Chapter Three

Deciding on Public Policy Rules by the Arbitral Tribunal

As has been previously stated, the question of applying public policy rules may arise at different stages of the arbitration process, which ultimately would affect the recognition and enforcement of the final arbitral award. One should consider in this respect that the extent of applying public policy may differ between these different stages: for example, what an arbitrator may consider as the applicable public policy rules to determine the validity of the arbitration agreement, or the applicable law to the arbitration procedures or the substance of the dispute may not necessarily be the same as what a court may consider as applicable. This is mainly due to the difference between how arbitrators and courts perceive their functions. Courts are the guardians of their national legal systems and therefore they are obliged to give preference to the public policy rules of their national legal systems over any foreign mandatory rule. On the other hand, international commercial arbitrators are not guardians of a particular national law and they have no allegiance to a particular state[1], since they derive their authority from an agreement between two private parties. Thus they are not bound

1. For an international commercial arbitrator, all state laws are on an equal footing and none of them has a privileged status. See, Bernard Hanotiau, "What Law Governs the Issue of Arbitrability?," 12 Arb.Int., No.4 (1996), p. 391; Daniel Hochstranger, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 11 J.Int.Arb., (1994), p. 57 at 59. This writer considers that: "The arbitrator has no duty whatsoever to respect the mandatory rules of the forum because he does not have a forum, and even less to respect public policy of a state, the law of which has not been chosen by the parties, just because this law pretends to be applicable."

to protect a particular national interest.[2] Nevertheless, as will be demonstrated later in this chapter, an arbitrator in international commercial arbitration has a duty to provide the parties with an enforceable arbitral award, which would entail consideration of the application of the various national mandatory rules that are relevant to the dispute.[3]

In this chapter the main question to be examined does not concern the problem of deciding the validity of the arbitration agreement by the arbitral tribunal or the ability of the arbitral tribunal to rule on the existence and scope of its own jurisdiction. The latter question relates to the principle of Competence-Competence by virtue of which an arbitrator can give a final ruling on his own jurisdiction which generally should be raised at the early stages of the arbitration process before submitting the respondent's statement of defence.[4] The Competence-Competence principle is closely related to the concept of separability or independence of the arbitral clause, since in deciding its own competence the tribunal needs to refer to the arbitration clause. The separability doctrine and the competence of the arbitral tribunal to rule on its own jurisdiction are now fully recognised by several conventions and rules of arbitration.[5] For example, Article 23 (1) of the LCIA Rules; Article [6] (4) of the ICC Rules6; Article 16 of the Model law; Article 22 of the Egyptian Law of 1994; Section 7 and Section 30 (1) of the English 1996 Act.[7]
Based on the above consideration, this chapter will examine the potential conflict of public policy rules that could be raised during

2. The duty of arbitrators to consider the application of public policy rules as a distinction from courts' obligation to apply public policy of their national law has been taken into account in ICC award Case No. 2178 1973. Cited in, Yves Derains, op. cit., p. 253, the award contained the following statement, "The narrow links between State Courts and their national law which compel the application of their national law to the solution of problems of conflict of law that present themselves to national jurisdictions are absent in arbitration proceedings which are based on the parties will. As long as it does not relate to a law of public policy which applies to the parties within the realm of their respective rights and which the arbitrators must take into consideration."
3. Gunther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award," 18:2 Journal of International Arbitration (2001), p. 135.

4. See for example, Article 16 of the Model law; Article 22 of the Egyptian Law; Carlos E. Alfaro and Flavia Gumerey, "Who Should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment," 12 Arb. Int., No.4 (1996), p. 415 at, 419; Bernard Hanotiau, op. cit., p. 391.

5. Many countries recognise the effect of an arbitration agreement even where the validity of the main contract is in issue or is void. See, Julian DM Lew, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on that Jurisdiction", Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 73 at 76.

6. This has been confirmed in ICC final Award Case No. 6437 (1990) reprinted in ICC International Court of Arbitration Bulletin, vol. VIII/1 (May 1997) at 64. "It is universally accepted that an arbitral tribunal or arbitrator is competent to determine its own competence to hear the dispute. This power is based not on the rules of local procedure, but derives simply from powers granted to it pursuant to Art. 8(3) of the ICC Rules."

7. See, Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd., [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111.

the arbitration process. The question mainly relates to determining the applicable public policy when the dispute involves claims that more than one law is applicable. This requires that the following questions be addressed: firstly, whether or not arbitral tribunals have a duty to consider the application of public policy rules during the arbitration process and secondly how an arbitrator can determine the conflict of public policy rules in the domain of international commercial arbitration. In order to answer these questions it will be necessary first to examine the rules applicable to international commercial arbitration and how they can be determined. This will be followed by an analysis of the arbitral tribunal's duty to comply with the public policy rules.

I. Applicable Rules in International Commercial Arbitration

Generally, international commercial arbitration is subject to different legal systems, which vary according to the different stages of arbitration. These bodies of law include; the law which governs the parties' capacity to enter into arbitration and to constitute a valid arbitration agreement[8]; the law which governs the arbitration agreement[9]; the law or the set of rules which governs the proceedings of arbitration[10]; the law, or set of rules which governs the substantive issues of the dispute[11]; and finally the law governing the recognition and enforcement of the arbitral award.

Since arbitration is founded on a contract, it follows that parties to an international commercial contract can autonomously agree

8. This legal system has a considerable effect on the arbitral award, since the New York Convention emphasised the necessity for a valid arbitration agreement. Article V (1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the parties were, "under the law applicable to them, 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 the country where the award was made"; see Article 34 (2)(a)(i) and Article 36 (1)(a)(i) of the Model Law; The importance of considering the application of this law has been subject to a great deal of analysis by several writers, see for example, Lawrence Collins, "The Law Governing the Agreement and Procedure in International Arbitration in England," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 126; Redfern and Hunter, 2nd ed., op. cit., p. 72.

9. See Article V (2)(a) of the New York Convention; Articles 34 (2)(a)(i) and 36 (1)(a)(i) of the Model Law.

10. How the applicable procedural rules are determined is of great importance and needs to be discussed in more detail since the effect of procedural public policy rules will repeatedly occur through the different stages of this study.

11. Redfern and Hunter, 2nd ed., op. cit., p. 96. The authors demonstrate the meaning of the law that governs the substance of the dispute, providing that: "… the law that supports the main contract is the governing law, the applicable law, the proper law of the contract. These various terms all denote the particular system of law which governs the interpretation and validity of the contract, the rights and obligations of the parties, the mode of performance and consequences of breaches of the contract."

to settle any disputes.[12] In international commercial arbitration, "parties' autonomy" means that parties can, within certain limitations, determine which law governs issues involving the nature of their obligations, the validity of their contract[13], the arbitration proceedings and the law applicable to the substance of their dispute.[14]

The general trend in international commercial arbitration is to give parties a complete discretion in designating the applicable law[15], providing that the application of the choice of law rules does not lead to a violation of the public policy of the countries closely connected to the dispute.[16] In the absence of the parties' choice, arbitrators will be obliged to decide the applicable rules. This duty emanates from their paramount duty to resolve the dispute and to provide the parties with a binding decision that can be recognised and enforced by national courts.[17]

Determining the applicable law in international commercial arbitration affects the decision as to applicable public policy rules during the arbitration process, and may be relevant later in the process if the award is challenged before a competent authority for

12. The autonomy of the will of the parties is fully recognised in this connection. See Rubino-Sammartano. M., op. cit., p. 283, "Parties autonomy has been recognised as one of the cardinal elements of international commercial arbitration"; Redfern and Hunter, 2nd ed., op. cit., p. 97; Okezie Chukwumerije, op. cit., p.79; A.J.E Jaffy, Topics in the Choice of Law. The British Institute of International and Comparative Law. (1996), p. 20, where the author explains the reasons which drive the parties to make their own choice of law; also see, Clive M Schmitthoff, "Finality of arbitral awards and judicial review," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 230; J. G. Collier, op. cit., p. 159.

13. Subject to the rules of public policy, the parties are free to agree upon such terms as they may decide. Such limitation, for example, is clearly provided in Section 1 (b) of the English 1996 Act, which provides that: "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

14. Parties' choice when choosing the 'procedural rules' may vary when deciding the applicable 'substantive rules'. The distinction between the choices involved in selecting procedural rules and the applicable substantive rules has been recognised in Cie Tunisienne v. Cie d'Armement (1971) A.C., p. 572. The arbitration proceedings were governed by the English law and the French law was the law applicable to govern the substantive issues as it was the law which is most closely connected to the dispute.

15. See ICC Award, Case No. 1581/1971, ICC International Court of Arbitration Bulletin, p. 14. The arbitral tribunal expressly stated that: "… the arbitral tribunal derives from the terms of reference the entire scope of its powers and of its competence and unlike a State Court, it is bound by the will of the parties where such parties are unanimous on the question"; see also, Yves Derains, op. cit., p. 238.

16. See Kolkey, "Attacking Arbitral Awards : Rights of Appeal and Review in International Arbitrations," (1988) International Lawyer, p. 693.

17. Such obligation could be inferred from Article 32 (2) of the LCIA Rules and Article 35 of the ICC Rules (1998); in Carlisle Place Investments Ltd v. Wimpey Construction (UK) Ltd., 15 BLR 109 (1980), Robert Goff J stated: "the arbitrators duty is to decide the matter which has been submitted to him, and he also has a duty to act fairly as between the parties"; also see, John A Tackaberry, "The Conduct of Arbitration Proceedings Under English Law", Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p 216 at 217; Pierre Lalive, op. cit., p. 273, provides that an arbitrator "must strive to render a valid award capable of being recognized and enforced."

being contrary to rules of public policy.[18] It is therefore important to examine the freedom of the parties to choose the applicable procedural and substantive rules and in the absence of the parties' choice, to study the decision of the arbitral tribunal in determining these rules.

A. Parties choice of procedural rules

In determining the rules that should govern arbitration procedures, parties have a wide degree of freedom to agree to rules of arbitral procedure, and have a wide variety of rules and laws to choose from. They can agree to submit the arbitration proceedings to be dealt with under the national arbitration law of a specific country[19], where quite often parties prefer to choose the law of the state in which the arbitration is administered.[20] They may also choose to apply the arbitration procedures of an institutional body, such as the ICC or the LCIA Rules. Finally, they can determine the applicable procedural law by directly composing the rules with which the arbitral tribunal must comply.[21]

18. See Comment, "General Principles of Law in International Commercial Arbitration," (1988), 101 Harv. L.Rev., p. 1816 at p.1817. He explains the importance of the choice of law, which is made either expressly or impliedly, in an arbitration or jurisdiction clause as it reduces the uncertainty arising from the existence of divergent national laws.

19. Many contracts contain clauses which expressly submit them to the law of a certain country. This may be done for several reasons, for instance, in order to obtain the co-operation of the courts in that state. Also a national system of law will be a known and existing system, capable of reasonably accurate interpretation by experienced practitioners. Parties often want a neutral law or a well-developed law to apply. See, Ole Lando, "The law applicable to the merits of the dispute," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 104; ICC Case No. 1512/1971, Journal du Droit International, p. 905. Date of publication 1974; Y. Comm. Arb., 1976, p. 128; S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards: 1974-1985 (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1990); also see, James Miller and Partners Ltd. v. Whitworth Street Estates Ltd. [1970] 1 All E.R. 796; cited also in, [1970] 2 Weekly Law Review, p. 728 (H.L.).

20. However, this does not prevent the parties from choosing a national procedural law different from the law of the forum. This possibility was discussed in Bank Mellat v. Helleniki Technik Court of Appeal, England, June 28, (1983) 3 All ER 4J1.

21. Abu Zaid Redwan, op. cit., p. 93. He states that: "This kind of arrangement is usually followed in Ad Hoc arbitration, where parties initially undertake the formation of the arbitration procedures. But due to practical difficulties which may arise from allowing the arbitral procedures to be determined directly by the parties, a process which may conflict with the mandatory procedural rules, parties of international commercial arbitration often choose arbitration rules that are more suitable and are specifically designed to govern such arbitration procedures." Emphasis added); The difficulty of composing the arbitral procedures by the parties was also emphasised by Marianne Roth, "False Testimony at International Arbitration Hearings Conducted in England and Switzerland," 11 J. Int. Arb., (March 1994), p. 8. The writer provides that: "… such an arbitration agreement would require not only skilled draughtsmanship but also time consuming negotiations between the parties, and is, therefore, rarely done, especially if the dispute involves parties of different legal cultures."

The parties' free consent to choose the rules that govern the arbitration procedures has been recognised by international conventions[22], international institutions of commercial arbitration[23] and by the domestic laws of different countries.[24] For example, Section [16] of the English 1996 Act demonstrates the procedures that should be followed when appointing an arbitral tribunal and gives the parties a free choice in deciding this issue. Moreover, Section 35(1) provides that:

"The parties are free to agree- (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, on such terms as may be agreed."

Also Section 38 (1) provides that:

"The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings."

In Egypt, Article 25 of the law No. 27 of 1994, provides that:

"The two parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal, including the right to submit the arbitral proceedings to the rules prevailing under the auspices of any arbitral organisation or centre in the Arab Republic of Egypt or abroad. In the absence of such agreement, the arbitral tribunal may, subject to the provisions of this law, adopt the arbitration procedures it considers appropriate."

The UNCITRAL Model Law of 1985 specifies in Article 19 (1) that:

"Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

22. For example, Article 2 of the Geneva Protocol provides that the constitution of arbitral tribunals and arbitral procedure shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place; Article 1 of the Geneva Convention of 1927 provides the parties with freedom to decide the manner in which the arbitral tribunal is to be constituted; the New York Convention in its list of grounds for refusal to enforce foreign arbitral awards does not include the question of the law applicable to the dispute, nevertheless, Article V (1)(d) of the New York Convention requires that the arbitral procedures are agreed by the parties.

23. For example, Article 14 (1) of the LCIA Rules of 1998 provides that: "The parties may agree on the arbitral procedure, and are encouraged to do so"; Article 15 (1) of The ICC Rules of 1998 provides that: "The proceedings before the arbitral tribunal shall be governed by these rules, and, where these rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

24. Most states allow parties some flexibility to choose the procedural rules applicable to the arbitration. See Baker and Davis, "Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal," (1988) 23 Int.Law., p. 81 at 83.

This can also be inferred from Article V (1)(d) of the New York Convention since it requires the composition of the arbitral authority and the arbitral procedure to be "in accordance with the agreement of the parties" otherwise, recognition of the arbitral award may be refused.

These different provisions exemplify the international trend in recognising the freedom of parties to decide the applicable procedural rules. However, while parties can agree to the rules of procedure that will apply to their arbitration, they cannot derogate from the control function of the courts at the seat of arbitration, except to the extent that the law of the arbitration site permits them to do so. This will be explored in more depth later in this chapter.

B. Deciding the applicable procedural rules

Where the parties' clear intention is absent, the arbitral tribunal will decide the applicable procedural rules according to what the arbitrators consider appropriate to govern the arbitration proceedings. The procedural rules of the country in which the arbitration is taking place (the forum) are perhaps, those most likely to be applied. The defenders of the so-called 'seat theory' assert that applying the law of the country in which arbitration takes place is inevitable.[25] There may be several reasons for this. Firstly, there is the matter of the impact of these rules on the enforceability of the final arbitral award. In this respect Article V (1)(d) of the New York Convention indicates that, in the absence of the parties' choice, enforcement of the arbitral award may be refused if the composition of the arbitral authority and the arbitral procedure "was not in accordance with the law of the country where the arbitration took place."[26] This may indicate that arbitrators are required to comply with the procedural law of the place of arbitration or at least to consider the mandatory procedural rules of this law as accompanying a national law. Nevertheless, it has been submitted that:[27] "the Convention seems only to regulate

25. See Andrew Beck, "Floating Choice of Law Choices," [1987] LMCLQ, p. 523 at 529; ICC Award 5029/1986, Collection of ICC Arbitral Awards, Volume II, 1986-1990, Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez, p. 69, 480.

26. Also see, Article 2 of the Geneva Protocol of 1923.

27. Rubino-Sammartano. M., op. cit., p. 289.

the consequences of certain invalidities in the arbitration agreement and of its setting aside by given courts of law. It does not state that the award must be made under a national procedural law, or that an award cannot be recognised if it has not been made under a national procedural law."

Secondly, the law of the forum may also be applied because of a necessary interrelation between the arbitral tribunal and national courts.[28] This can be recognised by considering two aspects of this relationship. Firstly, the law of the forum helps to fill the gaps in the procedural rules of the choice of law if the law chosen by the parties or by the tribunal fails to provide a solution for the prospective procedural deficiency.[29] Secondly, this relationship can be recognised by considering that there are rules of law which provide national courts with the authority to give orders, which reach beyond the parties agreement and the tribunal's power, such as, the freezing of Bank accounts or the detention of goods.[30]

Thirdly, a main reason that has been presented to justify the jurisdiction of the forum's law is the national courts' right to supervise the arbitration process. This reason is based mainly on the hypothetical theory that once the parties choose a particular country to be the forum of their arbitration they accordingly agree to submit their arbitration to the legal framework of the forum which will both assist and, to some degree, control the arbitration proceedings.[31] In this regard Mann commented that:[32]

"A state has the right to supervise and regulate every activity which occurs within its territory, and every arbitration even if it relates to

28. In this regard one should recognise the importance of choosing a particular country to be the forum of arbitration procedures since the familiarity of a particular law in a certain place may be effective in helping the arbitration process and in reducing problems which may arise before, during or after an international arbitration. See Adam Samuel, "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate," (1992) Arb.Int., p. 257.

29. William W. Park, "The Lex Loci Arbitri and International Commercial Arbitration," 32 INT'L & COMP. L. Q., (1983), p. 27.

30. It is essential to have regard to the usual rules and practice of the place in which the arbitration is held, which is likely to include such matters as disclosure of documents, rules of evidence, freedom of the parties to be represented by counsel of their own choice and so on. See, for instance, Article 27 of the Model Law (1985); J Martin H Hunter, "Judicial assistance for the arbitrator," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 195; Berthold Goldman, "The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective," 60 Years of ICC Arbitration-A Look at the Future, ICC publication (1984) No. 412, p. 275.

31. See, Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep., p. 223; Marine Contractors Inc v. Shell Petroleum Development Co of Nigeria, [1984] 2 Lloyd's Rep, p. 77.

32. F. A. Mann, "Lex Facit Arbitrum," in P. Sanders (ed.) International Arbitration: Liber Amicorum for Martin Domke (The Hague: Martinus Nijhoff, 1967), p. 133 at 159; also see, Okezie Chukwumerije, op. cit., p. 86.

international transactions should be subject to a specific system of national law in order to give national courts the right to supervise the conduct of the arbitration to insure that the proceedings are in conformity with requirements of justice and fairness."

Finally, this relationship could be established upon the concept of "nationality of arbitral awards", whereby the arbitral award assumes the nationality of the forum.[33]

This trend which calls for the application of the law of the forum, however, conflicts with the 'delocalisation theory'.[34] This theory calls for detaching of international commercial arbitration from the control of the national legal system of the forum. Its aim is to allow arbitral tribunals to resort to other procedural rules and not to be confined to the national procedural rules of the forum. Under this approach an arbitral tribunal is free to apply the rules of any legal system even if these rules do not belong to a particular national law.[35]

Contrary to the 'seat theory', the 'delocalisation theory' argues that selecting a place for international arbitration does not necessarily mean that parties have intended to apply the procedural law of the forum.[36] In fact parties may wish to avoid the procedural law of the forum, the country they choose to be the forum of their arbitration

33. The importance of deciding the nationality of an arbitral award could be attributed to the reservation clauses that can be found in several international conventions for the enforcement of foreign arbitral awards, as countries may insist on applying the convention only between the member states. See, Klaus Peter Berger, op. cit., p. 656; Enonchong, "Public Policy in the Conflict of Laws: a Chinese Wall Around Little England," INT'L & COMP. L. Q., (1996) 45, p. 633; W. Laurence Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration," 30 Tex. Int'l L.J. 1, (1995), p. 23.

34. Redfern and Hunter, 2nd ed., op. cit., p. 82; Okezie Chukwumerije, op. cit., pp. 85 and 88; Rubino-Sammartano. M., op. cit., p. 287; Jan Paulsson, "The extent of Independence of International Arbitration from the Law of the Situs," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 141; Texas Overseas petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (1979) IV Yearbook Commercial International, p. 177; Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117, 159-83 (1963).

35. Article 15 (1) of the ICC Rules of (1998) supports this theory. It provides that: "The proceedings before the arbitral tribunal shall be governed by these rules,… ,whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration"; In Dallal v. Bank Mellat, Q. B., June 2, 3, 26, 1985 (1985) 1 All ER., p. 239, the English High Court held that: "English law does not deny the possibility of a different curial law".

36. The place of arbitration, however, may not even be chosen by the parties, but could be designated instead by an arbitration institution, such as the ICC. The Arbitral Tribunal in ICC Case No. 1512 /1971, Y. Comm. Arb., (1976), p. 128; Clunet 1974, at 905, S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards: 1974-1985 (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1990) 3 at 4-5. The award provided that the parties, having agreed to have their dispute settled under the Rules of the ICC Court of Arbitration, which gave the Court of Arbitration the power to fix the place of arbitration when it was not agreed upon by the parties. See Article 14 (1) of the ICC Rules of 1998; Article 16 of the LCIA Rules; Article 16 (1) of The Cairo Regional Center for International Commercial Arbitration (CRCICA) which provides that: "Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration."

might not necessarily have any connection with the parties or the dispute.[37] This may frequently happen in international commercial arbitration, as parties may choose the forum for reasons which may be entirely fortuitous, and which bear no relation whatsoever to the dispute submitted to the arbitral tribunal.[38] Furthermore, as previously stated, parties are allowed to choose the procedural law by themselves, so they can choose procedural rules, which may not relate to any national legal system.[39] Therefore, in the absence of the parties' choice, arbitrators can act on behalf of the parties and select the rules that they may find suitable.[40] Finally, applying the procedural rules of the forum may lead to the application of national public policy rules to an international arbitration and to the subjection of international commercial relations to the requirements of national rules which may be obscure, narrow and may vary considerably from country to country.

Nevertheless, the "delocalisation theory" may encounter a number of difficulties. Laurence W. Craig argues that[41], "States have been unwilling to accept the idea that there is no link whatsoever between arbitral proceedings in their territory and the state's legal regime, and the idea that arbitral awards made in their territory should be considered national awards."[42] The real problem is that most legal systems insist on keeping some measure of control over arbitrations

37. The importance of having a connection between the forum and arbitration was considered in Bank Mellat v. Helliniki Techniki (1984) Q.B, p. 291.

38. The selection of the place of arbitration may depend on considerations that have no connection with the dispute between the parties. For example, arbitration may take place in a neutral country, in the sense that it is not the home of either of the parties to the arbitration. See R Pagnan and Fratelli v. Corbisa industrial Agropacuaria Ltd., (1971) 1 All ER 165; [1970] 1 W.L.R. 1306. However, in regard to this particular point, Van den Berg argues that this argument was valid some 2o years ago, but nowadays parties generally choose a place of arbitration that provides an adequate legal framework for their arbitration. A J van den Berg, "The Efficacy of Award in Intercom Arbitration," 58 The Journal of the Chartered Institute of Arbitrators (1992), 267 at 271.

39. We have already seen how parties, are granted complete liberty to establish the arbitral procedure by a number of rules drafted by arbitral institutions, such as the ICC Rules.

40. A. J. Jaffy reflects this tendency as transferring the freedom of the parties to the arbitral tribunal. He comments that: "If the parties are free to decide the law applicable to their dispute then why should the principle not extend to allowing them to empower the arbitrators to make the choice for them" A. J. Jaffy, op. cit., p. 80; also see, Hans Smit, "A-national Arbitration," (1988) 63 Tul. L.Rev., p. 1311, who illustrates that the rules of procedure applied in international tribunals frequently do not follow the pattern of any national legal system. Instead, international arbitrators are developing a procedural system of their own; also see, London Export Corporation Ltd v. Jubilee Coffee Roasting Co Ltd [1958] 2 All ER 411, [1958] 1 WLR 661.

41. W. Laurence Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration," op. cit., p. 23.

42. See in this regard Naviera Amazonica Peruana S.A. v. Compania Internacionial de Seguros Del Peru, [1988] 1 Lloyd's Rep. 116 (CA.). The court found, at that time, that English law rejected the idea of a floating or delocalised arbitration and found that "every arbitration must have a 'seat' or locus arbitri or forum which subjects its procedural rules to the municipal law which is there in force."

conducted in their territory, in order to ensure that mandatory provisions of that law are applicable to arbitrations whose seat is in that country.[43] Thus, if the national law of the place where arbitration is taking place, requires that the arbitral tribunal should follow certain procedures, then the tribunal should comply with that law, otherwise its award could be challenged under the national public policy rules of the forum. This may lead to the refusal to enforce the award in other countries under Article V (1)(e) of the New York Convention.[44]

The trend in international commercial arbitration is to allow the arbitral tribunal to enjoy more flexibility than that of a national court when choosing the applicable procedural rules.[45] There is a growing consensus among theorists and practitioners to free arbitrators from any local rules of procedure, in particular, from the procedural law of the country where the arbitration has its seat.[46]
As Lord Diplock said in Bremer Vulkan v. South India Shipping Corp. Limited:[47]

"The parties make the arbitrator the master of the procedure to be followed in the arbitration. Apart from a few statutory requirements under the Arbitration Acts . . . he has complete discretion to determine how the arbitration is to be conducted, from the time of his appointment, to the time of his award, as long as the procedure he adopts does not offend the rules of natural justice."

The arbitrators' power is derived from the arbitration agreement, and arbitrators are not state judges, therefore, they are not obliged to follow the procedural rules provided for state judges of the state where they are sitting, especially if the parties, arbitrators and the

43. National courts' concern is that arbitrators must be bound to respect the mandatory national procedural rules of the forum.

44. The objections that have been presented against the "Delocalisation theory", based on the New York Convention, were challenged by Okezie Chukwumerije on the ground that: "the Convention should be read as requiring a geographical connection between the award and a particular jurisdiction, without demanding that such awards be governed by the national law of that jurisdiction", Okezie Chukwumerije, op. cit., p. 95; see also Rubino-Sammartano. M., op. cit., p. 289.

45. Article 19(2) of the Model Law (1985); Lawrence Collins, op. cit., p. 133; Article 4(3) of The Washington Convention of 1965; Yves Derains, op. cit., p. 232; See Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1970] A.C. 583.

46. Jan Paulsson, "The Extent of Independence …" Julian Lew ed., op. cit., p. 141 at 148.

47. Bremer Vulkan v. South India Shipping Corp. Limited. [l981] 1 Lloyd's Rep. 253.

dispute are not related to the place where the arbitration is to take place.[48]

One can reply to defenders of the 'seat theory', that there is no affront to the integrity of the national legal system, if parties or arbitrators decide to apply procedural rules different from the forum rules, because the procedural public policy rules of the place of arbitration will provide a safety net to ensure that the main principles of justice in the national legal system are upheld. It will always remain possible for a state to set the award aside or to refuse recognition and enforcement of an award if this award is contrary to public policy however that may be conceived in that state. Therefore, if the arbitral proceedings take place in a given state, arbitrators must not disregard the mandatory procedural rules of that state, as will be explained later in this chapter.

C. Parties' choice of substantive rules

The substance of the dispute is a particularly sensitive area. The difficulty arises in international commercial arbitration since various national laws may be deemed applicable to the substance of the dispute due to international commercial relations often involving several foreign elements, which connect the dispute to different countries with different laws and rules.[49]

Generally, the parties' freedom to choose foreign laws to govern the substance of their dispute is subject to the courts' control in order to ensure that their agreement does not contravene the national mandatory rules.[50] However, the modern trend in international commercial arbitration tends towards liberating commercial arbitration from the control of national courts where the freedom of the parties to choose the applicable substantive rules has gained

48. See Bank Mellat v. Helliniki Techniki, per Kerr L.J. Q.B. [1984], p.301; also in Dallal v. Bank Mellat, [1986] Q. B., p. 441; (1985) 1 All ER., p. 239, the High Court held that: "English law does not deny the possibility of applying a different curial law."; Saudi Arabia v. Aramco, International Law Reports (1963) 27 ILR 117; see also, Rubino-Sammartano. M., op. cit., p. 283.

49. G. Guedji Thomas, "Theory of the Lois de Police - A Functional Trend in Continental Private International Law (a Comparative Analysis with Modem American Theories," 39 AJIL (1991), p. 660; Nathalie Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," Am. Rev. Int'l Arb. (1996) 7, p. 319; James Miller & Partners, Ltd. v. Whitworth Street Estates (Manchester), Ltd., [1970] AC 583, [1970]2 Weekly Law Report, p. 728(H.L.).

50. Marc Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," (1997) 14 J.Int. Arb., p. 23.

a considerable amount of respect. International entities and several legal systems have accepted the application of this concept.[51] For example, Article [28] of the Model Law (1985) provides that:[52]

"The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."

Article 17(1) of the ICC Rules (1998) provides that:[53]
"The parties shall be free to agree upon the rules to be applied by the arbitral tribunal to the merits of the dispute."

Section 46 (1) of the English law provides that:
"The arbitral tribunal shall decide the dispute- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or; (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal."

Article 39(1) of the Egyptian law provides that:
"The arbitral tribunal shall apply to the substance of the dispute the rules that have been agreed upon by the two parties."

Parties to an international contract may sometimes agree to have their dispute governed by a particular national law or may choose to apply the customs and usage of international trade that are common to all or most of the states connected with the dispute[54] or international trade

51. It has been reported that: "Despite their differences, common law, civil law and socialist countries have all equally been affected by the movement towards the rule allowing parties to choose the law to govern their contractual relations". Okezie Chukwumerije, op. cit., p. 108; Julian Lew, op. cit., p. 75; Abu Zaid Redwan, op. cit., p 93; Ashraf al Rifaie, op. cit., p. 217.

52. See also, Article 33. (1) of the UNCITRAL Rules of (1976) providing that: "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute."

53. See ICC Case No. 1512 /1971, Y. Comm. Arb., (1976), p. 128; Clunet 1974, at 905, S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards: 1974 -1985 (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1990) 3 at 4-5; See, Okezie Chukwumerije, op. cit., p. 108.

54. This approach is in conformity with certain rules of arbitral institution such as ICC, since Article l3 (5) of the ICC Rules of 1988, which has been repeated in Article 17 (2) of the 1998 rules which provides that: "In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages". See, ICC Award 6527/1991, Y. Comm. Arb., (1993), p. 45; ICC Award 4629/1989, Y. Comm. Arb., (1993), p. 11; ICC Award 6076/1989. Y. Comm. Arb., (1990), p. 83.

law (lex mercatoria).[55] The latter has been considered preferable by parties involved in international commercial arbitration, which may prefer to apply a special set of rules made in consideration of their needs. Businessmen dealing with international commercial relations need to apply a developed commercial law different in some measure from the state laws, which the courts would apply.[56] Awards based on the lex mercatoria are now placed on the same footing as awards rendered on the basis of domestic or international law rules in the sense that, in both cases, the courts will not sit in judgement as to what is the correct or incorrect construction by the arbitrator of the rules on which the award is based.[57]

Arbitrators are bound to apply the laws or rules that have been determined by the parties.[58] If the parties' intention is not clear or absent, then it is for the arbitral tribunal to decide the applicable rules in order to proceed with the arbitration and decide on the outcome of the dispute.

D. Deciding the applicable substantive rules

Deciding the applicable substantive rules, a matter for the arbitral tribunal, may stir up difficult problems. Considering that in international commercial relationships several legal systems may be applicable to the contract, and that these various legal systems may treat the contract in different ways, the contractual relationships will differ according to the applicable legal system. In order to decide

55. Berthold Goldman defines the Lex Meractoria rules as: "lex mercatoria is, at the least, a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a national system of law." Berthold Goldman, "The applicable law: general principles of law - the lex mercatoria," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 116. He also considers lex mercatoria as the result of the rules and principles arising from various sources: from multinational systems, national legal systems and spontaneous sources, including the fundamental principle of international law and the principles which drive their binding nature from the knowledge of the international community rather than from a given national legal system; Julian Lew defines it as a "non-national or transnational commercial law which governs those aspects of international trade not regulated by some national law, and are applied by arbitrators." Julian Lew, Applicable Law in International Commercial Arbitration, op. cit., p. 532; Hans Smit, op. cit., p. 629 at p. 632.

56. B. Goldman provides that: "This is the case especially in international commercial contracts that deal with specific types of goods, where they prefer to apply rules derived from commercial usage or (lex mercatoria) of an international nature, which is or may be, different from the applicable national law. The 'lex mercatoria' is precisely an assemblage of principles, institutions and rules from all sources, which have nourished and still do nourish the legal structures and the legal functioning specific to the collectivity of operators in international commerce." B. Goldman, La Lex Mercatoria dans les Contrats et l'Arbitrage Internationale. Translated from French by Wolfgang Peter, op. cit., p. 94.

57. Vanessa L.D. Wilkinson, "The New Lex Mercatoria Reality or Academic Fantasy?," 12 J.Int.Arb., (1995), p. 103; Georges R. Delaume, op. cit., p. 9.

58. In ICC award Case No. 1581/1971, ICC International Court of Arbitration Bulletin, VI/1 (1995), p. 14. The award states that: " … the arbitral tribunal derives from the terms of reference the entire scope of its power and its competence and contrary to a State Court, is bound by the will of the parties where such parties are unanimous on the question."

which substantive rules the arbitral tribunal may apply, the following questions will be examined:

1. Does the arbitral tribunal have a free choice in its search for the applicable law (as parties acting autonomously do), or should it first search for any indication of what could be considered as an implied choice by the parties?

2. If there is no indication of the parties' choice, then is it permissible for the arbitral tribunal to apply whatever system it deems appropriate in order to govern the dispute?

1. Searching for the tacit choice

Parties may refer to arbitration without providing a clear intention as to which law or set of rules should govern their dispute. Nevertheless, there might be indications that would guide the arbitral tribunal in determining the applicable law.[59] It may be possible to infer the choice of law from the nature and terms of the parties' contract and the relevant surrounding circumstances.[60] Arbitrators may be guided by the parties' previous relationships and, in their absence, from current practice in the countries to which the contracting parties belong. They may also be guided by searching for a suitable solution that is as near as possible to the expectations of both parties.[61] In such circumstances arbitrators are bound to search first for such indications before they decide on the applicable rules by using their discretionary power.[62]

59. The law governing a contract could be inferred from the parties' intentions, whether they are expressed or implied. This was the view in Sapphire Int. Petroleum Ltd. v National Iranian Oil Co. (1967) International Law Review, p. 136; also see, the Texaco case (1979) International Law Review, p. 389; ICC Award 3572/1982, Y. Comm. Arb., (1989), p. 111; ICC Award 4145/1984, Y. Comm. Arb., (1987), p. 97.

60. This can be established if it appears from the circumstances of the case that the contract has its most significant connection with the law of a particular country. See Dicey and Morris, The Conflict of Laws, 7th ed., Stevens, (1958); Redfern and Hunter, 2nd ed., op. cit., p. 122; See Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. (1987) A.C. 50.

61. For example, if in the course of their pre-contractual negotiations the parties had held diametrically opposed points of view on the question of the applicable law, and for this reason did not specify such a law in their contract. Arbitrators in such circumstances may apply the law that best conforms to the parties' legitimate expectations. See Yves Derains, op. cit., p. 234. To the same extent this was the trend followed in Article 3 (1) of the Rome Convention (Convention on the Law Applicable to Contractual Obligations (19 Jun 1980)), which provides that: "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."; Rubino-Sammartano. M., op. cit., p. 275; Klaus Peter Berger, op. cit., p. 691; Bernard Hanotiau, op. cit., p. 397.

62. In order to consider a tacit choice as a choice made by the parties, and therefore, binding on the tribunal, there should be a clear indication that it represents the genuine choice of the parties. See Julian Lew, Applicable Law in International Commercial Arbitration, op. cit., p. 181; Redfern and Hunter, 2nd ed., op. cit., p. 123; Ole Lando, "The law applicable to the merits …", op. cit., p. 112; J. G. Collier, op. cit., pp.185-188; Rubino-Sammartano. M., op. cit., p. 256; Okezie Chukwumerije, op. cit., p. 122; Amin Rasheed Shipping Corporation v. Kuwait Insurance Company (1984). E.C.R. 1351.

The most important factor used to determine the tacit choice of the parties is whether or not the parties have agreed to hold the arbitration in a particular country.[63] If so, this would be a strong indication to consider their 'choice of forum as choice of law'.[64] According to this concept, the parties' choice of country as the seat of their arbitration will automatically involve the application of the domestic law of that country, which in practice should prevent the arbitrators from choosing a different law. This method of considering the choice of forum as the choice of law provides an easy solution. The English court of appeal in Tzortzis v. Monark Line A/B considered this solution as "irresistible" in deciding the law applicable to international contracts.[65] The court viewed the choice of England as the seat of arbitration as a factor indicating the choice of English law which "overrides all other factors".

However, the application of this concept is not acceptable in all cases, especially if arbitration takes place in different countries, or if the choice of a specific forum is made for reasons unconnected with the law of that forum. For example, the parties may choose a country to be their forum for geographical convenience if it provides a suitable neutral venue especially if each party is sceptical about receiving fair treatment in the other state's courts or about the reputation of the arbitration service to be found in that forum.[66] Moreover, the trend followed by international doctrines tends to detach international commercial arbitration from the forum, stating that "there is no lex fori to international arbitral tribunals".[67]

63. Thomas, D. Rhidian, "Commercial Arbitration: Arbitration Agreements as a Signpost of The Proper Law," [1984] LMCLQ, p. 141.

64. English courts have held that an agreement to submit to the jurisdiction of the courts or to go to arbitration in a particular country is evidence of the intention to apply the law of that country. In most cases this has led to the application of English law. NV Kwik Hoo Tong Handel Maatschappij v. James & Co. Ltd, [1972] AC 604 HL; Tzortzis v. Monark Line AB, [1968] 1 WLR 406 CA. In the latter case, the choice of arbitration in London by a Greek and a Swedish party was considered to be a choice of English law; see also Sojuzenfterexport v. Joc Oil Ltd. (1990) Yearbook of Commercial Arbitration (1992), p. 384, in which it was agreed that all disputes were to be referred to arbitration in Moscow without specifying the proper law of the agreement, and in which the Bermuda Court decided that the Soviet law was the proper law to use in order to decide the scope of the agreement.

65. In Tzortzis v. Monark Line A/B (1968) 1 All E.R. 949, also can be viewed in, 1 W.L.R. (1968) at 406.

66. O Lando, op. cit., p. 105; Redfern and Hunter, 2nd ed., op. cit., p. 123; Rubino-Sammartano. M., op. cit., p. 123; W. Michael Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration," 38 INT'L & COMP. L. Q., (1989), p. 26 at 42; Also see, Compagnie d'Armement Maritime S.A. Appellants v. Compagnie Tunisienne de Navigation S.A. Respondents (1971) A.C. 572.

67. B. Stern, "Three Arbitrations, the Same Problem, Three Solutions," Rev. Arb. 1957, p. 111, referring to the arbitrator in Aramco where he reached to the conclusion that: "the arbitral tribunal has no lex fori"; Pierre Lalive, Transnational (or Truly International) Public Policy op.cit., p. 271; Redfern and Hunter, 2nd ed., op. cit., p. 125; Yves Derains, op. cit., p. 232; Rubino-Sammartano. M., op. cit., p. 258; Okezie Chukwumerije, op. cit., p. 124; J. G. Collier, op. cit., p. 17.

Therefore, to consider a choice of forum as a tacit choice of law, there must be some relevant relationship between the arbitration and that forum.[68] For instance, if the parties choose an arbitration institution established in a particular country which is also the country where the contract has been or would have been performed, then it is likely that it will be considered that the tacit choice has been to apply the law of that country.[69]

2. Deciding which rules govern the substance of the dispute

The modern trends of international commercial conventions and rules of arbitration give considerable freedom to the arbitral tribunal to choose the rules that govern the substance of the dispute.[70] This trend has been reflected in the rules of various international commercial institutions and international conventions:
For example, Article 28(2) of the Model Law (1985) provides that:[71]

"Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable."

The same essential provision can be found in Article 17 (1) of the ICC Rules (1998), in which the word 'appropriate' is used.[72] Article 17 (1) of the ICC Rules provides that:[73]

"The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate".

68. Yves Derains, op. cit., p. 231.

69. Sometimes when parties select an arbitrator from a certain country and place the seat of arbitration in that same country, this may provide an indication that they expect him to apply the law of that country.

70. The freedom of arbitrators to choose the rules that they consider appropriate was asserted in the award made in ICC Case No. 2735/1976, Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 301; Journal du Droit International, Clunet (1977), p. 947. Here the tribunal decided to apply French law as the proper law to govern the dispute; Paolo Contini, op. cit., p. 283 at 290. However, there were objections to the freedom of arbitrators to apply the rules as they think fit on the grounds that this leads to uncertainty; A.J.E Jaffy, op. cit., p. 78; also see, Rubino-Sammartano. M., op. cit., p. 258; Redfern and Hunter, 2nd ed., op. cit., p. 128.

71. See also Article 33(1) of the "UNCITRAL" Arbitration Rules (1976).

72. The "Model Law" and the "UNCITRAL" uses 'applicable'.

73. See also Article 17 (2) of the ICC Rules which provide that "In all cases the arbitral tribunal shall take account of the provisions of the contract and the relevant trade usages"; also see Article 7 (1) of the European Convention on Commercial Arbitration (1961) which provides that: "… Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable."

Several legal systems follow this trend, by giving arbitrators a free choice in deciding the applicable substantive rules according to what they may find appropriate and closely connected to the dispute. For example, this was the method followed in Article 39 (2)(3) and (4) of the Egyptian law of (1994) which provides that:

"(2)- if the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral tribunal shall apply the substantive rules of the law it considers closest to the dispute.

(3)- the arbitral tribunal, when adjudicating the merits of the dispute, shall decide in accordance with the terms of the contract in dispute and the usage of the trade applicable to the transaction."

The English Arbitration Act of 1996 provides in Section 46 (3):[74]

"(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

The question here is: how can arbitrators determine the appropriate rules? One should consider here that the arbitrators have a duty to resolve the dispute and to provide the parties with an enforceable award, and must therefore determine the law that should govern the dispute. Therefore, they are required to search for links between the matter under arbitration and a particular legal system. This can be made by examining several relevant factors notably[75], the place of business or habitual residence of the parties[76], the place

74. Also this was the trend before the 1996 Act. In Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Ras Al-Khaimah National Oil Co, [1988] 3 W.L.R. 230; [1988] 2 All E.R. 833; [1988] 2 Lloyd's Rep. 293. The English court of appeal considered the validity of an agreement under which arbitrators had chosen the "international accepted principles of law governing contractual relationships". Lord Donaldson held that: "By choosing to arbitrate under the rules of the ICC and in particular Article 13. (3), the parties have left the proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators' choice of proper law – a common denominator of principles underlying the laws of various nations governing contractual relations – is outside the scope of the choice which the parties left to the arbitrators"; also see, James Miller & Partners, Ltd. v. Whitworth Street Estates (Manchester), Ltd., 1 All E. R. 796, 801-02, 809-10 (House of Lords Mar. 3, 1970).

75. See Dicey and Morris, The Conflict of Laws, 11th ed., Stevens (1987) Vol. II, p. 1161. It has been stated that: "the term 'proper law of a contract' means the system of law by which the parties intended the contract to be performed, or where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."

76. The principal office and the habitual residence of the seller at the time in question, and the place of conclusion of sales contracts were considered in deciding the applicable law in ICC Award 6281/1989, Y. Comm. Arb., (1990), p. 96; Collection of ICC Arbitral Awards, Volume III, 1991-1995, Jean-Jacques Arnaldez, Yves Derains, Dominique Hascher, p. 409. Also, the place of performance of contract was considered in ICC Award 4650/1985, Y. Comm. Arb., (1987), p. 110; ICC Award 5460/1987, Y. Comm. Arb., (1988), p. 104; See, A. Rogers, "Contemporary Problems in International Commercial Arbitration," (1989) 17 IBL, p. 154 at 158; M. N. Howard, "Floating Choice of Law Clauses," (1995) LMCLQ, p. 1 at 5; Dicey and Morris, The Conflict of Laws, 8th ed., Stevens and Sons Ltd., (1967), p. 1048.

of contractual performance, the place of arbitration[77], and even the nationality of the arbitrator.[78]

Most frequently, arbitrators in international commercial arbitration apply the following systems for determining the applicable law:[79]

a- Application of the rules of the forum;[80]
b- Cumulative application of the legal systems of the countries that have close links with the dispute;[81]
c- Application of the rules chosen directly by the arbitral tribunal, by directly selecting the applicable law that it may find the most relevant to the contract.[82]
d- Application of general principles of conflict of laws;[83]

77. See ICC Award 6268/1990, Y. Comm. Arb., (1991), p. 119.

78. However, applying the law of the country of which an arbitrator is a national was criticised as being less relevant in choosing the applicable law. See Rubino-Sammartano. M., op. cit., p. 261.

79. In an arbitral award issued under the auspices of the Cairo Centre, (Arbitration case No. 95/1997, March 12, 1998, 1 Journal of Arab Arbitration (1999), p. 45). The tribunal relied on five different criteria to determine the applicable law: "When an issue of conflict of laws arises, the arbitral tribunal relies on five criteria in its endeavour to determine the applicable law, namely: the arbitration venue, the venue of signing the contract, the residence of the parties to the contract, the venue of executing the contract and the language of the contract or the language of the arbitration if they are different."

80. See ICC Case No. 1598/1971, Y. Comm. Arb., (1978), p. 216; S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards: 1974-1985. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1990), p. 167; See also ICC Case No. 1455/1967, Y. Comm. Arb., (1978), p. 215; S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards: 1974-1985. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1990), p. 167; S. Baker and M. Davis, The "UNCITRAL" Arbitration Rules in Practice: The Experience of the Iran – United States Claims Tribunal (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1992), p. 127; Okezie Chukwumerije, op. cit., p. 127; A.J.E. Jaffey, op. cit., p. 79. However, the same criticism that has been addressed to the application of the forum's procedural rules (mentioned above), can be imposed on the application of the forum's substantial rules.

81. This method can be used when there are competing sets of rules in conflict with each other, such as the conflict between rules of the parties' country of nationality or residence and the rules of the seat of arbitration; and that between the rules of the country where the contract is to be performed and the country where the award would be enforced). see Yves Derains, op. cit., p. 233. This method was applied by the arbitral tribunal in ICC Case No. 953/1956, Y. Comm. Arb., (1978), p. 214; see also, CC Award No 4434/ 1982, Journal du Droit International (1983), p. 893; Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 458; ICC Award No 2886/1977, Journal du Droit International (1978), p. 996; Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 332; ICC Award No 3235, reported in Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 410; Journal du Droit International (1981), p. 925; ICC Award No. 4434/1982, : Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 458; Okezie Chukwumerije, op. cit., p. 128. The problem with this theory occurs when the dispute involves a conflict of rules which involves different substantial laws.

82. Here arbitrators should weigh up the different criteria, on a case by case basis and their relative importance in relation to the centre of gravity of the contract. See Yves Derains, op. cit., p. 236; Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 305. He considers the tribunal's choice in determining the closest connection to the dispute, on the same level as the autonomy of the will of the parties; Ole Lando, "The law applicable to the merits…", op. cit., pp. 107 and p.133; also in this regard see, ICC Award No. 6281/1989, Egyptian Co. v. Yugoslav Co. Award (August 26, 1989), 15 Y. Comm. Arb., (1990), p. 96.

83. This includes applying the law applicable to conflict of rules that is common to the majority of countries and which is accepted by most modern jurisdictions and international conventions, having become international commercial practice. See ICC Case No. 4650/1987, 12 Y. Comm. Arb., (1987), p. 110; ICC Case 6527/1991, Y. Comm. Arb., (1993), p. 44 at 46; ICC Award No 4434/ 1982, Journal du Droit International (1983), p. 893; Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 458; ICC Award No 3880/1983, Y. Comm. Arb., (1985), p. 44; Okezie Chukwumerije, op. cit., p. 129; Ole Lando, "The law applicable to the merits…", op. cit., p. 109.

e- Applying the lex mercatoria rules[84], which would meet with the requirements of international commerce.[85]

As previously stated, arbitrators are responsible for making an award that must have a legally valid basis in order to be enforced. Therefore, it is imperative to choose a legal system or set of rules, which are closely connected to the dispute[86], and which also corresponds to the parties' legitimate expectations.[87] In order to accommodate these different aims arbitrators should consider what the parties would have decided if they had considered the question of the law applicable to their contract, and arbitrators should also avoid the possibility of violating the public policy of countries closely connected to the dispute. Whilst the latter consideration is integral to creating an award which could be enforceable, arbitrators may encounter the problem of determining the extent to which public policy should be applied and which public policy rules are applicable particularly in situations where they are not acting according to the rules of a particular national law.[88] Accordingly parties or arbitrators have to select the law most appropriate to the needs of the arbitration and the merits of the dispute, in order to avoid as far as possible a decision to set the award aside because it has violated national public policy rules.

84. One should consider that arbitrators might need authorisation from the parties, since otherwise arbitrators would be considered as acting as aimable compositeurs. Kluas Berger pointed to examples in Germany and Switzerland. See Klaus Peter Berger, op. cit., p. 685. Notwithstanding that, Berger considers "the arbitrator's decision according to the rules of lex mercatoria as decisions made according to the law, not equity", at p. 686.

85. Arbitrators may resort to the application of such rules and/ or usage where there are no efficient connecting factors as in cases where there is more than one place of execution and performance of the contract. See for example, ICC Award, Case No. 1375/65; ICC Award, Case No. 1859/73; ICC Award No 1675/1969, Journal du Droit International (1974), p. 895;Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 197; see also, Deutsche Schachtbau-und Tiefbohrgesellschaft GmbH (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil), [1987] 2 Lloyd's Rep. 246, which concerns the enforcement of an arbitral award which was based on lex mercatoria; See Berthold Goldman, Julian Lew ed., (1987), op. cit., p. 117; Ole Lando, "The law applicable to the merits…", op. cit., p. 107; Ole Lando, "The Lex Mercatoria in International Commercial Arbitration," International and Comparative Law Quarterly, 34 (1985), p. 747 at 768.

86. Compagnie d'Armement Maritime S.A. Appellants v. Compagnie Tunisienne de Navigation S.A. Respondents (1971) A.C. 596.

87. Yves Derains, op. cit., p. 233; Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 305.

88. Gunther J. Horvath, op. cit., p. 146.

II. The Duty to Respect the Applicable Rules

In general, arbitrators' duties can be divided into two categories: their duties towards the arbitrating parties, and their duties towards the applicable law.[89] The first category is of a contractual nature as it establishes the relationship between parties and arbitrators. The second category can be inferred from the duty of the arbitral tribunal as it assumes the role entrusted to a court of the state in resolving disputes. This accordingly imposes the duties of reaching a just decision between the parties and balancing the interests of the parties with the interests of the community or communities that would be affected by the resulting award.[90] The latter duty could be discharged by considering the application of public policy rules, as illustrated below. However, it will be important firstly to scrutinise the nature of the duties of both parties and arbitrators, and then to examine the duty of the arbitral tribunal in considering the application of public policy rules.

A. Mutual obligations imposed by the arbitration agreement

The relationship between parties and arbitrators is generally regarded as contractual in nature, and is recognised by several legal systems. In 'Common Law Jurisdictions', this relationship has been described as a 'contract for services'.[91] In 'Civil Law Jurisdictions' there are two tendencies: some consider the relationship as being a contractual relationship, while others consider that arbitrators are discharging a public task.[92] In Islamic Law and generally in Arab countries which apply the "Sharia" legal system, this relationship is considered as contractual, since the contract consists of an offer from one of the contracting parties and an acceptance from the other.[93]

89. Julian D.M. Lew, "Determination of Arbitrators' Jurisdiction…" op. cit., p. 73.

90. Redfern and Hunter, 2nd ed., op. cit., p. 262. The writers provide here that there are two groups of duties imposed on arbitrators. These are; duties imposed by the agreement of the parties; and those imposed by the law such as the duty to act with due care the duty to act with diligence, the duty to act judicially and ethical duties.

91. See Michael J. Mustill and Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England, 2nd ed., Butterworths, London, (1989), p. 280; Rubino-Sammartano. M., op. cit., p. 189.

92. Ibid. p. 190.

93. See, for example, Article 87 of the Jordanian Civil Law of 1985, where it defined contracts as: "The contract is a joining and consistence of the offer from one of the contracting parties with the acceptance from the other in a manner which proves the effect thereof on the object of the contract and the obligation of each party by what he is bound with to the other." See Hisham R. Hashem, The Civil Law Code of Moslem Jurisprudence, (1990), Al- Tawfiq Printing Press, p. 13. (in English).

Accordingly, an offer made by the parties to an arbitrator must meet with an acceptance of appointment by that arbitrator, as a condition of the institution and enforcement of the arbitration agreement.[94] As a consequence of their contractual relationship, both parties and arbitrators will have mutual obligations.

1. Duties of the parties

During the arbitration proceedings, parties are obliged to comply with the procedures of arbitration. For example, they are obliged to provide the tribunal with a document which can support their claims.[95] Parties are also obliged to enforce "partial awards" and "interim measures", in order to help the arbitral tribunal to conduct the arbitration.[96] For example, if the arbitral tribunal ordered one of the parties to present a document held in his possession[97], then that party must comply with that order.[98] Parties are also obliged to co-operate in good faith and not to aggravate an on-going arbitration[99], and they must avoid acts which make enforcement more difficult.[100] They are also obliged to pay the cost of arbitration and arbitrators' fees, whether this is paid directly to the arbitrators or through an arbitral institution with a supervisory function.[101]

Parties are also obliged to comply with the public policy rules of the countries that are closely connected to the dispute. They are also required to choose rules or laws that do not contradict international public policy.

94. Samir Saleh, Commercial Arbitration in the Arab Middle East, Graham and Trotman, London, 1984, at 21- 39.

95. Article 23(1) of the Model Law (1985); Article 15 of the LCIA Rules of 1998; Article 30 of the Egyptian law of 1994; Section 40 of the English law of 1996.

96. Article 17 of the Model Law (1985).

97. Arbitrators can order parties to produce a particular document. See, Kenneth S Rokison, "The Sources and Limits of the Arbitrator's Powers in England," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 95.

98. For example, see Article 20 (5) of the ICC Rules of 1988; Section 40 (2)(a) of the English 1996 Act.

99. Bremer Vulkan v. South India Shipping Corp. Limited. [1981] 1 Lloyd's Rep. 253; (1981) A.C., p. 909. The court expressly provided that: "The parties were equally under an obligation to keep the procedure moving, both were under an obligation to apply to the arbitrator to prevent inordinate delay."

100. Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," Contemporary Problems in International Arbitration, Julian Lew ed., (1987), p. 63.

101. Article 30 and 31 of the ICC Rules (1998); Section 59 of the English Law of 1996.

2. Duties of the arbitral tribunal

In accordance with their contractual obligations, arbitrators have to respect the will of the parties as expressed in their arbitration agreement. They also have a duty to give the parties an equal opportunity to present their case[102], and a duty to respect what the parties decide are the most suitable rules to govern their dispute. Where parties agree to apply a particular law to govern their dispute, arbitrators are obliged to enforce their agreement.[103] If they fail to make their choice according to the law that has been chosen by the parties, arbitrators will be deemed not to have carried out the task entrusted to them by the arbitration agreement.[104] This may affect the enforcement of the award since a party can challenge the arbitral award if the arbitral tribunal applied rules other than those chosen by the parties.[105] Therefore, arbitrators should keep in mind that disregarding the parties' choice might lead to a defective award.[106]

In spite of the arbitrators' obligation to apply the law chosen by the parties they are not completely barred from applying other rules to the dispute, particularly if the choice of the parties leads to a violation of public policy rules, and if by disregarding the parties choice arbitrators would avoid derogation of the public policy of other countries connected to the dispute.[107] The fact that the arbitrator can apply other rules to the dispute despite the parties' choice, reflects his duty towards the community that has a close connection with the dispute and in this respect he must take into account the applicability

102. Arbitrators must consider the need to secure quick arbitration procedures and they should avoid going through lengthy presentations of evidence, which will add to the cost and time of the arbitration. See, for example, Article 15 (2) of the ICC Rules (1998) which provides that: "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."; Article 14 of the LCIA Rules; Article 18 of the Model Law. The right of the parties to have a fair chance to present their case will be handled in more detail later in Chapter Five, at p. 187.

103. Section 46(1) of the English law (1996) provides that: "The arbitral tribunal shall decide the dispute – (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute".

104. Robert H. Smith, "An Inside View of the ICC Court," (1994) Arb.Int., p. 53 at 58.

105. For example, Article 33(d) of the Egyptian law (1994) provides, that the arbitral award may be nullified where it " failed to apply the law agreed upon by the parties to govern the subject matter in dispute". Also see, Article 36 (1)(a) of the Model Law; Article V (1) of the New York Convention.

106. Okezie Chukwumerije, op. cit., p. 80; Redfern and Hunter, 2nd ed., op. cit., p. 100.

107. In ICC Case No. 3267/1979, Y. Comm. Arb., (1982), p. 96. The arbitral tribunal concluded that, "It is a generally accepted principle of international arbitration that the first duty of the arbitrator, even if he is an amiable compositeur, is to apply the contract entered into between the parties, unless it is established that the clauses which are quoted to him are manifestly contrary to the real intention of the parties or that they break a principle of public policy which is generally admitted". Rubino-Sammartano. M., op. cit., p. 216; Yves Derains, op. cit., p. 230.

of public policy rules. Finally, one should say that, regardless of the argument which states that arbitrators are not public servants like national judges, and are not bound therefore by the same duties as a national judge, the fact that they have the duty to provide the parties with an enforceable award, should ensure that they address the applicable public policy rules.

B. The duty of respecting public policy rules

As stated above, the duty of considering the applicability of public policy rules may originate in the arbitration agreement. In addition to their contractual duties, arbitrators' duties have another dimension, emanating from their duty to consider the interests of the parties along with the interests of the community or communities that are connected to the dispute.[108] They have to resolve the dispute between the parties by achieving justice and equity[109], while at the same time they have to take into account factors which might be injurious to public policy.[110] Therefore, arbitrators must evaluate two sets of interests: those of the parties and those of the community, although ultimately they are always bound to give preference to the public interests.[111] Furthermore, arbitrators are required to act as an alternative to national courts. Therefore, because of the power allocated to them in this capacity, they should consider the applicable public policy rules of the countries that have the closest connection with the dispute, such as the country where the arbitration proceedings are held[112], or the country where the contract will be performed or enforcement of the arbitral award will take

108. Ole Lando, "The law applicable to the merits…", op. cit., p. 107. He considers arbitrators as responsible for the legitimacy of their award, and states: "… the arbitrator has a double concern. As the servant of the parties he must persuade them and especially the losing party of the justice of his award. Furthermore, he must make sure that the award is enforceable in the country or the countries where enforcement may be sought"; Yves Derains, op. cit., p. 233.

109. See Hagop Ardohalian v. Unifer International SA (The "Elissar") [1984] 2 Lloyd's Law Reports 84 at pp 87, 87.

110. Arbitrators are not authorised to take a decision contrary to an absolutely constraining law, particularly in matters concerning public order. See ICC Award 1677/1975, 3 Y. Comm. Arb., (1978), p. 217; William W. Park, "National Legal Systems and Private Dispute Resolution", (1988) 82 AJIL., p. 616.

111. See A.J.E. Jaffey, op. cit., p. 1.

112. For example, it is necessary for arbitrators to consider to what extent the law of the place of arbitration applies when deciding the arbitrability and the validity of an arbitration agreement. See ICC Final award 6162/1990, Y. Comm. Arb., (1992), p. 153; Alsing Trading Co.Ltd. v. The Greek State (1956) International Law Review, p. 633; Sapphire Int.Petroleum Ltd. v. National Iranian Oil Co. (1967) International Law Review 136; BP v. Libyan Arab Republic (1979) ILR 297; Wintershall AG v. The Government of Qatar, (1989) International Legal Materials, p, 798; also see, William W. Park, "The Lex Loci Arbitri…", op. cit., p. 23.

place. One should recognise however, that arbitrators are not the guardians of a specific national law as court judges are and they are not 'completely bound' to apply the public policy rules of a particular country. Accordingly, arbitrators are only expected to 'consider' the public policy rules of countries that are closely connected with the dispute.

Another source of this duty comes from the arbitrators' duty to protect the rules and customs of international trade. This is the view of Julian Lew[113], for whom arbitrators are:

" … the guardians of the international commercial order: they must protect the rights of participants in international trade; give effect to the parties' respective obligations under the contract; imply the presence of commercial bona fides in every transaction; respect the customs followed in international trade practice and the rules developed in relevant international treaties; uphold the commonly accepted views of the international commercial community and policies expressed and adopted by appropriate international organisations; and the fundamental moral and ethical values which underlie every level of commercial activity."[114]

By examining the dispute in this light, arbitrators will provide an award that is more likely to be recognised and enforced. This approach corresponds to the modern tendency followed in international commercial arbitration, where arbitrators are obliged to ensure the validity of their award.[115]

113. Julian DM Lew, Applicable Law in International Commercial Arbitration, op. cit., 532; also see, Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," Julian Lew ed., (1987), op. cit., pp. 67-68.

114. See also, Geoffrey Beresford Hartwell, "The New York Convention of 1958. A Basis for a Supra National Code," Internet address: (http:www.hartwell.demon.co.uk/nyc_asa.htm), p. 1. He holds that, "…arbitrators, even in an international context, have some overriding responsibility to the public interest or to the concept of public order"; Okezie Chukwumerije, op. cit., p. 180. He states that, "... the integrity of international arbitration and its endurance as a viable alternative to litigation would seem to rest on arbitrators' continual respect for the public policy of states whose legitimate interests are implicated in arbitration disputes. Arbitrators therefore have to balance their respect for the autonomy of the parties' will with the need to apply the mandatory provisions of laws that are relevant to the dispute."

115. Klaus Peter Berger, op. cit., p. 673. He provided that arbitrators are always concerned about the effectiveness of their decision: "The arbitrator has at least a moral obligation to give the parties an award which can be expected to stand, both in the case of setting aside procedures and in the case of enforcement procedure, before national courts"; Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," op. cit., p. 185, appears to concur and adds, "…the arbitrator should therefore make every effort possible to find out and respect also mandatory or at least public policy rules of countries where such court procedures might be expected."; John Y. Gotanda, op. cit., p. 100.

For example, Article 32 (2) of the LCIA Rules provides that:
"In all matters not expressly provided for in these rules, the court and the tribunal shall act in the spirit of these rules and shall make every reasonable effort to ensure that the award is legally enforceable."

Article 35 of the ICC rules of (1998) provides that:[116]
"In all matters not expressly provided for in these rules, the court and the arbitral tribunal shall act in the spirit of these rules and shall make every effort to make sure that the award is enforceable at law".

One can add here that the examination of the dispute by the arbitral tribunal could be considered a preliminary stage prior to inspection by the court, which may lead to more respect and confidence in international commercial arbitration.

Having established these points, it is now necessary to analyse which public policy rules are applicable in international commercial arbitration.

C. The applicable public policy rules

The arbitrator must take into account the rules of several legal systems in deciding the applicable public policy rules in international commercial arbitration. The process by which the arbitral tribunal determines the applicable public policy rules may be examined under two categories, these are:
1- The public policy of the law chosen by the parties.
2- The proper public policy rules.

116. The same was provided in Article 26 of the ICC Rules of 1988. For the application of this rule see ICC Case No. 5485/1987, reported in 14 Y. Comm. Arb., (1989), p. 156, 162; ICC Case No. 5505/1987, reported in 13 Y. Comm. Arb., (1988), p. 110, at 110, 112, which states, "In order to fulfil the obligation imposed by article 26 of the ICC rules the arbitrator should probably also deviate from the law chosen by the parties if it would appear that such a choice, if applied by the arbitral tribunal, could prevent that the award be implemented. The arbitrator must ensure that his award is ultimately enforceable."

1. Public policy rules of the law chosen by the parties

If an arbitration agreement includes a clear choice of law, then arbitrators will be required to apply that law, and thus the public policy behind that law.[117] The problem that may occur here is that parties may deliberately choose a particular law in order to avoid applying the mandatory rules of another law.[118] They may also make a "negative choice of rules", for example, by excluding some provisions of the applicable law, particularly the mandatory rules, which conflict with their private interests.[119] This problem emanates from the right of the parties to choose the applicable law which will govern their dispute even if that entails that the dispute will be governed by general principles of law or the lex mercatoria.[120] According to this freedom, it is argued that parties should also be allowed to exclude certain provisions of the applicable law that they do not consider appropriate to their transaction[121], and that which conflict with their interests.[122] The arbitrator is faced here with a

117. In an award made in 1980 in ICC Case No. 3380/1980, Y. Comm. Arb., Vol. VII, (1982) p. 116. The arbitrators considered that a clause phrased, "…this Agreement shall be subject to and constructed in accordance with the laws in Syria" meant that "the contract is governed by and should be interpreted in accordance with Syrian law in its entirety without restriction." Cited in Yves Derains, op. cit., p. 240; see also ICC Case No. 2119/1978, Journal du Droit International (1979), p. 997; Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 355.

118. For example, if it appeared that by choosing a given law the parties had deliberately decided to take themselves outside the field of operation of another law, for instance, the law of the place of performance of the contract or the law of the country where the enforcement of the contract is likely to take place. see Paczy v. Haendler & Natermann [1981]1 Lloyd's Rep. 302 at pp. 307-308.

119. Rubino-Sammartano. M., op. cit., p. 274. He illustrates the negative choice of the parties and states that, "… 'the negative choice of the parties' means that the parties intended to avoid accepting provisions which they were not aware of in order to avoid finding themselves subject to unanticipated regulation."

120. Vanessa L.D. Wilkinson, op. cit., p. 103.

121. See, Arbitral Award in ICC Case No. 7528/1993 reprinted in 22 Yearbook Commercial Arbitration 125 (1997). The tribunal in this case distinguished between national and international arbitration when determining whether or not to consider the parties' exclusion of a national mandatory rule. In this case the arbitration agreement stipulated that French law would be the governing law but made the proviso that French Law No. 75-134 of 1975 – the purpose of which was to protect the sub-contractor from the consequences of the contractor's bankruptcy – was to be avoided. The tribunal noted that even in international arbitration the parties' agreement should not be allowed to prevail over all mandatory rules of national laws and in all circumstances: some rules are so important to the economic or social welfare of the country that international arbitrators must enforce them irrespective of the contrary intent of the parties. However, the tribunal recognised in this case that, "while French Law No. 75-134 of 1975 has a mandatory character (d'ordre public) in domestic transactions, given the international character of the contract and its place of performance outside France, the parties intent to avoid the provisions of Law No. 75-134 of 1975 must be upheld."

122. Yves Derains, op. cit., p. 235. He refers to the system of "… the incorporation of the law into the contract" where he emphasises that, "… the law applicable to the international contract has no mandatory effect except insofar as the will of the parties has given it that effect. This is the system known as 'the incorporation' of the law into the contract whereby the law is part of the contract and therefore has no greater or lesser value than its other provisions."

potential conflict of loyalties.[123] On the one hand, should arbitrators be loyal to the interests of the parties and thereby bind themselves to apply the rules that they prefer? On the other hand, should arbitrators submit to their duty to act as a court (to act in a quasi-judicial capacity), to protect the public interest if the exclusion of the mandatory rule would lead to a violation of such public interests?[124] The latter means that the arbitral tribunal will be obliged to examine the contract and make sure that the law which has been chosen by the parties is not injurious to the public policy of the country that has closest connections with the dispute.[125]

The freedom of the parties to exclude the applicable mandatory rules has been arguable, because if the parties choose a law to govern their relations, arbitrators have to apply that law as a whole together with its mandatory rules.[126] Moreover, parties and arbitrators are private individuals and do not have the power to exclude what the legislators consider to be important mandatory rules which have to be applied in all cases.[127] Accordingly, there are limits to the principle of 'parties' autonomy' even in international commercial arbitration[128], where protecting the public interest takes precedence over private

123. See in this regard Gerold Herrman, "Does the World Need Additional Uniform Legislation on Arbitration?," 15(3) Arb.Int., (1999), p. 173. He highlighted this conflict and considered that Article V (1)(d) of the New York Convention might lead to "an unacceptable dilemma." Article V (1)(d) requires that the procedural rules should be in accordance with the parties' will, which may lead an arbitrator either to disregard such procedural stipulations and follow the mandatory local provisions, with the result that enforcement of the award may be refused under Article V (1)(d), or to comply with the stipulation, with the result that the award may be set aside on the grounds that it violates a mandatory local provision, in which case, by virtue of Article V (1)(e), its enforcement abroad could be refused.

124. Berthold Goldman, Julian Lew ed., (1987), op. cit., p. 116. In this regard he states that, "One may meet clauses that expressly exclude the application of every municipal law, and provide for the exclusive application of general principles and usages of international trade. In reality, such clauses cannot prevent the arbitrator (and possibly the judge) from referring, in some instances, to a municipal law: for example, where the validity of the consent to the contract or the personal capacity of one of the parties is challenged." See ICC Award, case No 1569/70.

125. This trend was applied in ICC Case No. 1859 (1973) Rev. Arb. 122, in which the arbitral tribunal held that, "… since the contract must be performed in Lebanon, Syria, Jordan, it is a sure fact that the Lebanese importer was obliged to comply with the mandatory rules of the countries of importation and that the Japanese party cannot now claim that those rules cannot be raised against him". Cited in Okezie Chukwumerije, op. cit., p. 189; also see, Daniel Hochstrasser, op. cit., p. 73.

126. Okezie Chukwumerije, op. cit., p. 184, states that: "…when the parties have made an express choice of law, the arbitrator must apply that law, together with its mandatory rules. In most awards in which the applicability of the mandatory rules of the law chosen by the parties arose, arbitrators applied those rules as a matter of fact."

127. Daniel Hochstrasser, op. cit., p. 69; Okezie Chukwumerije, op. cit., p. 187, "…justice is not always to be controlled by the individual as distinct from the community of which the individual is a part."

128. See, Rubino-Sammartano. M., op. cit., p. 252. He states that: "Even the parties' freedom of choice is not unlimited. In fact, if the choice of a given applicable law is the result of the joint attempt by the parties to avoid mandatory provisions which would otherwise be applicable, this choice is not valid, since it is an attempt to evade the law. This is generally referred as fraude a la loi"; see also, A.J.E. Jaffey op. cit., p. 80.

interests.[129] As guardians of the international commercial order[130], arbitrators are thus required to disregard the clause in the parties' agreement[131] which restricts the application of the public policy rules of the law that has a close connection to the dispute where these rules are part of the international public policy. This will be explained below.

2. Searching for proper public policy rules

One should distinguish here between searching for the proper public policy rules and deciding which law is the proper law governing the dispute, as the former comes after deciding which law is the appropriate law.[132] To illustrate the application of the proper public policy rules, we assume that the public policy rules of several legal systems which have a connection to the arbitration are at stake and that the task of the arbitrators is to decide which public policy rules should prevail. Searching for the proper public policy rules in this sense will generate a conflict of public policy rules of the different legal systems that are related to the dispute. The proper public policy rules in this sense are determined according to what arbitrators consider are most closely connected to the dispute.[133]

One should consider in this regard that Article V (2)(b) of the New York Convention does not provide a clear indication as to which public policy rules are to be applied. There is no reference to any particular legal system in the Convention, therefore, an arbitrator

129. ICC award No. 1434/1975, : Journal du Droit International (1976), p. 978; : Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 263.

130. See Klaus Peter Berger, op. cit., p. 692. He states that: "… international arbitrators carry an enhanced responsibility towards the international legal community which is a major factor for the functioning of the international arbitral process as an effective and reliable dispute settlement mechanism."

131. However, see in this regard Pierre Lalive who believes that arbitrators are obliged to apply the public policy rules of the law chosen by the parties since the autonomy of the will should be considered as part of international public policy. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 301-302.

132. However, exceptions may occur in international commercial arbitration, an award in ICC Case No. 4123 in 1983, Yearbook, Vol. X (1985), p. 49, where the arbitrator was dealing with a dispute regarding a contract that had to be performed by a party in Korea and another party in the EEC. He considered the question of the application to the contract of the Korean mandatory rules and the EEC before determining the law applicable to the contract. Cited in , Yves Derains, op. cit., p. 245.

133. This approach was followed by the European Convention on the Law Applicable to Contractual Obligations. Article 3(3) of the Convention provides that, "… the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract mandatory rules."

has the power to decide that a court in the country of enforcement may examine the award under the public policy rules of any legal system involved in the arbitration.[134] This imposes on arbitrators the duty to respect the relevant public policy rules as part of their duty to provide an enforceable award. If an arbitrator made a decision without considering the applicable public policy rules, he would be infringing the duty he is expected to respect and abide by. The question that follows is: which public policy rules is it most appropriate to apply?

There are several aspects of legal systems that have to be considered in this respect. These are:
1. The public policy rules of the forum.
2. The public policy of the country (or countries) where enforcement is likely to take place.[135]
3. The public policy of other countries, where a close link exists between the case and that country and when there are grounds for applying that law (e.g. place of performance of the contract).[136]
4. The application of international public policy rules.

Each of these aspects of legal systems may relate to the dispute, as has been previously discussed. The first possibility for arbitrators is to examine the dispute according to the public policy rules of the forum, which may be explained in two ways. Firstly, it is due to the possibility of setting the award aside by the court of the forum under the ground of public policy rules, which might accordingly effect the enforcement of the award in other countries under Article V ([1])(e) of the New York Convention. Secondly, it is due to the arbitrator's duty to undertake the role of the courts of that country in resolving disputes.[137] Accordingly, an arbitrator will be obliged to apply the

134. Public policy rules of the country where enforcement of the award is taking place is commonly applicable by the courts in the country of enforcement, by virtue of being the public policy rules of their national legal system.

135. It should be taken into account that assets in international commercial contracts are often distributed between different countries, and that an arbitrator may not be able to predict where the award will be enforced. However, once the facts are presented before the arbitrator, he may be able to envisage the probable place or places where the award might be enforced. However, there is a debate about the duty of arbitrators to consider such rules. See, Bernard Hanotiau, op. cit., p. 398. He states that, "… a majority of arbitrators consider that there is no 'moral duty' to apply the foreign rules of public policy of the place where the award could be enforced". Also see the decision of the Federal District Court Eastern District of New York, of 29 March 1991, (760 F Supp. (1991) 1036, Yearbook International Commercial Arbitration (1992) at p. 686.), in which the court refused to rely on the public policy of the law in the country where the enforcement of the award would take place.

136. See Yves Derains, op. cit., pp. 252 and 249.

137. Rene David, op. cit., p. 56.

same rules as a national court of the forum.[138] Thus, if an arbitrator acknowledges that the substance of the dispute or the applicable rules contravenes the public policy of the forum, he will be bound to apply what a national court of the forum would apply. A national court will apply its national law.[139] It seems then that examining the legitimacy of an issue under the concept of public policy must be established upon the forum's own public policy rules.[140]

However, as previously mentioned in this chapter, the "seat theory" has been criticised on the ground that it is not necessary to have a connection between the arbitration and the forum, especially where this choice was merely a place in which to hold the arbitration proceedings.[141] Therefore, it seems inappropriate to apply the public policy rules of the forum.[142] Okezie Chukwumerije, clearly illustrates this point:[143]

"Unlike national courts, international arbitrator tribunals do not owe strict allegiance to the laws of the place of arbitration … an arbitral tribunal could decide to conduct the arbitration proceedings in different countries, in which case it is unrealistic to categorise

138. In ICC Award 5505/1987. Y. Comm. Arb., (1988), p. 110. The choice of Switzerland as the place of arbitration implied the application of the Swiss mandatory provisions.

139. See Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," op. cit., p. 61; Lawrence Collins, op. cit., p. 126 at 137. He states that, "It has been the policy of English law that arbitrators are subject to English law"; A. J. E. Jaffey, op. cit., p. 88. He states: "If during the arbitration, the courts of the country in which the arbitration is held actually make an order that the arbitrators should apply a particular law, they must comply, for being present in the country when they act, they must obey the orders of its courts…they must regard themselves as bound by any rules of that country directing them which law to apply"; Yves Derains, op. cit., p. 242, states that: "The mandatory rules of the forum have a natural priority which the judge has to apply, whatever the proper law of the contract"; see Orion Compania de Seguros v. Belfort (1962) 2 Lloyd's Rep 257; Rsler v. Rottwinkel (E.C.J.) Q.B. [1986] 53, the court held that: "Such legal rules include mandatory provisions which must be observed in deciding the dispute, regardless of the law governing the contract, and which are therefore in the nature of public policy."

140. This has been asserted by the Egyptian Courts in Case No. 521 (1944), Collection of Court of Cassation (29), p. 472; see also, Ashraf al Rifaie, op. cit., p. 20; Jonathan Hill, International Commercial Disputes, 2ed, London: LLP, (1998), p. 640. He states that: "…the principle of party autonomy must be subordinate to the public interest of the country in which the seat of arbitration is located. Since the law of the seat has a legitimate interest in ensuring that the arbitral process meets certain basic standards of justice and fairness, the parties to an arbitration cannot be entitled to exclude procedural rules which are mandatory according to the law of the seat."

141. A forum can be completely foreign to the arbitration, especially if the forum was not the place were the contract made and where it should be performed; or neither parties nor arbitrators have the nationality of the forum; or the applicable rules to govern the procedures and the substance of the dispute were foreign laws.

142. See Yves Derains, op. cit., p. 243. He states that: "… The international arbitrator does not go into the question of the application of mandatory rules in the same way as the judge. He takes no account of the distinction between the mandatory rules of the forum and foreign mandatory rules. He can only take account of the distinction between mandatory rules of the lex contractus and mandatory rules of another legal system."

143. Okezie Chukwumerije, op. cit., p. 182; see also A.J.E. Jaffey, op. cit., p. 81, who states that according to the English conflict of law rules, arbitrators are bound to apply English domestic public policy, unless if the dispute is outside the English court jurisdiction. He writes that: "… when the English court would not have had jurisdiction to try the dispute, in the absence of the agreement of the parties, England may have been chosen as the place of arbitration precisely because neither party belonged to it. In such a case English conflict rules, even those providing for the application of mandatory rules, have no claim to be applied, so that the question of their being avoided does not arise"; also see, Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 271.

the stringent public policy of the forum as applicable to the merits of the dispute. Even in cases where the proceedings are held in one country, international arbitrators still do not, as a theoretical matter, owe strict allegiance to the laws of that seat, in the sense that they are not constrained to apply all the imperative rules of the forum in the same way that national courts are."

One should bear in mind though, that in practice arbitrators cannot act without considering the public policy rules of the forum. Article V (1)(d) of the New York Convention incorporates this idea, that non-observance of the procedural rules of the forum would be considered as a ground on which to refuse enforcement of the award. Accordingly, arbitrators cannot wholly disregard the public policy rules of the forum[144], whether they are embodied in the procedural public policy rules or in the substantial rules of the forum. For example, if a given country considers a particular issue an offensive violation of their highest social values and principles, then any arbitration proceedings
which take place in its territory will be considered as null and void, even if the enforcement of the arbitral award would be performed in another country which considers such agreements valid.

Arbitrators are also expected to take account of the public policy rules of the countries that are closely connected to the dispute as long as their interests are affected directly or indirectly by the dispute[145], especially if the transaction conceals an illegal act, which is severely injurious to the public policy of such countries.[146] For example, if the dispute concerns acts, which would threaten the social security of

144. Public policy rules of the forum should be considered as long as they relate to the facts and circumstances of the case, thus demonstrating that the disputed matters in the arbitration are most clearly related to that law. See ICC Case No. 2178 (1973); AJE Jaffey, op. cit., p. 27, referring to Kaufman v. Garson [1904] 1 K.B. 591.

145. See A.J.E. Jaffey op. cit., p. 90. He states that: "Arbitrators in international commercial arbitration are under some sort of duty to apply the international public policy rules of countries closely connected with the contract, even though they do not regard themselves as bound to apply any country's conflict rules, and even if they are applying the lex mercatoria"; See Regazzoni v. K.C. Sethia (1957) 3 All ER p. 286. In which the contract was held to be null and void because Indian law did not allow the trade of jute with South Africa, because of apartheid practised by that country. The Indian legal system was applied to the sale even though it was not the designed law to govern the dispute or the forum, but merely the law of a third country. See, Okezie Chukwumerije, op. cit., p. 183, who states: "…Arbitrators have a responsibility to apply the mandatory rules of those jurisdictions whose national interests are substantially involved in the matter under arbitration"; See ICC Case No. 2930/1982, Y. Comm. Arb., Vol. IX (1984), p. 105; ICC Case No. 4123/1983, Yearbook, Vol. X (1985), p. 49; See Yves Derains, op. cit., p. 245.

146. ICC Case No. 1782/1973, Journal du Droit International (1975), p. 923; Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 230. This case concerned the refusal of agreement by the authorities of the place of performance of a contract which was subject to another law; also see, ICC Case No. 2216/1974, Journal du Droit International (1975), p. 917; Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 225.

another country[147], then arbitrators should consider the public policy of that country.[148] In this regard, mention should be made of the significant Articles provided in the European Convention of 1980[149], which gave considerable consideration to the conflict of public policy rules, where Articles 3(3)[150], Article 7 and Article 16 provide guiding rules for deciding on the applicable public policy rules.

Article 7 provides that:

"In the application of this convention effect may be given to the mandatory rules of any state with which the situation has significant connection, if and in so far as, under the law of that state, those rules must be applied whatever the law applicable to the contract."[151]

Article 16 provides that:

"The application of a rule of law of any country specified by this convention may be refused only if such application is manifestly contrary to public policy."

An arbitrator is also required to consider the public policy of the country where the parties are likely to seek enforcement of the award and to ensure that his award is ultimately enforceable, by making sure that his award does not contravene the national public policy rules of that country.[152]

147. See ICC award Case No. 2136/1974, Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 456. A dispute involving problems of performance of licence granted by a German firm to a Spanish firm. Based on lack of authorisation by a mandatory rule of the place of performance, the tribunal held that: "Even though the licence contract would have been subject to German law, the consequences of a failure to obtain authorisation must be examined according to Spanish law"; See the Crete Rubles' case in De Wutz v. Hendricks (1824) 2 Bing. 314; Regazzoni v. K.C. Sethia (1944) Ltd. (1958) A.C. 301.(1956) Q. B. p. 490; J. G. Collier, op. cit., p. 211.

148. Okezie Chukwumerije, op. cit., p. 185, states that: "The tribunal might have to balance the interests of other countries that are equally connected with the transaction. The tribunal's objective should be to determine which of them has a greater claim to the application of its mandatory rules by virtue of its connection with the dispute."

149. The Convention on the Law Applicable to Contractual Obligations, the Rome Convention (1980), was concluded between the member states of the European Community. This Convention was designed to achieve harmonisation of the relevant conflict rules of the member states and was said to be a logical and necessary consequence of the Brussels Convention of (1968) on Jurisdiction and Judgements in Civil Commercial Matters. It has also been argued that it introduces certainty into the rules of the conflict of the laws. However, the convention does not apply to arbitration agreements, see Article 1(2)(d); J. G. Collier, op. cit., p. 182.

150. Article 3(3) of the Convention provides that: "the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract mandatory rules."

151. See J. G. Collier, op. cit., p. 211. He states that this article "…allows the court to give effect to the mandatory rules of another country with which the situation has a close connection if and in so far as, under the law of the latter country, these rules must be applied". However, this provision has not been enacted into United Kingdom law; See, Redfern and Hunter, 2nd ed., op. cit., p. 100.

152. Julian D.M Lew, Applicable Law in International Commercial Arbitration, (1978), op. cit., p. 537; Mohammad Reza Baniassadi, "Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?" (1992) 10 INT'L TAX & BUS. L.J. 59, p. 81; John Y. Gotanda, op. cit., p. 103, fn. 216.

However, applying these rules exclusively might not be sufficient to ensure the enforceability of the arbitral award since applying domestic mandatory rules to some questions and foreign mandatory rules to others presents considerable difficulties. Moreover, arbitrators cannot investigate every public policy rule contained in various legal systems as they are not expected to "scientifically investigate" the public policy rules of different legal systems[153] and they do not have the time nor the knowledge to do so. It would be more rational if it were expected from arbitrators to base their test, when determining which public policy rules apply to international commercial arbitration, on more suitable grounds, rather than blindly searching through the diversity of several legal systems for the applicable public policy rule. Thus, one could reach the conclusion that it would be more rational if arbitrators were to consider the application of internationally accepted public policy rules as the most appropriate public policy rules to govern international commercial relations.[154]

D. Applying the international public policy rules

Applying the international public policy rules in international commercial relations will provide arbitrators with a suitable way of avoiding the problems which may arise from the conflict of public policy rules.[155] There are several reasons for this. Firstly, international arbitrators are in a better position than national judges to understand the specific needs of international commerce, which is one of the reasons that drives parties to resort to international commercial arbitration. Secondly, international arbitrators do not have conflict of rules of their own or any particular concept of national "public policy". Moreover, arbitrators are not expected to comply with national standards of public policy, especially where the national rules in question were designed to govern domestic relations only.[156] This approach was followed in a decision made

153. It was noted in ICC Award 4695/1984, Y. Comm. Arb., (1986), p. 149, that if a tribunal declined to exercise jurisdiction on the basis of the possible difficulties of a future enforcement in a given country, then there would be no award at all.

154. In ICC Case 8891(unpublished). Cited in, ILA Report, London Conference (2000), op. cit., p. 23, in which "… the tribunal itself raised the issue of illicit commissions and invited submissions, and noted in its award that the illicit character of contracts for the payment of bribes was well established in arbitral jurisprudence and that arbitrators may properly base their decisions in such matters on general principles of law or transnational public order."

155. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 287.

156. Arbitrators should comply with the narrower, and less constraining, standards of international public policy rather than with the broader test of domestic public policy. See, Pieter Sanders, "Commentary on "UNCITRAL" Arbitration Rules," 2 Y.B. COM. ARB. (1977), p. 172.

under the ICC Rules.[157] In a case between an Italian and a Belgian party (in which Italian law was the governing law), the arbitrator refused to apply a Belgian mandatory rule because it "… does not aim at binding the international arbitrator".[158]

Applying international public policy rules also serves as a remedy in situations where parties expressly exclude the mandatory rules of the law of their choice. Not giving effect to the parties' intentions as such should not be considered as tantamount to disregarding the parties' choice provided that arbitrators based their decision on the grounds that such exclusion would violate a truly international public policy rule.[159] For example, in cases such as corruption[160], or if the parties have chosen a law the application of which establishes racial discrimination against one of the parties.[161] Whilst the parties are precluded from excluding mandatory rules of the law applicable to the dispute, an arbitrator conversely may exclude the application of a mandatory rule although provided by the proper law, if it is incompatible with truly international public policy.[162]

As stated above, for practical considerations international commercial arbitrators are required to consider the application of the public policy rules of the countries that have a nexus with the arbitration. The forum, the place or places where enforcement may take place, the public policy of the law chosen by the parties and the public policy of the place where performance of the contract will take place[163] all

157. See ICC Case No. 6379/1990, 17 Y. Comm. Arb., (1992), p. 212- 218; Okezie Chukwumerije, op. cit., p. 191.

158. The arbitrator found that the rule was designed for application by Belgian courts.

159. Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 304. He states that: " … what can be, and indeed should be admitted, it is submitted, is not only the freedom of the international arbitrator but also the duty to disregard the choice of the parties, if this is required by a really international or transnational public policy. This is both a logical, advisable and inevitable transposition, to the domain of international arbitration, of the relationship which, in domestic private international law, exists between the normally applicable law and international public policy (of the State)."

160. For more information see Chapter Six, at p. 242.

161. Yves Derains, op. cit., p. 251, "… An arbitrator should not agree to be an accomplice in a deliberate fraud on a mandatory rule that the arbitrator considers has an undisputed right to be applied"; Hisham Sadik, op. cit,. p. 317. He states that: "International public policy must be imposed on both parties and arbitrators. As for the parties, they will not get an enforceable award if its subject includes a matter which is contrary to public policy, such as, a violation of moral values, drug smuggling, terrorist acts, corruption, etc. As for the arbitrator, he will be considered as committing a violation of international public policy if he accept such conduct."

162. See for example ICC Award, Case No. 7063/1993 reprinted in 22 Yearbook Commercial Arbitration 87 (1997). The defendant argued that pursuant to the doctrine of riba embodied in Saudi law, the claimant is not entitled to interest on any arbitration award. The tribunal held that the doctrine of riba does not bar all awards of compensation for financial loss due to a party who has not had the use of a sum of money to which they would have otherwise been entitled.

163. See Ralli Brothers v. Compania Naviera Sota y Aznar, (1920) 2 K.B. 287 C. A; J. G. Collier, op. cit., p. 212; Klaus Peter Berger, op. cit., p. 689.

have to be respected as long as, in the view of the tribunal, these laws have a serious right to be applied.[164] However, the application of these rules does not mean that arbitrators are obliged to apply purely domestic public policy rules to international relations. Arbitrators must ascertain the public policy rules that a national law considers essential to the protection of its national interests and moral values, those which cannot be derogated by any other rule. Also, when such laws require the application of their public policy rules to both national and international commercial relations, this could be treated as constituting an international public policy rule for that country.[165] This has been illustrated in an ICC award, where the tribunal held that:[166]

"arbitrators are not bound to apply such rules in the same strict manner at some state courts."

In the following chapters several judicial decisions which concern the concept of international public policy in the enforcement of foreign arbitral awards, will be reviewed. In the next chapter the application of public policy rules by national courts in the country of origin will be examined.

164. This, for example, was followed in the ICC award rendered in 1973 in Case No. 1859. The arbitrators in this case decided to combine the application of national rules concerning the general principles and customs of international trade and the policy laws of the states where the contract was carried out. See, Yves Derains, op. cit., p. 252.

165. Daniel Hochstrasser, op. cit., p. 61. He referred to Werner Wenger, Die Internationale Schiedsgerichtsbarkeit, in Basler Juristische Mitteilungen, 1989, pp. 337, 353 and 354., where he states: "Towards the law declared applicable by the parties or the arbitral tribunal, a public policy reservation exists: the arbitral tribunal has to respect fundamental principles of law which are valid in the sense of a transnational public policy, independent of the relation of the facts of the case to a special state. Furthermore, the arbitral tribunal has to respect the international public policy of such third countries (countries other than the one whose law is applicable) who have a close connection to the matter."

166. ICC Award No. 1434/1975,: Journal du Droit International (1976), p. 978; Collection of ICC Arbitral Awards, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 263; Pierre Lalive, "Transnational (or Truly International) Public Policy…", op. cit., p. 300, footnote (121).