The Scope and Legal Effect of Choice of Law in International Arbitration

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I. Introduction

The scope and legal force of choice of law have not been given relevant attention in both legal scholarship and international arbitration. This article is concerned with such issues. I seek to establish that choice of law limits the applicable law to law that is freely, voluntarily and legitimately chosen by the parties, and. arbitral tribunals do not have unfettered discretion to administer what they may term justice outside the scope of that law. Cross-border commerce and uncertainty as to its applicable law are features of today's world economy.[1] Thus, contractual parties may, as they commonly do, choose a particular law to govern their legal relationship. They make a choice of law in the exercise of their autonomy and freedom of choice to do so. Particularly in the context of international business transactions involving parties from different jurisdictions, if the parties do not make a choice of law, uncertainty may arise as to the applicable law. This can

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[1] Sagi Peari, *The Foundations of Choice of Law: Choice and Equity* (Oxford University Press 2018) xv–xvi.

make it difficult for the parties to know and comply with the appropriate law in the course of contractual performance or when a dispute arises.[2]

The uncertainty as to the applicable law in the absence of choice of law may arise due to at least two reasons. Firstly, the applicable law to a contract is determined by applying rules of private international law belonging to a particular national legal system. Different countries have different legal rules of private international law for the determination of the law applicable to a contract. Thus, unless a choice of law is made by the parties, it may be difficult to determine the law applicable to the contract on the basis of rules of private international law within national jurisdictions. Secondly, uncertainty may still arise even if the application of rules of private international law to determine the applicable law are certain. This is because those rules may be too general or vague to enable a reasonably certain and accurate determination to be made. Choice of law then, when made within the legal limits of rules of the relevant system of private international law, can lead to certainty and predictability as to the law applicable to the contract.[3]

As stated by the United Nations Commission on International Trade Law (UNCITRAL), the autonomy of the parties may be limited to the extent that they are permitted to choose a legal system only if it has some connection with the contract.[4] This may require a choice of the legal system of the country of one of the parties or of the place of performance or even of the seat of arbitration.[5] It is also possible for the parties to choose the law applicable to the contract without these restrictions.[6] To avoid these uncertainties surrounding lack of specificity as to the law applicable to the parties' transaction, the parties choose the law of a particular country to govern their contract.[7] Their "very purpose in specifically selecting a law to govern the contract is to settle in advance all doubts as to what internal law is to be applied."[8] Making a choice of applicable law also serves the interests of the international community or society at large because, as asserted by Derrick Wyattc, the choice of a particular law can further a policy favoured by

2 Elliott E Cheatham and Willis LM Reese, 'Choice of the Applicable Law' (1952) 52(8) Columbia Law Review 959.

3 UNCITRAL, *Legal Guide on Drawing up International Contracts for the Construction of Industrial Works* (New York: United Nations, 1988) 299–301.

4 ibid 301.

5 ibid.

6 ibid.

7 ibid 300.

8 Columbia Law Review Association, Inc, 'Conflict of Laws. Choice of Law in Contracts. Intent of the Parties. Renvoi.' (1940) 40(3) Columbia Law Review 518, 523.

most commercial nations since such nations allow citizens a degree of freedom of contract.[9]

Based on a choice of law analysis, I seek to contribute to an understanding and appreciation of the continued role of municipal law (the law invariably chosen by the parties) in the regulation and protection of foreign investment, trade and other international business transactions. I will do so by examining the limitations of the choice of law on the scope of applicable law, the rights of the parties to international business transactions and the powers of arbitral tribunals. According to UNCITRAL, if a dispute "is settled in arbitral proceedings, the law chosen by the parties will *normally* be applied by the arbitrators."[10] This attests to the fact that arbitral tribunals do depart from the choice of applicable law made by the parties, and in fact as shown in Part III, arbitrators have rejected the parties' choice of municipal law. This seems to be at odds with the concept of arbitration, which is founded on the consent of the parties. Acknowledging party autonomy and consent as the foundations of arbitration and the central role of *lex loci contractus* in the control of arbitration, the New Zealand Law Commission stated the following:

> Arbitration law concerns a critical balance: the balance which is to be struck between the autonomy of the parties and the law of the land. On the one side of the balance is the agreement of the parties. The parties to a contract or to a dispute agree that their disputes are to be resolved by a tribunal which they establish themselves or to which they agree. The tribunal is to follow a procedure on which the parties may agree, and is to apply the law which they may state. The parties also, in general, pay for the arbitration. That is to say, the whole process rests on the parties' consent and is their creation. But not quite. For on the other side of the balance is the significant weight of the general law of the land. The very agreement that sets up the tribunal is an agreement under some system of law. It is national law, with national courts, which can be used to require a reluctant party to submit to arbitration, and to enforce any resulting award. The law may state the procedure to be followed. The law might, as well, also be used to control the arbitrator.[11]

[9] Derrick Wyatt, 'Choice of Law in Contract Matters—A Question of Policy' (1974) 37(4) The Modern Law Review 399, 408.

[10] UNCITRAL (n 3).

[11] New Zealand Law Commission, *Arbitration* (Report No 20, 1991) [3].

A conflict of law situation arises when two or more systems of law have some possible basis to govern the resolution of a legal dispute.[12] Where the parties have legitimately made a choice of applicable law for the resolution of their dispute, it does seem that no conflict of law situation remains to be addressed because *prima facie* an arbitral tribunal knows the governing law. For example, under the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), a tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties,"[13] and may "decide a dispute *ex aequo et bono* if the parties so agree."[14]

The analysis on the legal effect of choice of law is relevant for investment treaty law and arbitration as well, especially because investment contracts commonly require investment arbitration. The backlash against investment treaty law and arbitration[15] is a manifestation of its inability to work to the satisfaction of states. In particular, the limitations and inadequacies of the investment treaty regime call for the need to rethink the role of municipal law, which is invariably chosen as the governing law, in foreign investment and international commercial regulation. The role of municipal law in the regulation of foreign investment and international business transactions depends on tribunals' recognition and acceptance of a choice of domestic law made by the parties in respect of that system of law. I will discuss the circumstances in which arbitral tribunals have rejected a choice of particular domestic law in order to contribute to a new understanding of the continued role of municipal legal systems, international investment agreements (IIAs), and principles of international commercial law in international business and foreign investment protection in light of a choice of law.

International arbitration is not simply a creature of states; it also depends on their goodwill and support through their laws and courts for the enforcement of arbitral awards. Without states' cooperation and support, the international arbitral system will not work. Furthermore, it will operate at risk of its own collapse if it does not respect and uphold national laws simply because these laws will not work in favour of the investor. As Professor William Park argues, freedom from

[12] Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31(2) Federal Law Review 248, 249.

[13] Convention for the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature at Washington, on 18 March 1965, entered into force 14 October 1966) art 42(1).

[14] ibid article 42(3).

[15] See generally M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015); Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press 2008); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007).

the constraints of substantive and procedural law is desirable in international arbitration.[16] He further notes that:

> [arbitration] affects not only winners, but also losers, and often society at large as well. The fashions for non-national justice and arbitral autonomy, if pushed too far, will ultimately backfire to compromise the integrity of international dispute resolution. The chemistry of these trends may inflict on the business community an unjust uncertainty even less appealing than the mandatory norms of local arbitration law.[17]

It is, therefore, imperative that arbitral tribunals should respect and uphold national laws put in place by countries.[18] The obligations to respect and uphold national laws arise particularly where the parties have legitimately chosen a particular national legal system as the governing law to their legal relationship.

I argue that where the parties have made a choice of law within the legal limits permitting such a choice to be made, the chosen jurisdiction has the dominant interest to have its law followed. The laws of the jurisdiction of choice must accordingly be applied to the resolution of the dispute and the agreement to arbitrate unless the internal rules of conflict of laws in that jurisdiction point to some other jurisdiction, or if the parties have reserved powers in an arbitral tribunal to do otherwise. Where the parties agree that their *underlying agreement* contains all their understandings, rights and obligations (entire agreement clause) in relation to the subject matter of the contract, the powers of the arbitral tribunal are limited to that agreement, the governing law and the rules of arbitration specified in that agreement. I argue also that where an underlying contract voluntarily and legitimately agreed by the parties expressly indicates that *any* dispute *arising out of* or *in relation to the underlying contract* shall be settled by arbitration and that the arbitration shall be governed by and conducted in accordance with specified arbitration rules, then a dispute as to the validity of the arbitration clause has to be resolved within the terms of those arbitration rules and governing law by the parties in that underlying contract. Furthermore, I would like to point out the emphasis that applicable arbitration rules and conventions on applicable law place on the need for arbitral tribunals to respect and uphold the choice of law made by the parties and the fact that some of the arbitration rules even require that arbitral

[16] William W Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1988–1989) 63(3) Tulane Law Review 647, 649.

[17] ibid 649–650.

[18] Daniel Hochstrasser, 'Choice of Law and "Foreign" Mandatory Rules in International Arbitration' (1994) 11(1) Journal of International Arbitration 57, 85.

tribunals shall only make decisions as *amiable compositeur* or *ex aequo et bono* only if so expressly authorised by the parties. In this regard, an arbitral tribunal cannot embark on a journey of its own to do justice according to its sense of equity unless so authorised by the parties. As far back as 1875, Sir George Jessel MR stated in *Printing & Numerical Registering Co v Sampson* that:

> if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy—that you are not lightly to interfere with this freedom of contract.[19]

The free will to contract and the autonomy of parties, as discussed in Part II, are the foundations of international arbitration. The parties to an agreement who have made a choice of law to govern the underlying contract in which the arbitration agreement is contained and to which it intimately relates to are always free not only to make the choice of law but also to specify the scope of the governing law chosen by them. They are the best judges of which law best serves the interests of their contractual relationship, including the resolution of their disputes. If the parties fail to specify the limits of the chosen law by omitting to mention that it does not apply to the arbitration agreement, and without expressly giving authority to arbitral tribunals to make decisions on the validity of the arbitration agreement in accordance with some other system of law, then the chosen law for the matrix contract must apply to the arbitration agreement. The values of predictability and certainty underling the making of choice of law also raise a strong presumption in favour of a one-stop system of law to govern all aspects of the legal relationship between the parties to a matrix contract in which the arbitration agreement is contained. In those same circumstances, that freely chosen law should regulate all other aspects of the relationship of the parties because they made a choice of law for that purpose.

Professor Gary Born rightly stated in 2014 in *International Commercial Arbitration* that the:

> choice of the law applicable to an international commercial arbitration agreement is a complex subject. The topic has given rise to extensive commentary, and almost equally extensive confusion. This confusion does not comport with the ideals of international commercial arbitration, which seeks to simplify, expedite and

[19] *Printing & Numerical Registering Co v Sampson* (1875) 19 Eq 462, 465.

rationalize international dispute resolution.[20]

The same point was made 54 years earlier in 1960 by Lester Nurick that:

> [i]t is difficult enough to predict the effects of a choice-of-law clause in a domestic contract; but to do so in an international contract involves so many imponderables that it sometimes seems more like predicting the result of a lottery than a law suit.[21]

I seek to show that the complexity and confusion are largely due to the refusal or failure of such parties to appreciate and respect the legal effect and scope of the choice of law made. If the parties to international commercial disputes and arbitral tribunals keep faith with the purpose and legal effect of the applicable law chosen by the parties themselves, then the uncertainty and confusion as to the applicable law to an arbitration agreement can be reduced, if not removed. In this regard, the proposition advanced by Professor Born that an analysis of the governing law to an arbitration agreement "*begins* with the separability presumption"[22] needs qualification. This proposition has full effect if the parties have not made a choice of governing law to the matrix contract. Similarly, I argue that, on the contrary, where the parties have made a choice of applicable law to the underlying contract in which the arbitration agreement is embedded, the starting point is to ascertain the scope and full effect of the chosen law as expressed by the parties themselves and not with the separability principle. Using this approach, I provide a legal and principled basis for rethinking the purpose and legal effect of the parties making a choice of law.

II. The Foundations of International Arbitration and Choice of Law

Arbitration is consensual in nature because it is based on an agreement by the parties to resolve disputes through a third party nominated or selected by them rather than to have the dispute litigated before a court.[23] Arbitration is a private matter based on an agreement between the parties and this agreement usually covers issues such as the use of arbitration, the identity of the arbitrators and how they are appointed, the procedure to be followed and the applicable law.[24]

[20] Gary Born, *International Commercial Arbitration* (2edn, Kluwer Law International 2014) 472.

[21] Lester Nurick, 'Choice-of-Law Clauses and International Contracts' (1960) 54 Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969) 56.

[22] Born (n 20) (emphasis added).

[23] New Zealand Law Commission (n 11) [98].

[24] ibid 59 [16].

Professor Henry De Vries describes arbitration as "a contractual substitute for national courts" in the title to his article because "it is a mode of resolving disputes by one or more third persons who derive their powers from agreement of the parties and whose decision is binding upon them."[25] In that sense, Professor Cindy Buys is arguably right when she states that "arbitration is all about choice."[26]

Parties to an international business transaction are free to choose the law of any state to govern their legal relationship. Party autonomy with regards to choice of law and arbitration is well established in international commercial and business transactions law.[27] Article 2 of the Hague Principles on Choice of Law in International Commercial Contracts establishes the parties' freedom to choose the law that will govern their contract.[28] Article 42(1) of the ICSID Convention requires tribunals to decide a dispute in accordance with rules of law "as may be agreed by the parties." The parties' freedom to choose the applicable law is regarded under Rome I Regulation as "the cornerstones of the system of conflict-of-law rules in matters of contractual obligations."[29] Choice of law is not only voluntary, it is also a purposeful and deliberate action. The parties voluntarily and deliberately affiliate themselves, their transaction and their dispute to the laws of a particulate state for the sole purpose of protecting their rights. Therefore, "rights are important to choice of law analysis."[30]

The internationality of a business transaction necessitates a choice of law. Where a contract or a business transaction touches two or more countries, each of which has its own substantive, procedural laws and conflict of law rules, uncertainty over the governing law to the resolution of disputes that may arise between the parties to the transaction is inevitable. Even within the domestic context in a federal country, different state laws may provide different advantages and disadvantages for the resolution of a dispute. A provision in a contract or business transaction for the applicable law and the forum for the resolution of disputes is an indispensable precondition to certainty of the law applicable to such activity. Specification of

[25] Henry P De Vries, 'International Commercial Arbitration: A Contractual Substitute For National Courts' (1982–1983) 57(1) Tulane Law Review 42, 43.

[26] Cindy G Buys, 'The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration' (2005) 79(1) St John Law Review 59.

[27] Zhaohua Meng, 'Party Autonomy, Private Autonomy, and Freedom of Contract' (2014) 10(6) Canadian Social Science 212.

[28] Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (The Hague: The Hague Conference on Private International Law Permanent Bureau 2015).

[29] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Preamble.

[30] Lea Brilmayer, 'Rights, Fairness, and Choice of Law' (1989) 98(7) The Yale Law Journal 1277, 1280.

the law applicable to the contract is a legal risk management mechanism to the extent that it helps avoid a dispute being governed by law that may be hostile to the interests of one of or even both parties, and which may be ill-suited for the nature of the dispute involved.[31] The efficient resolution of disputes depends in part on the appropriateness of the law in terms of its connection and suitability for the nature of the dispute involved. Therefore, it is imperative that the parties select a law that they consider appropriate for the resolution of their potential disputes. Professor Park states: "Discussion of future disputes when signing the contract often seems a bit like planning for divorce at a wedding feast".

Yet lack of reasonable certainty regarding the applicable norms will not usually enhance cross-border commerce, finance, or investment. While some deals may be consummated without regard to applicable law, others will not. In many contexts, multinational business enterprises will insist on calculating and balancing legal risks in making choices about their alternative commercial opportunities.

A banker may extend credit on the basis of his borrower's reputation and balance sheet. The lender will nevertheless want to know that the loan agreement, as well as any security agreement or third-party guarantee, will be enforced under the applicable law.[32]

There are, however, legal limits to the parties' autonomy to choose the law they want to govern their disputes resolution. This is because national laws and policies have implications for the recognition and enforcement of commercial and contractual agreements whether between private parties and states or just between private parties themselves. Private commercial activities take place within national territories and therefore fundamental national laws, and policies should be respected and upheld by private parties in making decisions on choice of law. Ultimately, private commercial activity will invariably be subject to various national rules and policies, at least when it comes to the enforcement of arbitral awards. Mandatory rules will include laws and policies that may apply irrespective of a choice of applicable law and the procedural regime selected by the parties.[33] For example, under Article 54(3) of the ICSID Convention, the execution of an arbitral award is governed by the laws concerning the execution of judgments in the state in which the award is sought to be enforced. By Article 25(1) of the ICSID Convention, any contracting state may notify ICSID of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of ICSID. Under Article 46 of the Vienna Convention on the Law of Treaties, a state may invoke

[31] Buys (n 26) 65–66.

[32] Park (n 16) 659.

[33] Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law In International Commercial Arbitration' (2005) 6(2) Melbourne Journal of International Law 205.

the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties, thereby invalidating its consent.[34] Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[35] (New York Convention) also requires each contracting state to recognise arbitral awards as binding and to enforce them "in accordance with the rules of procedure of the territory where the award is relied upon." The recognition and enforcement of the award may be refused if: the parties to an agreement to arbitrate were under some incapacity under the law applicable to them; the agreement arbitrated is not valid under the law to which the parties have subjected it; the subject matter of the difference is not capable of settlement by arbitration under the law of the country in which recognition and enforcement is sought; and if recognition or enforcement of the award is contrary to the public policy of that country.[36]

These conventions subject international arbitration to some measure of control and regulation by national laws and policies. The extent to which national law impacts choice of law decisions by a dispute resolution body depends on whether the parties have chosen national law as the governing law. Therefore, choice of law decisions by an arbitral tribunal or any dispute resolution body for that matter have to be made bearing in mind the laws of the country of choice in terms of the extent to which the subject matter is arbitrable and the actual enforceability of any ensuing award.

III. The Treatment of Choice of Law in International Arbitration

In this section, I analyse the circumstances in which arbitral tribunals have refused to enforce the parties' choice of law. A case in point where issues of choice of law and its scope and legal effect came under consideration by an arbitral tribunal was *Balkan Energy Limited v The Republic of Ghana (BELG v Ghana)*.[37] A close reading of the arbitration clause under consideration and the fact that the parties had agreed for the underlying contract, a Power Purchase Agreement (PPA), to be the *entire agreement* reveal that a dispute between the investor and Ghana about the law governing the validity of the arbitration clause was supposed to have been

[34] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331 < https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

[35] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 07 June 1959 <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

[36] ibid article V.

[37] *Balkan Energy Limited (Ghana) v The Republic of Ghana*, PCA Case No 2010–7, Interim Award, 22 December 2010.

resolved in terms of the governing law to the main contract and the arbitration rules chosen by the parties in the underlying contract. An in-depth discussion of this case is necessary to establish the point that the purpose and legal effect of the parties making a choice of law were not appreciated in this case. It would also seem that the Tribunal sought to avoid the application of the chosen law to assert its own jurisdiction and ultimately make a decision that favours the private party to the suit.

Balkan Energy Ltd (Ghana) (BELG) was a limited liability company incorporated under the laws of Ghana. Its sole shareholder was Balkan Energy Limited (incorporated in the United Kingdom), which was in turn wholly owned by Balkan Energy LLC of the United States. Balkan Energy Ltd entered into a PPA with Ghana in 2007 for the refurbishment and commissioning of dual fired (diesel and gas) barge and associated facilities. The PPA provided "if *any* dispute *arises out of or in relation to this Agreement* and if such matter cannot be settled through direct discussion of the Parties, the matter shall be referred to binding arbitration… Arbitration shall be governed by and conducted in accordance with UNCITRAL rules".[38] Thus the arbitration agreement was contained in the matrix contract (the PPA), which itself was governed by and was to be construed in accordance with the laws of Ghana.

Balkan Energy Ltd alleged a breach of the PPA and commenced arbitration proceedings against Ghana.[39] While the terms of appointment of arbitrators confirmed the UNCITRAL Rules as the governing rules of the arbitration and the laws of Ghana as the governing law of the PPA,[40] the parties disagreed as to which law governed the arbitration agreement. Dutch law (*lex loci arbitri*) was favoured by BELG, while the State maintained that Ghanaian law was the proper law.[41] The State argued that Ghanaian law governed the arbitration clause and also determined issues of arbitrability because the parties "specifically subjected the PPA to the laws of Ghana, and the default position in international arbitration is that a choice of law provision in the main contract also applies to an arbitration clause contained therein."[42] The BELG argued that the "conflict of laws rules… should not be used to determine the law applicable to arbitrability, but, rather, only to determine the substantive contract law applicable to the arbitration

[38] *Power Purchase Agreement between the Government of Ghana Acting through its Minister for Energy and Balkan Energy (Ghana) Ltd on Osagyefo Power Barge and Associated Facilities*, signed on 27 July 2007, clause 22.2 (emphasis added).

[39] *BELG v Ghana* (n 37) [4], [6]–[7].

[40] ibid [17].

[41] ibid [98].

[42] ibid [67].

agreement."[43] It argued that even if the formal validity of the arbitration clause was governed by Ghanaian substantive contract law, Ghanaian law did not govern issues of arbitrability because tribunals "usually determine the arbitrability of a dispute on the basis of the law of the place of arbitration, except in exceptional cases involving matters of public policy."[44]

Ghana objected to the jurisdiction of the Interim Tribunal, arguing that both the PPA and the arbitration clause were void because the PPA did not receive Parliamentary approval as required by Article 181(5) of the Constitution of the Republic of Ghana 1992 (the Constitution).[45] Ghana maintained that both the PPA and the arbitration clause were an "international business or economic transaction," and were therefore void and unenforceable due to lack of prior parliamentary approval.[46] Ghana argued that the determination of the validity of either the PPA or the arbitration clause involved questions of interpretation of the Constitution and was, therefore, non-arbitrable.[47]

The Tribunal held that it was competent to decide on the validity of the arbitration agreement and had the jurisdiction to entertain the substantive suit under the competence-competence and separability principles in international arbitration which allow tribunals to determine questions concerning their jurisdiction and the substantive validity of the arbitration clause respectively.[48] According to the Tribunal, the arbitration clause was valid because all the formalities for its validity had been met.[49] The Tribunal held that the law applicable to the arbitration agreement was the law of the seat of arbitration—namely, The Netherlands.[50] It reasoned that:

> The constitutional interpretation issue did not necessarily fall within the public policy restriction in The Netherlands, because, if it did, any arbitration agreement or contract which encounters an argument of constitutional nature in a foreign country would be excluded from the jurisdiction of an arbitration tribunal to decide

[43] ibid [88].
[44] ibid.
[45] ibid [9].
[46] ibid [117]–[119].
[47] ibid [64].
[48] ibid [100], [115], [152]–[153], [167] and [99].
[49] ibid [147].
[50] ibid [152]–[153].

upon.[51]

According to the Tribunal, the issue of the substantive validity of the PPA under the Constitution of Ghana and its consequences for the rights and obligations of the parties pursuant to their contractual undertakings were, "in essence, questions pertaining to the merits of the dispute, and they do not affect the validity or otherwise of the arbitration agreement."[52] The Tribunal held that there were strong arguments to be made:

> in favour of defining the scope of arbitrable matters in accordance with the *lex loci arbitri*… [T]he Parties' agreement to dispute settlement before the PCA is an indicator that the Parties intended to remove questions relating to dispute resolution—as opposed to the substantive performance of the contract—from the place of either Party, to a neutral forum.[53]

The Tribunal also saw "no reason, under Dutch or Ghanaian law, that constitutional provisions should be inherently non-arbitrable."[54] The position of the Tribunal seems to suggest that the law of the place of arbitration is not only mandatory and automatically applicable to the dispute but that it is inherently neutral because of the choice of the place as the seat of arbitration. This is quite misleading. It is arbitration that was chosen as a 'neutral' mechanism for the settlement of the parties' disputes and not the laws of The Netherlands. The Netherlands was the seat of arbitration because it happened to have been chosen by the parties, perhaps given the facilities it has for such arbitration. As argued by Professor Jan Paulsson, any other place could have been chosen as the seat of arbitration "[u]nless there are objective reasons to conclude that a *situs* is hostile to awards rendered in compliance with the Rules agreed between the parties, it is assumed that the whole world is a possible *situs*."[55]

Professor Gary Born states that an "[a]nalysis of choice of law governing an arbitration agreement begins with the separability presumption" by which an international arbitration agreement "is presumably separable from the underlying contract with which it is associated."[56] The effect of this presumption is that the arbitration agreement may be governed by a different law than the law governing

[51] ibid [144].
[52] ibid [112].
[53] ibid [142].
[54] ibid.
[55] Jan Paulsson, 'Delocalisation Of International Commercial Arbitration: When and Why It Matters' (1983) 32(1) The International and Comparative Law Quarterly 53, 55.
[56] Born (n 20) 472.

the primary contract.[57] In the words of Professor Born, the "separability doctrine does not mean that the law applicable to the arbitration clause is *necessarily* different from that applicable to the underlying contract. It instead means that differing laws *may* apply to the main contract and the arbitration agreement."[58] As such, it is not conclusive or settled that the choice of a place as the seat of arbitration means the laws of the seat of arbitration become automatically applicable to the arbitration or an issue arising out of that arbitration. Indeed, the Inter-American Convention on the Law Applicable to International Contracts directly addresses this issue by stating in Article 7 that the "[s]election of a certain forum by the parties does not necessarily entail selection of the applicable law."[59] Professor Born also points out that "different laws may apply to issues of formal validity, substantive validity, capacity, interpretation, assignment and waiver of an international arbitration agreement."[60] It follows that, in the instant case, the fact that The Netherlands was the seat of arbitration did not mean that its laws enjoyed some particular advantage or were inherently neutral and necessarily became automatically applicable to the parties' dispute as to the validity of the arbitration clause.

The application of Dutch law would invariably result in a decision being made in favour of one of the parties just as it would have been the case if the governing law was applied. The law of the seat of arbitration does not enjoy any particular advantage over the chosen law in terms of neutrality when it comes to its practical application to the dispute, especially when the governing law was not enacted specifically to give unfair protections to one of the parties to the detriment of the other party. Thus, if The Netherlands as the seat of arbitration was neutral, it would be neutral because it was *the place of arbitration* and, more importantly, for its presumed neutrality of those who sit to arbitrate. This, however, did not automatically and inherently import neutrality in the practical application of Dutch law. As Professor Lea Brilmayer rightly states:

> [w]henever a law is applied it will work to the advantage of one party to the litigation and to the disadvantage of the other. Choice of law at the adjudicative stage is a zero sum game; what advances the cause of the plaintiff simultaneously imposes costs on the defendant, and vice versa. This is as true in purely domestic cases as in conflicts cases.[61]

[57] ibid.

[58] ibid 475 (emphasis original).

[59] Inter-American Convention on The Law Applicable to International Contracts (signed 17 March 1994) (Fifth Inter-American Specialized Conference on Private International Law), signed at Mexico, DF Mexico.

[60] Born (n 20) 472.

[61] Brilmayer (n 30) 1280.

Thus, if by the text of the parties' agreement they meant to have the chosen law to govern the validity of the contract and the arbitration agreement, then this must be so upheld and respected whatever the outcome.

Professor Born points out that "by applying a law other than that governing the parties' underlying contract, national and international tribunals have sought to safeguard international arbitration agreements against challenges to their validity based on local (often idiosyncratic or discriminatory) law."[62] This, it is said, promotes the enforceability of arbitration agreements, clauses, and the general efficacy of arbitration.[63] Tribunals must not avoid the application of the choice of law made by the parties to an arbitration agreement merely because by applying that choice of law the arbitration agreement will be invalidated. Effect must be given to the intent of the parties to arbitrate and an agreement to arbitrate must not be invalidated lightly. If, however, by express requirement or by necessary and reasonable implication the governing law to the underlying contract applies to the arbitration agreement, it must be so held even if the arbitration clause will thereby be invalidated. If an implication can legitimately be made from the parties' agreement that the governing law to the contract shall apply to the arbitration agreement, that will be consistent with the intent of parties. And if the parties do not give a tribunal the authority to make decisions out of its sense of equity and of right, ignoring this implication deriving from the parties' agreement substitutes the tribunal's will and wish for the intent of the parties. Arbitral tribunals must not have interest in upholding the validity of an arbitration agreement beyond the express and implied understanding of the parties. Moreover, a refusal to apply the chosen law to both the underlying contract and to the arbitration agreement when it does apply expressly or by implication defeats the quest for *certainty and predictability* as to the applicable law which underlies the parties' decision to make a choice of law in the first place. After all, simply following the separability principle does not necessarily always promote the course of the arbitral process. As Professor Born states:

> An unfortunate consequence of the separability presumption in the choice-of-law context has been the development of a multiplicity of different approaches to choosing the law governing the formation, validity and termination of international arbitration agreements. National courts, arbitral tribunals and commentators have adopted a wide variety of choice-of-law approaches to issues of substantive validity, ranging from application of the law of the

[62] Born (n 20) 475.
[63] ibid.

> judicial enforcement forum, to the law of the arbitral seat, to the law governing the underlying contract, to a "closest connection" or "most significant relation" standard, to a "cumulative" approach looking to the law of all possibly-relevant states.

Other authorities have suggested even more esoteric choice-of-law rules, including the law of the arbitrator's residence or *lex mercatoria*. Commentators have variously identified three, four, or as many as nine approaches to the choice of law governing international arbitration agreements.

This multiplicity of choice-of-law rules potentially applicable to the arbitration agreement does not advance the purposes of the international arbitral process. The existence of multiple choice-of-law rules creates unfortunate uncertainties about the substantive law applicable to arbitration agreements, as well as the risk of inconsistent results in different forums.

In turn, this leads to uncertainty about the extent to which international arbitration agreements can actually be relied upon to provide an effective means of resolving international disputes. The multiplicity of choice-of-law rules also leads to delays and expense, resulting from the need to engage in choice-of-law debates, before both arbitral tribunals and national courts, when disputes arise concerning the formation or validity of arbitration agreements. This is inconsistent with parties' expectations of an efficient, centralized dispute resolution mechanism in entering into international arbitration agreements.[64]

In this regard, Professor Born proposes that "the analytical confusion about choice-of-law questions regarding the arbitration agreement creates uncertainty, delay and the risk of inappropriate and unjust results, and should be clarified."[65] The parties' choice of law was intended to clarify this uncertainty and avoid unnecessary delays and costs when the parties have made choice of law. Arbitral tribunals should not seek to sever or detach the law of the host country (which has also been chosen by the parties as the applicable law) for purposes of establishing their jurisdiction or validating an agreement to arbitrate and at the same time expect the investor to rely on these same laws for the purposes of enforcing an ensuing award. If indeed the choice of a place as the seat of arbitration is meant to completely detach the laws of the countries of the parties from the dispute, then the winning party cannot rely on the laws of the host country to enforce an award arising from the settlement of the dispute. The parties to an arbitration agreement are at liberty to choose the law of the seat of arbitration. If they do not do so, it

[64] ibid 476–477.
[65] ibid 46.

should not be lightly presumed that just because they chose the place as the seat of arbitration, they meant for the law of the seat to apply to their dispute.

On the issue of the applicable law to the arbitration clause itself, in the *BELG v Ghana* case, Ghana argued that since the PPA was governed by the laws of Ghana, a matter which was not disputed by BELG, the laws of Ghana should also apply to the arbitration agreement contained in the PPA. Balkan Energy Ltd argued to the contrary that since the PPA "did not make an express choice of law in respect of the arbitration agreement," the arbitration agreement was governed by the law of the seat of arbitration, in this case Dutch law.[66] The parties had specified that the governing law to the PPA was Ghanaian law. The "arbitration" was to be governed by and construed in accordance with UNCITRAL Arbitration Rules.[67] The parties did not expressly, positively or directly state the law to govern the arbitration clause. It is, however, clear that they expressly stated that *any* dispute which arose out of or related to the PPA had to be resolved in accordance with UNCITRAL Arbitration Rules. Since the dispute about the validity of the arbitration clause arose out of and in relation to the PPA, the parties must have intended for the laws governing law the PPA and the arbitration rules governing the arbitration to apply to the arbitration clause as well. Nonetheless, the Tribunal chose to apply the separability principle and concluded that the law of the seat of arbitration applied.

The parties had agreed to the applicable law to the arbitration, namely UNCITRAL Arbitration Rules for purposes of predictability and certainty. Since the arbitration was the mode of resolving the dispute and it was agreed to by the parties through an arbitration clause, both of which manifestly related to the PPA, the governing law to the arbitration (UNCITRAL Arbitration Rules) and the governing law to the main contract (Ghanaian Law) applied to the arbitration clause and took precedence over the law of the seat of arbitration. The governing law to the arbitration and the law to the main contract were manifestly closest to the arbitration clause than the law of the seat of arbitration. In particular, the law governing the arbitration as specified by the parties themselves was closest to the arbitration clause since the arbitration arose only because the parties agreed to submit the dispute to arbitration. In *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd*, it was held that the parties "have agreed to arbitration in accordance with English law and it is by that law alone that the ambit of the

[66] *BELG v Ghana* (n 37) [148].

[67] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration "UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)" (Vienna: UNCITRAL February 2014) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>.

arbitration provision can be determined, as a matter of construction."[68] Ghana and BELG had agreed to arbitration in accordance with UNCITRAL Arbitration Rules. Moreover, between the governing law to the main contract and the law of the seat of arbitration, the former was closer to the arbitration clause since the substantive dispute and the dispute about the validity of the arbitration clause related to or arose directly out of the underlying contract. Thus, the law of the seat of arbitration was comparatively far removed from the main contract and the dispute arising out of the performance of that contract and should have come last in the consideration of the applicable law to the arbitration clause. The parties' choice of the governing law *to the arbitration* and the governing law to the main contract legally justifies such an approach argued for here. Article 35(3) of UNCITRAL Arbitration Rules states that *"[i]n all cases*, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction".[69] "In all cases" in this provision would include situations where the validity of the arbitration clause is in dispute. The "terms of the contract" include the governing law to arbitration and the governing law to the main contract; these ought to have been applied in determining the validity of the arbitration clause.

The Tribunal's application of the law of the seat of arbitration could only be justified if the parties did not make a choice of applicable law to both the arbitration and the underlying contract. The decision of the Tribunal shows that it was out to make a decision that gave effect to the arbitration agreement, irrespective of the legal effect of the parties making a choice of law without limiting the scope of application of the governing law they have chosen. This is because the position of the Tribunal was very linear and lopsided towards validating the arbitration agreement rather than objectively deciding on the issues. In other words, the Tribunal started from an approach that was biased in favour of justifying or validating the agreement to arbitrate and favouring the rights of BELG rather than to assess the merits of each claim objectively from a neutral position. Holding in favour of BELG on this issue, The Tribunal stated:

> in deciding this issue, it should favour the approach that is more conducive to making the arbitration agreement effective rather than an approach that would render the agreement ineffective. The Parties agreed to an arbitration clause providing for the resolution of disputes arising under the PPA by arbitration and it is this choice that should prevail and not an interpretation the

[68] *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2007] EWHC 1713, [2007] 2 All ER (Comm) 701, [35].

[69] UNCITRAL Arbitration Rules (n 67) (emphasis added).

> result of which would be the exact opposite. A contract cannot be deemed to contain a clause which is self-defeating of its objectives. The validation principle invoked by the Claimant lends support to the conclusion that it makes more sense to consider that the Parties opted for an approach that would validate rather than render invalid the arbitration agreement.

The solution to this issue is also not clear-cut by reference to conflict of law rules. The basic tenet underlying the doctrine of *lis pendens*, however, points in the direction of finding in favour of the law that is most closely connected to the arbitration agreement. In this case it is the law of the Netherlands that appears to have the closest connection with the arbitration agreement under the PPA. This is borne out by the fact that The Netherlands was chosen as the seat of the arbitration and by the explicit decision to operate under the UNCITRAL Rules, which, among other consequences, determines the courts which will be competent to consider any challenge to the award rendered. More important still is the argument invoked by the Claimant to the effect that the choice of the seat of the arbitration in a neutral country indicates a clear understanding that the Parties wish to detach the arbitration agreement from the domestic law or the courts of either Party. The situation is, of course, different with respect to the law applicable to the PPA, since the PPA contains a choice of law provision that expressly subjects the contract to Ghanaian law.

In the light of the above considerations, the Tribunal concludes that the law applicable to the arbitration agreement in the PPA is the law of The Netherlands. In so deciding, the Tribunal wishes to state that this entails no disrespect for the laws of Ghana or of other developing countries. The Tribunal is sensitive to the importance of according due respect to the laws of every sovereign State; and it emphasizes that its decision in the present case is entirely unrelated to any views or judgments regarding the merits of the respective legal systems. Rather, its decision is based solely on its appreciation of which solution appears to be more appropriate for the effective discharge of the dispute resolution functions which have been entrusted to it by the agreement of the Parties themselves.[70]

The Tribunal ultimately concluded that the proper law governing the validity of the arbitration agreement was Dutch law and that therefore Article 181(5) of the Constitution did not in any way affect the validity of the arbitration agreement.[71] For the Tribunal then, the "more appropriate" solution for the "effective"[72] discharge of the dispute resolution functions entrusted to it was to

[70] *BELG v Ghana* (n 37) [149-150] and [152].
[71] ibid [154].
[72] ibid [152].

make a finding that the arbitration agreement is valid and binding. The position of the Tribunal is very problematic because it failed to explain why the same parties will make a choice of law of a place other than that of the seat of arbitration to govern the subject matter of the contract if indeed "the choice of the seat of the arbitration in a neutral country indicates a clear understanding that the Parties wish to detach the arbitration agreement from the domestic law or the courts of either Party."[73] The Tribunal did not give reasons for why a finding of the invalidity of the arbitration agreement under the governing law of the PPA chosen by the parties themselves was not at all appropriate and legitimate, or at least less so in comparison with its finding that the arbitration was binding under Dutch law. It is as if an arbitration agreement must always be valid and binding. The conflict of laws rule requiring the application of the law of the seat of arbitration is a default rule to comply with only if the parties have not made a choice of law that expressly or impliedly applies to the arbitration clause. If the choice of the seat of arbitration means the law of the seat automatically governs the agreement to arbitrate because of its *neutrality*, such logic should extend to the application of the law of the seat to the subject matter of the contract because the chosen law cannot truly be said to be neutral since it is the law of one of the parties. If this logic about the 'neutrality' of the law of the seat of arbitration was to be adopted *simpliciter*, then making a choice of law becomes of no use.

Indeed, the parties to the PPA recognised that any of its provisions could be held to be invalid when they agreed in clause 25 that "this Agreement shall be construed, if possible, in a manner to give effect by means of valid provisions to the intent of the parties to the particular provision or provisions held to be invalid." This provision specifically referred to the possibility of a court of competent jurisdiction holding the provisions of the PPA to be invalid. Similarly, in clause 27, the parties agreed that the PPA "contains all of the understandings and agreements of whatsoever kind and nature with respect to the subject matter of this Agreement and the rights, interests, understandings, agreements and obligations of the parties relating thereto." The parties made express reference to the laws of Ghana and the arbitration rules in clauses 22 and 23 of the PPA to govern the PPA and the arbitration. Based on clause 27 of the PPA, their rights and obligations "with respect to the subject matter" (the PPA) could not be determined outside of the scope of the PPA and the governing law they had expressly incorporated into the PPA. Since the PPA was the *entire agreement*, the "understandings" of the parties according to clause 27 was that the arbitration clause which was embedded in the PPA was to be governed by the law chosen to govern the PPA just like any other term of the PPA was. Thus, it was only if the parties did not agree on a choice

[73] ibid [149].

of law to govern the PPA and the law governing the arbitration that the Tribunal could embark on a journey in search of a law that would allow it to give effect to the arbitration agreement.

The claimant had argued that the parties had "not expressly agreed on the governing law" to the arbitration agreement and that in "such situations, it is common for arbitral tribunals to refuse to apply the general choice-of-law clause in the main contract to the arbitration agreement, *especially where the Parties' chosen law would invalidate the arbitration clause*."[74] Clearly, the concern of the claimant was not that the chosen law had no legitimate application to the arbitration agreement; its primary concern was that the application of the chosen law would invalidate the arbitration agreement. Thus, this was a case of a party seeking to avoid the consequences of applying the chosen law it had voluntarily agreed to. This is certainly not a legitimate basis to refuse to apply the chosen law, especially when the PPA and laws expressly stated in it as the governing laws constituted the entire legal regime for their rights and obligations. The Tribunal emphasized that the New York Convention "supports the conclusion that, in the absence of a choice of law provision in the arbitration agreement, the law of the seat of arbitration should be the applicable law for determining the validity of the arbitration agreement."[75] This position can only hold if the arbitration agreement is not embedded in the matrix contract. The New York Convention does not say that the governing law to a substantive contract cannot affect an agreement contained in it. The Convention also does not say that the parties must agree to a separate choice of law clause to an agreement to arbitrate contained in the contract. Therefore, the parties may well agree that the governing law to the contract covers an agreement to arbitrate and that this can be express or implied. In this case, the text of the arbitration clauses showed that the governing law to the arbitration was to be applied in determining the validity of the clause.

The conclusion of the Tribunal that "the arbitration agreement embodied in… the PPA is both valid and enforceable *independently from the issue of the validity of the PPA*"[76] was inaccurate and misleading as to what the real issue was. The real issue was whether the arbitration agreement "embodied in… the PPA" was valid and enforceable in light of the governing law to the PPA in which it was embodied. It was not whether the validity of the arbitration agreement was dependent on the validity of the PPA. The fact that both could be invalidated on the basis of the

[74] ibid [131] (emphasis added).
[75] ibid [151].
[76] ibid [167] (emphasis added).

governing law does not mean that the validity of one was dependent on the validity of the other.

Article 23 of UNCITRAL Arbitration Rules states that for the purpose of giving effect to the power of a tribunal to rule on its own jurisdiction:

> an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail *automatically* the invalidity of the arbitration clause.[77]

This provision does not say that an agreement to arbitrate can *never* be invalidated based on the invalidity of the underlying contract. It also does not say that the parties cannot agree to a choice of law that covers both the underlying contract and its agreement to arbitrate. If the parties can choose a law to govern both the subject matter of the contract and the arbitration agreement, then that chosen law can determine the validity of both. Thus, the requirement that an agreement to arbitrate be treated as *independent of the contract* does not mean that the governing law cannot cover and affect the agreement to arbitrate if by specifying the governing law the parties expressly or impliedly intended that it should cover and affect all other terms of the contract. Indeed, the courts are willing to hold that an arbitration *contained in the matrix contract* is invalid and not binding if one of the parties does not sign the matrix contract.[78]

There is no legal requirement that the parties agree to separate governing laws—one to the matrix contract and the other to the arbitration agreement. Thus, if the parties do not expressly exclude an agreement to arbitrate from being covered by the governing law to the matrix contract in which the arbitration agreement is embodied, then the law chosen by the parties governs the arbitration agreement as a term, like all other terms of the matrix contract. As Dr Ronán Feehily rightly argues, since the arbitration clause and the main contract "are included in one document signed by the parties, the separability doctrine has been characterised as solely a legal concept and not a factual determination… [T]here is no requirement on the parties to separately consent to the arbitration agreement."[79] Thus, the object of Article 23 of UNCITRAL Arbitration Rules is to preserve the jurisdiction of the arbitral tribunal, so that the tribunal can at least commence proceedings to

[77] UNCITRAL Arbitration Rules (n 67) (emphasis added).

[78] *Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others* [2007] UKHL 40, [2007] 4 All ER 951.

[79] Ronán Feehily, 'Separability in International Commercial Arbitration; Confluence, Conflict and the Appropriate Limitations in the Development and Application of the Doctrine' (2018) 34 Arbitration International 355, 356.

decide on the validity of an agreement to arbitrate in the first place. The object of the provision is not to say that the validity of an agreement to arbitrate cannot be questioned. The arbitration agreement, Professor Dietmar Czernich argues, "is the bridge from the land of litigation to the land of arbitration. This bridge has to hold so that the litigants can reach the land of arbitration."[80] I argue that the fate of such an agreement should depend on the intention of the parties to the matrix contract and arbitration agreement as revealed in their choice of law. The values of predictability and certainty of the applicable law underlying the making of choice of law strongly support the presumption of a one-stop legal regime to regulate all aspects of the parties' legal relationship.

In *BELG v Ghana*, the Tribunal maintained that Ghana was "attempting to rely on its own domestic law to invalidate an arbitration agreement to which it previously acceded and implemented, an approach that Dutch law and international law and international public policy do not permit."[81] The issue with this proposition is that it is lopsided. First, the crucial thing is that Ghanaian law was the governing law voluntarily chosen by the parties. Based on the parties' choice, either party was entitled to rely on the chosen law in support of their legal argument if it worked in their favour. That was exactly what Ghana did. Ghana did not make the simple argument that its law must invalidate the agreement to arbitrate. That argument was based on the fact the parties, who were at liberty to choose the law of the seat of arbitration, chose Ghanaian law as the governing law. Second, given that the parties had chosen Ghanaian law, which is domestic law, it is not convincing that Dutch law (which is also domestic law) should dictate whether Ghanaian law applied or not. The fact that Dutch law was *lex loci arbitri* did not remove the fact that the parties had made a choice of law which entitled a party to rely on that choice of law. Third, the tribunal failed to articulate the content of the so-called "international law and international public policy" and how they denied Ghana from arguing based on its law which was also chosen by the parties. The Tribunal also held that "reliance on internal law should not be permissible to invalidate an arbitration agreement whether the place of performance is within or outside of the State."[82] This argument could also hold if the parties did not choose Ghanaian law. If the parties choose internal law and that internal law governs both

[80] Dietmar Czernich, 'The Theory of Separability in Austrian Arbitration Law: Is It on Stable Pillars?' (2018) 34 *Arbitration International* 463.

[81] *BELG v Ghana* (n 37) [160].

[82] ibid [161].

the substantive contract and the arbitration agreement, then the position held by the tribunal will lack merit.

The Tribunal also held that "[w]hile there may be valid reasons for the Ghanaian Constitution to impose restrictions on the State's powers to enter into certain kinds of international transactions, there are circumstances where such a restriction cannot derogate from the effectiveness of the arbitration agreement to which the Parties are committed and which has been held out as valid by the competent Ghanaian officials."[83] It should also be noted the fact that Ghana "proposed the alternative of arbitration to settle the dispute indicates that the arbitration agreement was considered by it to be valid and in force, even if" Ghana "ultimately decided not to pursue this line of action."[84] For the Tribunal, "the approval of business transactions by government officials not objected as to their legality under local law, and relied upon for a number of years, have been held to amount to estoppel by various arbitral tribunals."[85]

The efficacy of these propositions depends on whether the chosen law of the parties governed the substantive contract and the arbitration agreement. If the chosen law which included the Constitution governed the arbitration agreement, the validity of that agreement could be questioned within the terms of the chosen law. It is neither consistent with the purpose of making a choice of law nor fair to avoid the application of the chosen law simply because its application would invalidate an agreement to arbitrate. The parties to a choice of law clause in making that choice of law must accept the natural and inherent consequences attached to the application of their choice of law. Thus, if parties make a choice law without *expressly* making room for justice to be done as between them in accordance with any other law, then matters and disputes arising between them must be resolved in accordance with the chosen law. In this regard, the choice of a location as the place of arbitration is for that location to play the role of the seat of arbitration. If the parties intended the law of the seat of arbitration rather than the governing law to regulate the conduct of the arbitration in any particular manner, they would have expressly agreed to that because it was their free will to do so. Thus, the choice of a place as the seat of arbitration alone without more cannot make the *lex loci arbitri* trump the governing law freely chosen by the parties if the parties did not limit the scope of application of the governing law.

It is unusual that if the arbitration clause is invalid under the law chosen to govern the contract but valid under the law of the seat, then some tribunals and commentators may prefer the law of the seat to be applied to the arbitration

[83] ibid [163].
[84] ibid.
[85] ibid [165].

clause based on the separability principle. The separability presumption, however, provides a rebuttable basis for the law of the seat of arbitration to be considered to uphold the validity of the clause. Where the parties have made a choice of law, the separability presumption does not provide legal justification as to why the arbitration clause must not be held invalid under the governing law that expressly or impliedly applies to that clause. When the parties have made a choice of law, it is the intent of the parties as revealed in the express terms of the choice of law clause or as implied from the purpose of making the choice of law that provides that legal justification to determine the validity of the arbitration clause based on that chosen law. In other words, the express or implied intent of the parties as revealed in the making of the choice of governing law and deduced from the text of the matrix contract read as a whole supersedes the rebuttable presumption of separability. In the 1894 English case of *Hamlyn & Co v Talisker Distillery*, it was held that the governing law depends on the parties' intent "either as expressed in their contract, or as derivable by fair implication from its terms."[86]

In fact, recent case law does not limit the proper law of the arbitration clause to the law of the seat of arbitration even if the parties have not agreed to the governing law to the arbitration agreement. The English common law system, for example, recognises that the law applicable to the arbitration clause may be determined by taking into consideration a three stage approach: whether the parties have expressly chosen the governing law of the arbitration clause; whether the parties have *impliedly* made a choice of the governing law to the arbitration clause; and in the absence of an express or implied choice of law, a determination is made as to the law which the arbitration agreement has the closest, most real or substantial connection to. This is reflected in English cases such as *Sulamérica Cia Nacional De Seguros SA v Enesa Engenharia SA*,[87] *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*,[88] *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd*,[89] *Fiona Trust and Holding Corporation v Yuri Privalov*[90] and *Tamil Nadu Electricity Board v ST-*

[86] *Hamlyn & Co v Talisker Distillery* [1894] AC 202 (HL) 212.

[87] *Sulamérica Cia Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 102.

[88] *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 All ER (Comm) 1.

[89] *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm), [2013] 2 All ER (Comm) 1.

[90] *Fiona Trust* (n 78).

CMS Electric Company Private Ltd.[91] In the United States, the courts have also implied intent in the matter of the governing law.[92]

These cases support the proposition that, in conceptual terms, an *express* choice of law in the matrix contract is an *implied* choice of the law governing the arbitration clause.[93] It might be argued that it makes no sense to make such an implication if the arbitration clause is invalid under the law chosen to govern the matrix contract but valid under the law of the seat. The desire, however, to uphold the validity of the arbitration agreement using the separability principle does not provide a more solid legal justification to apply the law of the seat of arbitration rather than to imply the application of the chosen law to the matrix contract to the arbitration agreement when such implication can be derived from the intent of the parties to the arbitration agreement (as can be revealed from their choice of law). As I argued earlier, if the parties who are at liberty to choose the law of the seat of arbitration as the governing law do not do so, it is inconsistent with party autonomy, which is the foundation of arbitration, to say that because the parties have chosen a place as the seat of arbitration, they thereby implied that the law of the seat should apply to the arbitration clause.

It is in accordance with the parties' desire for predictability and certainty as to the applicable law in making a choice of the governing law that that the law should apply in determining the validity of the arbitration agreement. Since arbitration, a product of the parties' agreement to arbitrate, is about a dispute that arises out of the performance of the main contract, there is a manifest, substantial, closest, most real or significant connection between the substantive contract and the dispute and between the arbitration clause and the matrix contract. The chosen law must therefore govern the matrix contract and the arbitration agreement. The application of the law of the seat of arbitration becomes relevant for consideration just like any other connecting factor where no express choice of law is made. In the case of Member States of the European Community, Rome I Regulation states that:

> [w]here all the elements relevant to the situation at the time of the choice are located in a country other than the country whose law

[91] *Tamil Nadu Electricity Board* (n 68).

[92] *Connecticut General Life Insurance Co v Boseman*, 84 F (2d) 701 (CCA 5th, 1936); *Boseman v Connecticut General Life Insurance Co* 301 US 196 (1937); *Liberty National Bank and Trust Co. v. New England Investors Shares*, 25 F (2d) 493 (D Mass 1928); *Russell v Pierce*, 121 Mich 208, 80 NW 118 (1899); *United States Savings & Loan Co v Shain*, 8 ND 136, 77 NW 1006 (1898); and *Midland Savings & Loan Co v Henderson*, 47 Okla 693, 150 Pac 868 (1915). See also Symeon Symeonides, 'Choice of Law in the American Courts in 1997' (1998) 46(2) The American Journal of Comparative Law 233; and Gregory E Smith, 'Choice of Law in the United States' (1986–1987) 38 Hastings Law Journal 1041.

[93] Born (n 20) 524.

> has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country *which cannot be derogated from by agreement*".[94]

The addition of the emphasized phrase suggests that it is not sufficient to apply the law of a country other than that of the chosen country merely because the elements are located in that other country. Rather, it has to be shown that the law in that other country cannot be derogated from by agreement.

IV. The Obligation to Apply the Chosen Law

The *BELG v Ghana* case considered above highlights the important issues raised by Daniel Hochstrasser—namely, "whether the choice of law made by the parties limits the arbitral tribunal with respect to the applicable law to such provisions which are part of the legal system designated by the parties as the *lex contractus*."[95] Addressing this issue requires a language analysis of the provision expressing the choice of the governing law to the contract, the text of the arbitration clause, and the provisions of conventions that govern the exercise of powers by an arbitral tribunal. The analysis below shows that international arbitration conventions require arbitral tribunals to keep faith with the parties' choice of law. The scope of the chosen law and the limitations of choice of law on the powers of arbitral tribunals over whether to depart from that chosen law have not been considered in arbitral proceedings; it was certainly not argued in *BELG v Ghana*. I argue that a choice of law made by the parties limits the competence of a tribunal in determining the applicable law to the express and implied laws of the country designated by the parties, including its rules of private international law. The ICSID Convention states in Article 42(1) that a tribunal:

> shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

By this provision, the primary obligation of a tribunal when there is a choice of law is to apply the law chosen by the parties. This provision prevents a tribunal from fishing for some other law when the parties have legitimately made a choice of law. This is the case even if the consequences of applying the choice

[94] Council Regulation (EC) 593/2008 (n 29) article 3(3).
[95] Hochstrasser (n 18) 57.

of law will be unpalatable to a tribunal, both the parties, or one of them. The provision does not make room for a tribunal to apply some other law when the parties have made a choice of law. It is only in the absence of such agreement on choice of law that a tribunal is bound to apply the law of a *contracting state party* to the dispute. The law of the contracting state in such circumstances is defined to include the state's rules on the conflict of laws. If the parties make a choice of law, rules of international law (as may be applicable) only come in after consideration of the law of a contracting state. Article 42(1) of the ICISD Convention places overriding consideration on the need to respect and uphold the parties' choice of law and of the law of a contracting state, which in most cases will be municipal law. It also gives overriding consideration to municipal law when it requires that the law of a contracting state, broadly stated, should apply in the absence of choice of law agreement by the parties. It can be argued by this provision that international law only comes in when there is no choice of law and when the law of a contracting state does not apply, or unless its rules of conflict of laws dictate otherwise. These interpretations are right because by virtue of Article 42(2) and (3), a tribunal "may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law" and it does not have the power to decide a dispute *ex aequo et bono* if the parties have not so agreed. Strictly interpreted, under Article 42 of the ICSID Convention, the law of the seat of arbitration does not come in where the parties have made a choice of law.

Thus, a tribunal cannot simply decide to depart from the parties' choice of law because the applicable law will lead to an agreement to arbitrate being invalidated or because equitably and in the sense of judgement of a tribunal, an application of that choice of law will not lead to a party's or the tribunal's expected outcome. It is not the job of a tribunal to validate an agreement to arbitrate against the express dictates of the law chosen by the parties. As the United Nations Conference on Trade and Development (UNCTAD) rightly stated, amiable composition "implies a resort to rules, whereas *ex aequo et bono* involves ignoring them entirely. Either way, neither an amiable composition nor an *ex aequo et bono* clause can be assimilated in any sense to a choice by the parties of non-state rules."[96] Unless a choice of law or rules of conflicts of law of the country chosen dictate otherwise, Article 42 of the ICSID Convention does not retain any discretion by a tribunal to determine the law that is most closely connected to the situation. This is unlike Rome I Regulation, Article 3(3) under which choice of law may prejudice the application of provisions of the law of a country if "all other elements relevant

[96] UNCTAD, *Dispute Settlement: International Commercial Arbitration, Module 5.5 Law Governing the Merits of the Dispute* (New York and Geneva: United Nations 2005) 15.

to the situation at the time of the choice are located in" that country.[97] Article 42 of the ICISD Convention, which gives wide scope for the effect of choice of law, is similar to Article 9 of the Hague Principles on Choice of Law, which reads:

> The law chosen by the parties *shall govern all aspects of the contract* between the parties, *including but not limited to* - a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations. [98]

Article 8 of the Hague Principles strictly limits the scope of applicable law to the law chosen by parties by excluding rules of private international law from the law chosen by the parties unless the parties expressly provide that rules of private international law shall apply.[99] Similarly, under Article 12 of Rome I Regulation, the law applicable to a contract "shall govern in particular" the interpretation; performance; breach and consequences of breach of obligations; ways of extinguishing obligations, prescription and limitation of actions; and nullity of the contract and the consequences thereof.[100] The use of the phrase "shall govern in particular" suggests that the applicable law may govern other matters other than those specifically mentioned.

In the recent case of *Slowakische Republic (Slovak Republic) v Achmea AV*, decided on 8 March 2018, the European Court of Justice (ECJ) held that an arbitration agreement in an investment treaty between the Slovak Republic and the Kingdom of the Netherlands had an "adverse effect on the autonomy" of European Union law.[101] In the opinion of the ECJ, Articles 267 and 244 of the Treaty on the Functioning of the European Union[102] (TFEU) precluded:

> a provision in an international agreement concluded between Member States [such as the arbitration agreement in the investment

[97] Council Regulation (EC) 593/2008 (n 29), article 3(3).

[98] Hague Conference on Private International Law (n 28) article 9 (emphasis added).

[99] Ibid article 8.

[100] Council Regulation (EC) 593/2008 (n 29), article 12.

[101] Case C-284/16 *Slowakische Republic (Slovak Republic) v Achmea AV* (Judgment of the Grand Chamber, 6 March 2018) [59] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A62016CJ0284>.

[102] Consolidated Version of the Treaty on the Functioning of the European Union, 26.10.2012 Official Journal of the European Union C 326/47, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

> treaty] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[103]

The Court reasoned that by concluding the investment treaty, the member parties to it "established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law."[104] The ECJ further reasoned that even though the disputes under the investment treaty fell within the jurisdiction of the arbitral tribunal related to the interpretation of the investment treaty and EU law, there was the possibility of those disputes being submitted "to a body which is not part of the judicial system of the EU."[105] The arbitral tribunal established under that investment treaty was thus not situated within the judicial system of the EU and it could not be regarded as a court or tribunal of a Member State within the meaning of Article 267 of TFEU.[106] Only the decisions of courts and tribunals set up by Member States and "situated within the EU judicial system" "are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU."[107] The instant tribunal was not part of the judicial system of the Netherlands or Slovakia and therefore could not be classified under Article 267 of the TFEU as a court of tribunal of a Member State of the EU.[108]

Article 14 of the Inter-American Convention on the Law Applicable to International Contracts[109] is similar in scope to Article 12 of Rome I Regulation. It has an additional element in Article 14(b) that the "law applicable to the contract" "shall govern principally the rights and obligations of the parties." The obligations of the parties include the obligation to arbitrate. Hence, where the parties have not chosen the law to govern the arbitration clause, the applicable law as to the validity of the arbitration clause would be the Inter-American Convention.

Article 35(1) of UNCITRAL Arbitration Rules is similar in effect to Article 42 of the ICSID Convention. It requires an arbitral tribunal to apply the rules of law designated by the parties for the resolution of a dispute, and it is only when

[103] *Slovak v Achme*a (n 101) [60].
[104] ibid [56].
[105] ibid [58].
[106] ibid [43].
[107] ibid.
[108] ibid [45]–[46].
[109] Inter-American Convention (n 59).

the parties have failed to make the designation that the arbitral tribunal is free to apply the law which it determines to be appropriate. By Article 35(2) of the Rules, an arbitral tribunal may decide as *amiable compositeur* or *ex aequo et bono* "only if the parties have expressly authorized the arbitral tribunal to do so." Thus Article 35(1) and (2) of UNCITRAL Arbitration Rules do not make room for a tribunal to depart from the applicable law chosen by the parties in favour of the law of the seat of arbitration simply because in the tribunal's sense of judgement it is equitable or appropriate to do so. In relation to *BELG v Ghana* analysed above, the governing law to the PPA and the arbitration clause were manifestly closer to the substantive contract and its arbitration clause. Thus, in the *BELG v Ghana* case, which was decided under these Rules, the Tribunal was under obligation to follow the governing law agreed to by the parties, namely Ghanaian law and should not have avoided its application merely because its application would have voided the arbitration clause. If it applied Ghanaian law, it would have found that the arbitration agreement would be invalid. The Supreme Court of Ghana has held in *Attorney-General v Faroe Atlantic Co Ltd,*[110] *Attorney-General v Balkan Energy Ghana Ltd*[111] and *Amidu v Attorney-General Cases*[112] that international business or economic transactions such as power purchase agreements, international loan agreements, and international project implementation agreements that have not been laid before and approved by Parliament as required by Article 181(5) of the Constitution are unconstitutional and void. As such, the State cannot be required to pay damages for breach of such agreements. Such a finding of unconstitutionality would be the result of the parties' choice of law, not of a unilateral application of domestic law by Ghana. It was to avoid these consequences that the Tribunal chose to apply the law of the seat of arbitration in obvious disregard of the parties' freely chosen law.

The position of these arbitration conventions regarding fidelity to the choice of law recognises and gives effect to party autonomy and the need for this autonomy and will of the parties to be respected and upheld.[113] As international arbitration depends on the good faith and domestic institutional support to realise its objectives (for example reliance on domestic courts to enforce arbitral awards), arbitrators should equally respect laws that states have enacted in legitimate exercise of their legislative powers.[114] That obligation to respect and uphold national laws is particularly compelling when the parties to arbitration have chosen a particular national law to govern their relations and when that choice has been made within the limits of mandatory rules. Arbitration being dependent on the agreement of

[110] *Attorney-General v Faroe Atlantic Co Ltd* [2005–2006] SCGLR 271.
[111] *Attorney General v Balkan Energy Ghana Ltd* [2012] 2 SCGLR 998.
[112] *Amidu v Attorney-General* [2013–2014] 1 SCGLR 112; [2013–2014] 1 SCGLR 167.
[113] Hochstrasser (n 18) 58 and 84.
[114] ibid 85.

the parties to submit their disputes for settlement by arbitration, arbitrators derive their authority from such agreement and the exercise of their powers must equally be limited by the express and implied effect of the arbitration agreement and choice of law made by the parties. Arbitrators must not substitute their own view as to what the parties should have agreed to for what the parties have actually or impliedly agreed to. Arbitrators should decide within the scope of the agreement to arbitrate, the chosen law to be selected, and should not wish for the parties what they have not wished for themselves.[115] Professor Buys rightly argues this point when she states that "[i]n light of the contractual nature of arbitration, parties to a commercial arbitration agreement ought to be assured that their choice of the applicable law will be respected as well."[116] In other words, according to Professor Buys:

> [as] arbitrators are appointed by the private agreement of the parties… their allegiance should be to seeing that the terms of that private agreement are carried out. The arbitrator's duty to respect the wishes of the parties as expressed in their written agreement extends to respect for the parties' choice of law in a commercial transaction.[117]

Arbitral respect for the parties' choices as reflected in the agreement to arbitrate is not only consistent with the underlying principles of freedom of contract and party autonomy, it could also lead to reviewing courts respecting party autonomy and upholding decisions of arbitral tribunals, subject only to overriding public policy considerations and mandatory national rules.[118]

Despite the need to keep faith with party autonomy and the parties' choice of law made in exercise of that autonomy, there are cases, as reflected in *BELG v Ghana*, when one party becomes dissatisfied with the choice of law that the parties have agreed to and may seek to have the arbitrator apply the law of a different country such as that of the seat of arbitration. The party objecting to the application of the choice of law might argue that there does not exist a reasonable or substantial connection between the law chosen and the parties' transaction. The party may also be seeking simply to avoid the natural consequences of an unfavourable outcome against it that may result from the application of the chosen law. For example, in *BELG v Ghana*, BELG requested the Tribunal to "refuse to apply the choice-of-law clause to the arbitration clause because Ghanaian law

[115] Buys (n 26) 67–68.
[116] ibid 69.
[117] ibid.
[118] ibid 71.

discriminates between national and international transactions to which Ghana is a party and thwarts the Parties' true intentions to arbitrate."[119] It is further argued that if the Tribunal proceeded to apply conflict of laws rules, "the conflict of law rules of the seat of arbitration should be applied in determining the substantive law applicable to an arbitration agreement."[120]

In most cases, the tribunal will turn to the law of the seat of arbitration because it is traditionally taken that the designation of a place as the seat of arbitration is treated as consent to the procedural law of that place and as evidence that the substantive law of the seat applies.[121] In *BELG v Ghana*, the Tribunal held that the parties' agreement to dispute settlement before the Permanent Court of Arbitration "is an indicator that the Parties intended to remove questions relating to dispute resolution – as opposed to the substantive performance of the contract – from the place of either Party, to a neutral forum."[122] This position does not reflect the agreement of the parties. The Parties had expressly agreed to UNCITRAL Arbitration Rules for the conduct of arbitration. Even if the governing law to the main contract did not apply to the arbitration agreement, UNCITRAL Arbitration Rules did and ought to have been the reference for deciding whether the arbitration agreement was valid.

The parties to a choice of law agreement should not be allowed to evade their contractual obligation to observe that agreement if they are challenging the applicability of the chosen law in disguise—that is, as a camouflage to avoid the consequences attached to the application of the law they have freely agreed. If the chosen law cannot be applied for some substantive and legitimate reason, a tribunal should apply the conflict of law rules that accompany the substantive law chosen by the parties. This is because in the absence of a specific definition of the scope of the chosen law by the parties themselves, the chosen law must be taken to include its conflict of law rules.

The conventional theory that the choice of a place as the seat of arbitration gives reason to disregard the chosen law in favour of the law of the place of arbitration needs to be revisited. The place of arbitration is simply chosen as a place of arbitration for purposes of dispute resolution. If the parties really consider the law of the place of arbitration as neutral, they probably will go ahead to expressly make a choice of that law instead of choosing the law of one of the parties as the governing law. Therefore, in the absence of the parties expressly giving some role for the law of the seat of arbitration in the parties' dispute resolution, the

[119] *BELG v Ghana* (n 37) [130].
[120] ibid [131].
[121] Buys (n 26) 71.
[122] *BELG v Ghana* (n 37) [142].

law of that place is in no different position than the law of any other place which could equally have been chosen as the seat of arbitration or which has some other connecting fact but has not been chosen. The seat of arbitration has interest in the way justice is administered within its territory. That country's legal system, however, may also recognise party autonomy and its laws must not be applied to defeat party autonomy which has been legitimately exercised.

It may be argued that there may be no connection between the parties to the matrix contract and the governing law they have chosen.[123] While there are other important factors that can connect the parties and their transaction, it must to be borne in mind that the very purpose of choice of law is to connect the chosen law, the parties, their transaction, and their disputes. Thus, choice of law is a connecting factor. Indeed, this is the primary function of making choice of law. The parties would have made that choice of law well aware of other connecting factors. In choosing the laws of a particular jurisdiction, the parties mean to exclude all other factors that could plausibly be connected to their transaction and dispute. Therefore, it seems there can hardly be a lack of connection between a transaction or dispute and the chosen law. If the parties have the freedom to contract as well as the autonomy to choose the law to govern their contract and they have legitimately done so, there must be compelling and fundamental factors to ignore that choice as a connecting factor. Such a compelling factor cannot be that the chosen law will invalidate the underlying agreement or agreement to arbitrate. Such a compelling factor does not also include a tribunal's wish or desire to do justice beyond the terms of laws governing the exercise of its powers—that is, if the tribunal is not authorised by the parties or the applicable arbitration convention to exercise its powers as *amiable compositeur* or *ex aequo et bono*.

V. Conclusion

Professors Elliot Cheatham and Willis Reese rightly argue that: [124]

> All laws, be they statutory or judge-made, are the products of policies which, in turn, are deemed of sufficient importance to warrant their embodiment into law. A choice of law decision is, therefore, of real concern to the states involved, since in net effect it determines whose policy shall prevail in the particular case. This consideration dictates that the law of the state with the dominant interest, should normally at least, be applied.

[123] Born (n 20) and Buys (n 26).
[124] Cheatham and Reese (n 2).

I argue that if the interest of the state is a relevant criterion, "the state with the dominant interest" to have its law applied in a dispute involving parties *who have made a contractual choice of law* is the state the laws of which have been chosen as the applicable law to the contract. International arbitration tribunals should faithfully apply the law chosen by the parties because the choice of applicable law expresses the will and intention of the parties that that law, and not any other, shall apply to their transaction and dispute. In furtherance of the object of predictability and certainty as to the applicable law to the terms of the underlying contract and the rights and obligations of the parties deriving from that contract, the chosen law has express and implied application to both the matrix contract and arbitration clause embedded in it unless otherwise expressly indicated by the parties.

Therefore, if that choice of applicable law has been legitimately made, then effect must be given to the parties' will and intention. If the parties have made a choice of law, a tribunal and a party to the choice of law agreement must not seek overtly or covertly to avoid the application of the chosen simply because of unpalatable, undesirable or negative outcomes that will naturally arise from the application of the chosen law. Accordingly, I adopt Professor Park's perspective that:

> No one opts for an unfair result applied to himself. However, it is rarely possible to predict in advance of the dispute who will get the rough side of the law, since the contours of the controversy do not exist. For this reason, parties to commercial transactions agree to "play by the rules," aware that application of the rules will not always produce agreeable results. It is not irrational to assume that businessmen desire the application of rules of law as an accepted calculus of justice, even though those rules lead to consequences that could be described as unfair. [125]

[125] Park (n 16) 662.