\textsuperscript{94} the Pious Fund of Californias,\textsuperscript{95} the Norwegian Shipowners’ Claims,\textsuperscript{96} the Schufeldt Claim,\textsuperscript{97} and the George Pinson Claim.\textsuperscript{98} It was eventually endorsed and institutionalized as a general rule of international law in a series of decisions taken by

\begin{itemize}
\item \textsuperscript{92} The Alabama Arbitration (Award), 145 Consolidated Treaty Series 99 (1872-1873)
\item \textsuperscript{93} Id. “And Whereas, the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of the insufficiency of the legal means of action which it professed . . . .” Id. at 103.
\item \textsuperscript{94} Affaire des réclamations françaises contre le Pérou, (Fr. v. Peru) 1 U.N.R.I.A.A. 215, 219 (Award of 11 Oct. 1920) (“Attendu qu’il importe peu qu’une loi péruvienne du 26 octobre 1896, ait déclaré ‘nuls tous les actes d’administration intérieure accomplis par Nicolas de Pérola,’ cette loi ne pouvant être opposée à des étrangers qui ont traité de bonne foi.”).
\item \textsuperscript{95} Pious Fund of Californias (U.S. v. Mex.), ix U.N.R.I.A.A. 11, 13 (Sentence arbitrale du 14 octobre 1902)
\begin{quote}
Considérant que, depuis 1869, trente-trois annuités n’ont pas été payées par le Gouvernement des Etats-Unis Mexicains au Gouvernement des Etats-Unis d’Amérique et que les règles de la prescription, étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux Etats en litige . . . .
\end{quote}
\item \textsuperscript{96} Norwegian Shipowners’ Claims (Nor. v. U.S.), 1 U.N.R.I.A.A. 308 (1922). [The Tribunal cannot agree with . . . . with the contention of the United States that it should be governed by American Statutes whenever the United States claim jurisdiction. The Tribunal is at liberty to examine if these Statutes are consistent with the equality of the two Contracting Parties, with Treaties passed by the United States, or with well established principles of international law, including the customary law and the practice of the judges in other international courts.
\item \textsuperscript{97} Schufeldt Claim (U.S. v. Gua.), 2 U.N.R.I.A.A. 1079, 1095 (1930). [It is perfectly competent for the Government of Guatemala to enact any decree they like and for any reason they see fit, and such reasons are no concern of this Tribunal. But this Tribunal is only concerned where such a decree, passed even on the best of grounds, works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and can not invoke any municipal law to justify their refusal to do so.
\item \textsuperscript{98} George Pinson (Fr. v. Mex.), 5 U.N.R.I.A.A. 327 (1952). “Il est incontesté . . . . que le droit international est supérieur au droit interne.” Id. at 393.
\end{itemize}
the Permanent Court of International Justice and its successor, the International Court of Justice, including the *SS Wimbledon*,\(^9\) *Certain German Interests in Polish Upper Silesia*,\(^10\) Jurisdiction of the Courts of Danzig,\(^1\) *The Greco-Bulgarian “Communities,”*\(^2\) *Polish Nationals in Danzig*,\(^3\) Free Zones

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In any case a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. . . Germany was perfectly free to declare and regulate her neutrality in the Russo-Polish War, but subject to the condition that she respected and maintained intact the contractual obligations which she entered into at Versailles on June 28th, 1919.

*Id.*

\(^10\) Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 33 (May 25) (“Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals.”); *see also* Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia), 1933 P.C.I.J. (ser. A/B) No. 61, at 243 (Dec. 15).

[T]he Court has on several occasions, and particularly in its Judgment of May 25th, 1926 (Judgment No. 7), expressed the opinion that a measure prohibited by an international agreement cannot become lawful under that instrument simply by reason of the fact that the State concerned also applies the measures to its own nationals.

*Id.*


If . . . Poland would contend that the Danzig Courts could not apply the provisions of the *Beamtenabkommen* because they were not duly inserted in the Polish national law, the Court would have to observe that, at any rate, Poland could not avail herself of an objection which, according to the construction placed upon the *Beamtenabkommen* by the Court, would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement.

*Id.*


In the first place, it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty. In the second place, according to Article 2, paragraph 1, and Article 15 of the Greco-Bulgarian Convention, the two Governments have undertaken not to place any restriction on the right of emigration, notwithstanding any municipal laws or regulations to the contrary, and to modify their legislation in so far as may be necessary to secure the execution of the Convention. In these circumstances, if a proper application of the Convention were in conflict with some local law, the latter would not prevail over the Convention.
Obligation to Arbitrate Under the United Nations Headquarters Agreement, and ELSI. Relevant aspects of the rule have since then been codified in the Vienna Convention on the Law of Treaties and the International Law Commission's Articles on State Responsibility.

Id.


[W]hile on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. (emphasis added).

Id.


[T]he Court observes that... in case of doubt any limitation of sovereignty must be construed restrictively; and that while it is certain that France cannot rely on her own legislation to limit the scope of her international obligations, it is equally certain that French fiscal legislation applies in the territory of the free zones as in any other part of French territory. (emphasis added).

Id.

105. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. 12, 34 (Apr. 26) ("It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law.").

106. Elettronica Sicula S.p.A. (ELSI) (D.S. v. Ita.), 1989 I.C.J. 15, 74 (July 20). Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.

Id. at 51.

107. See Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1151 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); see also id. art. 46 (distinguishing between "rules of internal law of fundamental importance" and other internal rules; those falling under the former category may be invoked by a State as a defense against the binding force of a treaty).

108. See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 3, U.N. Doc. A/56/10 (Nov. 2001) ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."). For application of this rule see, e.g., Case Concerning the
The rule has arguably found its proper context in the field of transnational disputes between states and nationals of other states. It is also here where the technical nature of the rule as a conflict rule can best be appreciated. Its function is to enable a quasi-international or transnational court or tribunal to resolve a conflict between a state’s international obligations—international law—and its own municipal law. This rule does this by giving precedence, in case of conflict, to the state’s obligations under international law over its obligations under its own municipal law.109

Certain aspects of the rule have also been applied in international commercial arbitration, in particular when dealing with attempts by state parties or state entities to invoke their own domestic law in order to challenge their capacity to enter into an arbitration agreement.110 Since in these instances the applicable law is generally not international law—unless otherwise agreed by the parties—but rather the domestic law of one of the parties or the law of a third country, it is conceivable that the rule limiting the state’s ability to refer to its domestic law is not available because it has not been incorporated or transformed into the applicable law. Moreover, as discussed above, in such instances, the applicable private international law rule typically provides for the application of the personal law of the state party in question. Consequently, if such a conflict rule is applied, the end

109. Thus, the rule resolves the conflict of applicable laws simply by providing for the application of the law of the forum. Perhaps more accurately, given that an investment treaty tribunal may be considered a “transnational” rather than an “international” tribunal, the conflict rule operates so as to prevent the party that has given its consent to jurisdiction under international law from relying on its domestic law to avoid the consequences of its consent under international law. For arbitral jurisprudence, see, e.g., Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador, ICSID Case No. ARB 04/19, Award, para. 304 (Aug. 18, 2008); Société Ouest-Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB 82/01, Award, para. 4.56 (Feb. 25, 1988) (“Even if an issue of Senegal’s internal public order were so raised, an international arbitral tribunal would have no authority to require compliance with that internal public order by releasing the Government of the country concerned from contractual obligations which it itself has recognized.”).

result is the application of the state party's personal law and, accordingly, the setting aside of the agreement to arbitrate.\textsuperscript{111}

Many jurisdictions have found this consequence unacceptable from a policy point of view and have explicitly adopted in their domestic legislation a rule precluding the state from relying on its domestic law to avoid its obligation to arbitrate. Some countries have adopted a similar rule by way of case law. Switzerland has codified the rule in Article 177(2) of the Private International Law Act, which provides that, "[i]f a party to the arbitration agreement is a state, a state-held enterprise, or a state-owned organization, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement."\textsuperscript{112} French courts, on the other hand, consider that the rule forms part of international public policy.\textsuperscript{113} Article 2 of the European Convention on International Commercial Arbitration of 1961 also endorses the rule, subject to the possibility of a reservation.\textsuperscript{114} Based on these developments and arbitral jurisprudence, it has been suggested that the rule has developed into a

\textsuperscript{111} As noted above, under the conflict-of-laws rules of most countries, issues such as capacity to arbitrate are generally governed by the personal law of the party in question, \textit{i.e.}, the law of the State party. This would lead to the application of the State's own law and, consequently, a dismissal of the claim for lack of capacity to arbitrate, or as some prefer to state the issue, for lack of "subjective arbitrability." For discussion, see Jean-François Poudret & Sebastian Besson, Comparative Law of International Arbitration 182-86 (2nd ed. 2007) (discussing form of arbitration agreement).


\textsuperscript{113} See Société Gatoil v. Nat'l Iranian Oil Co., 1 Rev. Arb. 281 (Cour d'appel Paris 1991). Note, however, that French law continues to restrict the capacity of the French State to enter into an arbitration agreement. For a comparison of French law in this area to the law of other European countries, see Poudret & Besson, supra note 111, at 187-94.

\textsuperscript{114} See European Convention on International Commercial Arbitration of 1961 art. 2, Apr. 21, 1961, 484 U.N.T.S. 364, which states:

(1) [i]n cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements. (2) On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.

\textit{Id.}
substantive rule of the "common law" of international arbitration, or a substantive rule of private international law.\textsuperscript{115}

Indeed, when incorporated into or endorsed as part of domestic law, the rule no longer operates as a conflict rule but rather as a substantive "anti-conflict" rule precluding the application of a conflict rule that would refer the court to the personal law of the state party to the arbitration. On the other hand, the question of whether such an "anti-conflict" rule applies regardless of a legislative adoption or judicial endorsement raises a broader and much debated issue as to whether there exists un tiers droit—a transnational legal system or a lex mercatoria that is separate, conceptually and legally, from domestic law and public international law.\textsuperscript{116} In practical terms, may a private arbitral tribunal created by a contract (as opposed to a treaty) draw on a rule of law such as the one preventing a state from invoking its domestic law in order to avoid its obligation to arbitrate, even if such a rule does not form part of the law of the seat (\textit{lex arbitri}), on the basis that such a rule is applicable because it forms part of lex mercatoria, or the "common law" of international arbitration, or, perhaps most appropriately, transnational public policy?\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{115} See Jan Paulsson, \textit{May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?}, 2 ARB. INT'L 90, 97 (1985) (discussing Benteler v. Belgium, 1 REV. ARB. 339, 345 (1989)). "The Award clearly acknowledges the existence of a substantive rule of the 'common law of arbitration' to the effect that international arbitrators should reject a State's invoking its own law to contest the validity of its consent to an arbitration agreement." Id.
\item \textsuperscript{116} See supra note 1 and accompanying text; Michel Virally, \textit{Un tiers droit? Réflexions théoriques, in Le Droit des relations économiques internationales — Etudes offertes à Berthold Goldman} 373 (1982) (discussing notion of "tiers droit").
\item \textsuperscript{117} See Pierre Lalive, \textit{Transnational (or Truly International) Public Policy and International Arbitration, Report for the ICCA New York Arbitration Congress} paras. 135-36 (1986), stating:
\begin{quote}
[I]t can probably be asserted that certain principles of the law of international arbitration, because they receive general and acceptance and because of this fundamental character, should be recognized as particularly imperative and having acceded to the 'rank' of transnational public policy. Such appears to be the case for several and perhaps all of the principles which, for instance, recognize the impossibility for a contracting State, or a State company or public organization (a) after the execution of the contract containing an arbitration clause to invoke its incapacity to arbitrate; (b) to challenge the validity of the arbitration clause on the basis of absence of special powers to sign the contract; (c) unilaterally to rescind an international arbitration clause, either directly, or through retroactive legislation.
\end{quote}
\end{itemize}
At least in cases where the parties have agreed that such "general principles of law" or "usages of international commerce" apply, an arbitral tribunal may give effect to the rule. It is not necessary in such circumstances to postulate the existence of a third "legal system"—or a third Grundlegung or ordre juridique de base. The contract between the parties, which forms the basis of the arbitral tribunal's jurisdiction in any event, should be a sufficient basis for the tribunal to be able to apply such a rule. Whether a specific choice of law clause in the contract, designating "general principles of law" or "usages of international commerce" as the applicable law, also forms a necessary basis for the applicability of the rule in the sense that, without such a clause the rule cannot be applied, is another question. If one accepts the theory that the rule precluding the state from invoking its domestic law to avoid the obligation to arbitrate forms part of transnational public policy, then the arbitral tribunal may give effect to the rule regardless of whether the lex arbitri or the law governing the contract also endorses it.

V. Conclusion

Recent developments in the field of international arbitration, in particular the emergence of investment treaty arbitration, have evoked certain deep-seated conceptual issues about the law governing international arbitration. These developments are shedding new light on issues that were debated vigorously in the 1960's and 1970's, many of which were thought to have been settled or at least proven in practical terms irrelevant and, accordingly, buried in history books. However, recent developments have shown that these issues, and the debates they engendered at the time, continue to serve as a useful reference and background for those who seek to understand and place the

Id.

118. For discussion, see, e.g., Pierre Mayer, *Le mythe de l'ordre juridique de base* (ou Grundlegung), in *Le Droit des relations économiques internationales: Études offertes à Berthold Goldman* 119 (1982); Charles Leben, *Retour sur la notion de contrat d'Etat et sur le droit applicable à celui-ci*, in *L'évolution du droit international: mélanges offertes à Hubert Thierry* 247 (1998). One may note in passing that the existence of public international law as a legal system has always been subject to doubt. See H.L.A. Hart, *The Concept of Law* 209 (Oxford University Press 1961) (discussing whether "international law is really law"). It would not take much creativity to raise the question of whether, in these circumstances, any Grundlegung is necessary or indeed justified for municipal law either—apart, of course, from dépeçage.
current issues of international investment arbitration in a methodological and historiographical context. Accordingly, they deserve to be revisited. Suggesting that this is indeed the case has been the purpose of this modest contribution.

If there are any lessons to be learned from this visit, one of them certainly is that it is important to keep in mind the many meanings of the term “governing law” and be as clear as reasonably possible about what one means, or what one refers to, when talking about the governing law of international arbitration. Only too often scholars and commentators tend to assume what is meant by the term rather than be specific about the meaning and the context in which it is being used. While being too specific may lead to another extreme—endless dépeçage—this risk, it seems, can be avoided simply by terminating the analysis when the issues raised by the concrete case at hand will have been exhausted. *Wovon man nicht sprechen muss, darüber kann man schweigen.*

*P.S.* Despite its forbidding name and hybrid substance, dépeçage may be here to stay.

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119. Cf. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* proposition 7 (1922) ("Wovon man nicht sprechen kann, darüber muss man schweigen.") ("Whereof one cannot speak, thereof one must be silent.")
The State extending its consent to arbitrate to a foreign investor who reciprocates by requesting access to the international plane after the fact. Note the fingers do not touch as there is no privity of contract; the parties are separated in terms of both space and time (dépeçage). (© Michelangelo, ca. 1511).
Forbidding Dépeçage: Law Governing Investment Treaty Arbitration

Veijo Heiskanen