FORBIDDING *DÉPEÇAGE*: LAW GOVERNING INVESTMENT TREATY ARBITRATION

*Veijo Heiskanen**

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

---

* Partner, LALIVE, Geneva. I would like to thank David Bonifacio of LALIVE for effective and efficient research assistance.

1. For an overview of this discussion see, e.g., Berthold Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, 109 bk. II RECUEIL DES COURS 347 (1964) [hereinafter Goldman, *Les conflits de lois*]; Berthold Goldman, *Frontières du droit et lex mercatoria*, 9 ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964) [hereinafter Goldman, *Frontières du droit et lex mercatoria*]; PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 351-457 (1965); F.A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 157 (Pieter Sanders ed., 1967); Pierre Lalive, *Problèmes rélatifs à l'arbitrage international commercial*, 120 bk. I RECUEIL DES COURS 569, 597-663 (1968); Pieter Sanders, *Trends in the Field of International Commercial Arbitration*, 145 bk. II RECUEIL DES COURS 205, 238-65 (1976); Pierre Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siègeant en Suisse*, 145 RECUEIL DES COURS 2 (1976) [hereinafter Lalive, *Les règles de conflit de lois appliquées*]; Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978); JULIAN LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (1978); Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 JOURNAL DU DROIT INTERNATIONAL 475 (1979); Alain Hirsch, *The Place of Arbitration and the Lex Arbitri*, 34 ARB. J. 43 (1979); Frédéric-Edouard Klein, *The Law to Be Applied by the Arbitrators to the Substance of the Dispute*, *in* THE ART OF ARBITRATION 189 (Jan C. Schultsz & Albert Jan van den Berg eds., 1982); Arthur Taylor von Mehren, *To What Extent is International Commercial Arbitration Autonomous?*, *in* LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES – ETUDES OFFERTES A BERTHOLD GOLDMAN 215 (1982); Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613 (1982); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317 (1983-1984); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985); Arthur von Mehren, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816 (1988); Berthold

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

---

Goldman, *The Applicable Law: General Principles of Law – The Lex Mercatoria*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (Julian Lew ed., 1986); David J. Branson & Richard E. Wallace, *Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 VA. J. INT'L L. 39 (1986-87).

2. *See* Veijo Heiskanen, *Theory and Meaning of the Law Applicable to International Commercial Arbitration*, 4 FIN. Y.B. INT'L L. 98 (1993) (discussing the various theories regarding the applicable law).

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]

---

3. For significant contributions see, e.g., ESA PAASIVIRTA, PARTICIPATION OF STATES IN INTERNATIONAL CONTRACTS (1990); Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure*, *in* INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE (Pieter Sanders ed., 1967); Georges Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784 (1981); Georges Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319 (1985); Andrea Giardina, *State Contracts: National versus International Law*, 5 ITAL. Y.B. INT'L L. 147 (1980-81); R.Y. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156 (1961); Jean-Flavien Lalive, *Contracts Between a State or a State Agency and a Foreign Company*, 13 INT'L & COMP. L.Q. 987 (1964); F.A. Mann, *The Proper Law of Contracts Concluded by International Persons,* 35 BRIT. Y.B. INT'L L. 34 (1959) [hereinafter *Proper Law of Contracts*]; F.A. Mann, *State Contracts and International Arbitration*, 42 BRIT. Y.B. INT'L L. 1 (1967) [hereinafter *State Contracts and International Arbitration*]; Prosper Weil, *Problèmes relatifs aux contrats passés entre un Etat et an particulier*, *in* RECUEIL DES COURS 101 (1969).

4. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 160 [hereinafter ICSID Convention].

5. *Id.*, art. 25, para. 1 (referring to consent of parties to submit dispute to Centre, stressing that "[w]hen 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 law 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.[6] 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-

---

(instructing arbitral tribunal to decide dispute "in accordance with such rules of law as may be agreed between the parties").

6. *See generally* William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); Jan Paulsson, *The Extent of Independence of International Arbitration from the Law of the Situs, in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 297 (J. Lew ed., 1986); William W. Park, *Judicial Controls in the Arbitral Process,* 5 ARB. INT'L 230 (1989); Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1989); Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983) [hereinafter *Delocalisation of International Commercial Arbitration*]; Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629 (1981).

bitration (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).[7] 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.[8]

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.[9]

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

---

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.[10] 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.[11] 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,[12] and to a lesser degree, foreign investment laws.[13]

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-

---

10. *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. – FOREIGN INV. L.J. 232 (1995) (discussing rise of investment treaty arbitration and implications of arbitration agreement without privity).

11. *See* Veijo Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. WORLD INV. & TRADE 215, 215 (2007) (highlighting shift of states from market participants to regulators).

12. *See* RUDOLF DOZER & 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.[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,

---

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.[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 "impinges upon some of the hardest questions of international law."[16] This was because this topic "cannot be considered apart from the relationship of international and municipal law; the relationship of public international law and private international law . . . and the limits of domestic jurisdiction and the reserved domain."[17]

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

---

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, *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 domestic 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 Creation 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 Michelangelo, 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. *See infra* Annex: Illustration of Agreement to Arbitrate in Investment Treaty Arbitration.

16. Jennings, *supra* note 3, at 156.

17. *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-

---

18. *See infra* notes 89-109 and accompanying text (discussing transnational conflict rules).

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).

20. *See* Veijo Heiskanen, *Dealing with Pandora: The Concept of 'Merits' in International Commercial Arbitration*, 22 ARB. INT'L 597 (2006) (discussing the distinction between the "merits of the claim" and the "subject matter of the dispute").

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.[23] The principle is also incorporated in many modern inter-

---

23. *See, e.g.*, STEPHEN SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 1-60 (1987); ALAN REDFERN & MARTIN HUNTER WITH NIGEL BLACKABY & CONSTANTINE PARTASIDES, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 162-65 (4th. ed., 2004); DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 104-10 (2005).

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) (*"[L]orsqu'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 étrangeres à la volonté réelle des parties de saisir an 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[24] as well as in the UNCITRAL Model Law on International Commercial Arbitration.[25] 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 interna-

---

arbitration agreement applies to a dispute which has not yet arisen."); *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) (providng "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 Cardegna*, 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 UNCITRAL 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.

Id.

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 the 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 Sonatrac 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 HEUZÉ, DROIT INTERNATIONAL PRIVÉ 342, 663, 670-71 (7th ed. 2001)(discussing relationship between international law and private individuals in France); YVON LOUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ 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