

**THE ROME I AND ROME II REGULATIONS IN
INTERNATIONAL COMMERCIAL ARBITRATION**

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The Rome I and Rome II Regulations in International Commercial Arbitration

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I. Law Applicable to the Merits in Commercial Arbitration in the European Union.

- A. Legal Framework in the Union and its Member States.*
- B. Arbitration Rules.*
- C. Arbitration Practice.*

II. Scope of the Rome I Regulation with regard to Arbitration.

- A. The Regulation as a Binding Instrument?*
- B. State Courts as Direct Addressees of the Regulation.*
- C. Scope and Significance.*

III. Rome II Regulation.

- A. Application.*
- B. Structure and Mandatory Conflict of Laws Rules.*

IV. Choice-of-law Agreements: Meaning of the Rome I and II Regulations.

- A. Limits to Party Autonomy.*
- B. Source of Guidance.*
- C. Non-Contractual Obligations.*

V. Methods to Determine the Law Applicable in the Absence of Choice.

- A. General Considerations.*
- B. Contracts.*
- C. Non-Contractual Obligations.*

VI. International Mandatory Rules and Mandatory Conflict of Laws Rules.

- A. The Rome Instruments and the Protection of EU Public Policy in Arbitration.*
- B. Effect of Overriding Mandatory Provisions.*
- C. Bilateral Conflict Rules and Scope of Public Policy Provisions.*

VII. Conclusion.

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I. LAW APPLICABLE TO THE MERITS IN COMMERCIAL ARBITRATION IN THE EUROPEAN UNION

A. Legal Framework in the Union and its Member States

The question of the law applicable to the substance of the relationship between the parties is only one of the several choice-of-law issues that may arise in arbitration¹. Typically, only arbitrators deal with that specific question in the framework of international commercial arbitration². In the context of applications for setting aside an arbitral award or when recognition or enforcement is sought, the possibility that a state court will review the law or rules arbitrators apply to the substance is limited. The relevant exceptions concern mainly the disregard of overriding mandatory provisions (public policy)³ or express choice-of-law by the parties⁴. Additionally, as it will later be discussed, the issue of the effectiveness of overriding mandatory provisions is, to a great extent, independent from the issue of which is the law applicable to a contract. Moreover, if a state court finds that an arbitration agreement is not valid (under the law applicable to such an agreement) or that the dispute does not fall within the terms of the submission to arbitration, the issue of the law applicable to the merits by arbitrators loses its relevance.

In general terms, the EU instruments on Private International Law usually address arbitration with the purpose to exclude it or certain related issues from their scope of application⁵. For example, article 1.2.d) of Regulation (EU) 1215/2012 on jurisdiction and the

¹ See, e.g., H.A. Grigera Naón, *Choice-of-law Problems in International Commercial Arbitration*, 289 *R. DES C.*, (2001) 9-396; N. Blackaby & C. Partasides, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed. 2009), 163-239; T.M. de Boer, *Choice-of-law in Arbitration Proceedings*, 375 *R. DES C.* (2014), 61-87.

² J.D.M. Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978), 220-580; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1st ed. 1999), 781-882; Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed. 2014), 2614-2778.

³ Born, *supra* note 2, at 2776-77.

⁴ L. Silberman & F. Ferrari, *Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong* in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* (Sellier, 2011), 312-319.

⁵ Article 18 of Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (recast) is an exception, 2015 O.J. (L 141) 19. However, it is to be noted that the sole reference to arbitration in that Regulation is contained in Article 18, a provision of direct significance for state courts, providing that the

recognition and enforcement of judgments in civil and commercial matters (Brussels I recast)⁶ states that the Regulation shall not apply to arbitration; Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I)⁷ solely mentions arbitration in article 1.2(e) in order to exclude "arbitration agreements" from its scope of application; Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II)⁸ does not mention arbitration at all. Although there are opposing views concerning the direct applicability of the Rome I and Rome II Regulations by arbitral tribunals⁹, it can be noted that, in contrast with the lack of special provisions in EU law, Member States have traditionally adopted and maintained specific rules on the law applicable to the merits by arbitral tribunals and participate in international conventions that regulate this issue.

That the European Convention on International Commercial Arbitration of 21 April 1961 (Geneva Convention) binds most EU Member States is particularly significant¹⁰. Article VII of the Geneva Convention deals with the law to be applied by the arbitrators to the merits. First, it lays down the freedom of the parties to determine the applicable law. In the absence of a choice-of-law by the parties pursuant to article VII, arbitrators shall apply, to the substance of the dispute, "the proper law under the rule of conflict that the arbitrators deem applicable". In both situations arbitrators shall take account of the terms of the contract and trade usages. Moreover, article VII (2) allows arbitrators to act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration.

Furthermore, a common feature of arbitration law, in most EU Member States, is the inclusion of special provisions on the law applicable to the merits for international arbitration. The 1985 UNCITRAL Model Law on International Commercial Arbitration has influenced this

effects of insolvency proceedings on pending arbitral proceedings shall be governed solely by the law of the Member State in which the arbitral tribunal has its seat.

⁶ 2012 O.J. (L 351) 1.

⁷ 2008 O.J. (L 177) 6.

⁸ 2007 O.J. (L 199) 40.

⁹ Compare, e.g., and with further references, C. Reithmann & D. Martiny (eds.), *Internationales Vertragsrecht (Das Internationale Privatrecht der Schuldverträge)* (Otto Schmidt, 8th ed., 2015), 63-65; and P. Mankowski, *Rom I-VO und Schiedsverfahren*, RIW (2011), 30.

¹⁰ As of 1 August 2016, the Contracting States to the Geneva Convention include, among others, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, Slovakia, Slovenia and Spain (<https://treaties.un.org/>).

development. The UNCITRAL Model Law has been used as a blueprint by many national legislators in the European Union¹¹ and devotes article 28 to the "rules applicable to substance of dispute". Article 28 of the UNCITRAL Model Law is very similar to Article VII of the Geneva Convention, particularly in its provision on the law applicable in the absence of choice that sets forth that it is to be determined by the conflict of laws rules, which the arbitral tribunal considers applicable. However, its provision on party autonomy refers to the possibility by the parties to choose the applicable "rules of law" instead of the "law" and clarifies that renvoi is excluded when the law of a given State is designated by the parties. Furthermore, it also allows an arbitral tribunal to decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

In line with global trends, national codes or statutes of EU Member States contain provisions on the law applicable to the substance in international commercial arbitration. These provisions are drafted to respond to the particular needs of arbitration and deviate from regular choice-of-law rules for State courts, such as the Rome I and Rome II Regulations¹². Relevant exceptions are Italy¹³ and Sweden¹⁴, who lack special provisions on the applicable law to the substance of the arbitration.

National provisions of EU Member States on the law applicable to the merits for international arbitration grant arbitrators ample discretion in the selection of the applicable law or rules. First, such legislations usually allow parties to empower the arbitral tribunal to decide

¹¹ According to the information provided by UNCITRAL (<http://www.uncitral.org>), more than seventy States have adopted legislation based on the 1985 Model Law including: Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain and United Kingdom.

¹² See J.F. Poudret & S. Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd ed., 2007), 574-607; Silberman & Ferrari *supra* note 4, at 267-305; Born *supra* note 2, at 2629-2635.

¹³ See section V in Andrea Bonomi & Tito Ballarino, *Italy* in J. Basedow, G. Rühl, F. Ferrari & P.A. De Miguel Asensio (eds.), *Encyclopedia of Private International Law*, vol. III (Edward Elgar, 2017, forthcoming) (expressing the view that the absence of a specific rule on the law applicable to the merits is one of the most important drawbacks of Italian legislation on arbitration).

¹⁴ See section VII in M. Hellner, *Sweden* in Basedow, Rühl, Ferrari and De Miguel Asensio (eds.) *supra* note 13 (noting that in the absence of rules there is much uncertainty concerning this matter). However, reference to the provisions of the UNCITRAL Model Law and UNCITRAL Arbitration Rules on the law applicable to the substance of the dispute are not rare by arbitral tribunals seated in Sweden, See, e.g., final award in ICC case no. 9771 of 2001 (place of arbitration, Stockholm), noting that the Rome Convention was not directly applicable to the arbitration dispute, 2004 *Y.B. COMM. ARB'N.* 46-65, 53-54.

the dispute *ex aequo et bono* or as *amiable compositeur*, without having to refer to any particular body of law. At any rate, national special provisions on choice-of-law in arbitration proclaim party autonomy as the basic rule. However, some differences in drafting may be found among EU Member States. For instance, some statutes refer to the choice of a "law" by the parties, such as Section 46(1)(a) of the English Arbitration Act 1996, while others use the more flexible and broad term "rules" as the possible object of the choice, such as Article 34.2 of the 2003 Spanish Arbitration Act. The latter approach favours the view that a reference by the parties to non-state rules may be sufficient in the context of international commercial arbitration.

Additionally, national statutes usually establish how arbitrators determine the applicable law (or rules) where the parties have not chosen it. In line with international developments, two main approaches may be found in the arbitration statutes of EU Members States. Some legislators have opted for the so-called "direct approach", which allows arbitrators to directly apply the substantive law or rules they consider appropriate without analyzing any conflicts of laws provisions. Examples of this approach may be found in Article 1151 of the French Code of Civil Procedure (as revised by Décret of 13 January 2011); Article 34.2 of the Spanish Arbitration Act; Article 1054(2) of the Dutch Civil Procedure Code; Article 600(2) of the Austrian Code of Civil Procedure; Article 49 of the Hungarian Arbitration Act; Article 1119 of the 2010 New Civil Procedure Code of Romania; and Article 1710 of the Judicial Code of Belgium as amended in 2013.

Other national statutes in the EU opt for an "indirect approach" based on the UNCITRAL Model Law, which is founded on a choice-of-law analysis and requires the arbitral tribunal to rely on the conflict of law rules that it deems applicable or appropriate to determine the applicable law. Examples of this approach may be found in Section 46(3) of the English Arbitration Act 1996; § 28.2 of the Danish Arbitration Act; and Rule 47(1)(b) of the Scottish Arbitration Act, 2010. However, some laws that rest on an "indirect approach" establish a specific connecting factor, based in the closest connection test. For instance, in Germany pursuant to § 1051 ZPO the arbitral tribunal shall apply the law of the country with which the

subject matter of the proceedings is most closely connected. A similar provision may be found in Article 52(2) of the 2011 Portuguese Law on Voluntary Arbitration¹⁵. The latter option is closer to the typical choice-of-law rules for state courts, as the ones of the Rome I and Rome II Regulation, but even these national legislations grant more flexibility to arbitrators than to state courts, especially since no additional indications are provided with regard to the application of the closest connection test¹⁶.

It is generally intended that these special provisions, found in the legislation of most EU Member States, be applied as part of the *lex arbitri*. Therefore, arbitration statutes in most EU Member States seem construed on the express assumption that ordinary conflict rules are not directly binding on arbitral tribunals seated in that State. Unlike ordinary courts, arbitrators are not official state organs but private bodies, which are free to conduct their proceedings in a given state. Pursuant to these statutory provisions, they enjoy ample discretion regarding the law applicable to the substance of the dispute.

B. Arbitration Rules

The direct procedural framework applicable to international commercial arbitration results first from the content of the rules of procedure to be followed by the arbitral tribunal in conducting the proceedings. It is a common feature of the arbitration rules, usually applied both in ad-hoc arbitration and institutional arbitration, to include a provision on the law applicable to the substance of the dispute. With regard to non-administered commercial arbitration, the most influential text is the 2010 UNCITRAL Arbitration Rules (Revision of the 1976 UNCITRAL Arbitration Rules). Although the UNCITRAL Rules were drafted, in part, as an alternative to

¹⁵ Article 834 of the Italian Code of Civil Procedure contained a rule of the same sort but it was abrogated in 2006. See R. Hausmann, *Anwendbares Recht vor deutschen und italienischen Schiedsgerichten – Bindung an die Rom I-Verordnung oder Sonderkollisionsrecht?* in *Grenzen überwinden – Prinzipien bewahren, Festschrift für Bernd von Hoffmann* (Giesecking, 2011), 971, at 973-974.

¹⁶ As an exception and example of a more rigid approach, it has been reported that under Estonian law (§742(2) of CCP), in cases in which the parties have failed to agree on the applicable law in their arbitration agreement, and the applicable law has not been determined by a legal Act, Estonian substantive law should be applied, even with respect to foreign parties. See T. Cole et al., *Legal Instruments and Practice of Arbitration in the EU, Study for the Juri Committee of the European Parliament* (2014), <http://www.europarl.europa.eu/studies>, at 89 (stressing that in comparison with the legislation of the other EU Member States that provision "is rather surprising and unusual, and departs from the traditional rule in which the arbitrators retain the power to decide the applicable law").

private arbitration institutions, they have also been adapted to become the rules of a number of arbitration centres around the world.¹⁷ Furthermore, as far as the law governing the merits of the dispute is concerned, the approach of the UNCITRAL Rules is, to a great extent, the same that prevails in the rules of the most significant arbitration institutions.

Pursuant to Article 35(1) of the UNCITRAL Rules, the parties are free to designate the rules applicable to the substance of a dispute. In absence of a choice, the arbitral tribunal applies the law it determines to be appropriate. Therefore, the Rules adopt the so-called direct approach without providing additional indications as to how the appropriate law is to be established. Furthermore, Article 35(2) allows an arbitral tribunal to decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized it to do so. Finally, in all cases arbitrators shall decide in accordance with the terms of the contract and shall take into account any usage of trade applicable to the transaction.

The most significant international and European institutions that administer commercial arbitration proceedings have adopted a similar approach in their rules.¹⁸ Their rules enable arbitral tribunals to directly determine the law applicable to the merits, without having to rely on any system of conflict of laws rules. Relevant examples of this approach are Article 21 of the Rules of Arbitration of the International Chamber of Commerce (ICC) (in force as from 1 January 2012)¹⁹; Article 22(3) of the LCIA (London Court of International Arbitration) Arbitration Rules (effective 1 October 2014)²⁰; Article 61(a) of the WIPO Arbitration Rules (effective from June 1, 2014)²¹; Article 31 of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR) / American Arbitration Association

¹⁷ D.D. Caron & L.M. Caplan, *The UNCITRAL Arbitration Rules (A Commentary)* (Oxford University Press, 2nd ed., 2013), 6-7.

¹⁸ Born, *supra* note 2 at 2624-2625; Silberman & Ferrari, *supra* note 4, at 267-305.

¹⁹ International Chamber of Commerce, www.iccwbo.org.

²⁰ The London Court of International Arbitration, www.lcia.org.

²¹ World Intellectual Property Organization, <http://www.wipo.int/amc/en/arbitration/rules/>. Article 61(a) of the WIPO Rules includes the clarification that any designation of the law of a given State by the parties shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules, in line with Article 28(1) of the UNCITRAL Model Law. A similar clarification may be found in other Arbitration Rules, such as Article 22 (2) of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

(effective June 1, 2014)²²; Article 22 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (in force as of 1 January 2010)²³; Article 27(2) of the Arbitration Rules of the Vienna International Arbitral Centre (VIAC) (in force as from 1 July 2013)²⁴; Article 42 of the Arbitration Rules of the Netherlands Arbitration Institute (NAI) (in force as of 1 January 2015)²⁵; Article 3 of the 2010 Rules of the Chamber of Arbitration of Milan²⁶; and Article 28(1) of the Arbitration Rules of the Civil and Commercial Arbitration Court (CIMA-Madrid)²⁷.

Other institutions require arbitrators to apply, in the absence of choice, the law or the rules of law with the closest connection to the dispute. However, such provisions remain quite flexible since they do not provide additional indications about how the closest connection should be determined. Examples of this approach are section 23 of the DIS-Arbitration Rules 98 (German Institution of Arbitration)²⁸ and Article 33(1) of the Swiss Rules of International Arbitration (June 2012)²⁹.

C. Arbitration Practice

Therefore, it comes as no surprise that the practice of international commercial arbitration in the EU shows that, in general, arbitral tribunals do not consider themselves bound to apply the regular conflict of law rules that national courts have to apply, such as the Rome I and Rome II Regulations. However, this finding does not exclude those instruments from playing a significant role in many situations in which an arbitral tribunal determines the law applicable to the merits of the dispute. In the framework of institutional arbitration, arbitrators are, in principle, bound to decide on the basis of the provisions on applicable law of the rules of

²² The International Centre for Dispute Resolution, www.icdr.org.

²³ The Arbitration Institute of the Stockholm Chamber of Commerce, www.sccinstitute.com.

²⁴ Vienna International Arbitral Centre, www.viac.eu.

²⁵ Netherlands Arbitration Institute, www.nai-nl.org.

²⁶ Chamber of Arbitration of Milan, www.camera-arbitrale.it. These Rules include some indications about how to determine the appropriate rules. Pursuant to Article 3(3), in the absence of choice, "the Arbitral Tribunal shall apply the rules it determines to be appropriate, taking into account the nature of the relationship, the qualities of the parties and any other relevant circumstance".

²⁷ Corte Civil y Mercantil de Arbitraje, <http://arbitrajecima.com/>.

²⁸ German Institution of Arbitration, <http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10>.

²⁹ Swiss Chambers' Arbitration Institution, www.swissarbitration.org.

the institution that administers the arbitration proceedings. The flexible approach concerning the applicable law in the absence of choice that prevails in the arbitration rules of institutions grants ample discretion to arbitrators. As already noted, those rules –in line with the special national provisions in the field that may be applicable as *lex arbitri*- refer to the law chosen by the parties and in the absence thereof they usually refer to the law or rules of (conflicts of) law that arbitrators deem appropriate or applicable, but do not provide further indications as how to determine which are appropriate or applicable. This approach is consistent with the widespread legislative policies favouring arbitral autonomy that have influenced the evolution of EU Member States laws on arbitration.

There are various methods used by arbitrators to establish the law or rules of (conflicts of) law deemed applicable in the absence of a choice by the parties (*see* further section V, *infra*). A well-known trend in recent arbitration practice has been to restrict the significance of the place of arbitration when determining the law applicable to the merits of a dispute. This tendency is related to the limited connection that the development of arbitration proceedings may have with the seat of arbitration, the fact that the parties and the subject matter of the dispute may lack any connection with the formal seat of arbitration and the fact that such place may be chosen not by the parties but by the arbitral tribunal or an arbitral institution. Therefore, it is not common for arbitral tribunals following an indirect approach to directly apply the ordinary private international law rules of the seat of the arbitration, as a court of that country bound to decide according to the conflict rules of the forum would do. This is fully compatible with the arbitral tribunal respecting the special provisions of the country of the seat –as *lex arbitri*- on the law applicable to the substance by arbitrators that usually are very flexible and do not impose the direct application of the general conflict of law rules of that state, as illustrated by Article 28 of the UNCITRAL Model Law.

The practice of arbitral tribunals seated in EU Member States shows that is not rare in arbitral proceedings to have recourse to provisions of the Rome I Regulation (or the Rome

Convention)³⁰, and even of the Rome II Regulation where non-contractual issues become relevant. Such references are regularly found in connection, among others, with the determination of the law applicable to a contract in the absence of choice (art. 4 of the Rome Convention and the Rome I Regulation)³¹; the law applicable to the formal validity of a contract (art. 9 Rome Convention and art. 11 Rome I Regulation)³²; the law applicable to legal subrogation (art. 13 Rome Convention and 15 Rome I Regulation)³³; or the application of overriding mandatory provisions (art. 7 Rome Convention, art. 9 Rome I Regulation and art. 16 Rome II Regulation)³⁴. However, reference to such provisions is typically made in circumstances in which it is clear that they are not used by arbitrators because they are bound to apply those instruments on the same basis that the ordinary courts of EU Member States (*see* sections IV to VI, *infra*).

II. SCOPE OF THE ROME I REGULATION WITH REGARD TO ARBITRATION

A. The Regulation as a Binding Instrument?

To what extent arbitral tribunals, seated in a Member State of the EU, are bound to apply the Rome I Regulation (and previously the 1980 Rome Convention), in order to determine the law applicable to the merits of a contractual dispute, has been subject to significant controversy in scholarly circles. Opposing views have been expressed³⁵ and ambiguous

³⁰ Some examples are provided by B. Yüksel, *The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union*, 7 J. PRIV. INT'L L. (2011), 149, 158-159; A. Bělohávek, *Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration* I CZECH Y.B., INT'L L., (2010), 25, 41; Born *supra* note 2, at 2627.

³¹ *See, e.g.*, final award in ICC case no. 6283, 1992 Y.B. COMM. ARB'N 178, 179; and final award in ICC case no. 10274, 2004 Y.B. COMM. ARB'N 89, 92-93 (stating expressly that reference to the Rome Convention is made even though the Convention was not applicable in the case at hand); and final award in ICC case no. 9771, 2004 Y.B. COMM. ARB'N 46, 54 (noting as well that the Rome Convention was not directly applicable to the arbitration dispute).

³² *See* final award in ICC case no. 13756, 2014 Y.B. COMM. ARB'N 118, 128 (paras. 32 and 33).

³³ *See, e.g.*, partial final award of 17 May 2005 of the Netherlands Arbitration Institute, 2006 Y.B. COMM. ARB'N 172, 179.

³⁴ *See* final award in case no. 158/2011 SCC Arbitration Institute Sweden, 2013 Y.B. COMM. ARB'N 253, 269 (esp. para. 60).

³⁵ Among the authors that have concluded that arbitrators seated in the EU are bound, as national courts, to apply the Rome I Regulation, *see* Mankowski *supra* note 9; Yüksel *supra* note 30; P. Beaumont & P. McEleavy, *Private International Law - A.E. Anton* (W. Green, 2011), para. 10.46; and M.R. McGuire, *Grenzen der Rechtswahlfreiheit im Schiedsverfahrensrecht?* SchiedsVZ (2011), 257-267.

approaches are not rare³⁶. The Regulation does not address this issue and only mentions arbitration to exclude "arbitration agreements" from its scope of application in Article 1(2)(e). In the terms of the Commission Proposal, the exclusion of the Rome Convention was confirmed in the Regulation because arbitration agreements were already covered by satisfactory international regulations.³⁷

According to the Giuliano and Lagarde Report³⁸, the parallel exclusion in Article 1(2)(d) of the 1980 Rome Convention was justified due to some additional reasons. It was argued, during the drafting of the Convention, that the principle of severability made the arbitration clause independent from the main contract, the closest connection approach was difficult to apply to arbitration agreements, procedural and contractual aspects of an arbitration agreement are difficult to separate, and that since procedural matters and the question of arbitrability would in any case be excluded, the only matter to be regulated would be consent. Furthermore, the Report clarifies that the exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. The clarification that the arbitration exclusion covered the "effects" of arbitration agreements beyond their "procedural aspects" was one of the elements that made the idea that the Rome Convention was not binding on arbitrators a view widely accepted under the Convention³⁹.

However, the adoption of directly applicable EU instruments on the law applicable to obligations has triggered an intense debate on whether arbitrators are bound to apply EU conflict of laws rules or not. The unified rules established in the Rome I Regulation (and previously in the Rome Convention) apply to all situations involving a conflict of laws in the

³⁶ See Bělohávek *supra* note 30, at 40-43; R. Plender & M. Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell, 4th ed., 2015), 112; and M. McParland, *The Rome I Regulation on the law applicable to contractual obligations* (Oxford University Press, 2015), noting that the question has not been conclusively answered (at 79) and that any solution adopted would have to be equally applicable to both the Rome I and Rome II Regulations (at 83).

³⁷ Proposal of a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM(2005) 650 final, p. 5.

³⁸ M. Giuliano & P. Lagarde, *Report on the Convention on the law applicable to contractual obligations*, 1980 O.J. (C 282) 1.

³⁹ D. Busse, *Rome I and Rome II: Applicability in International Arbitration*, 7 AUSTRIAN Y.B. INT'L. ARB'N (2013), 23, 37.

field of contractual obligations (Article 1(1)). Additionally, because of the rules universal application, the courts of the Member States must apply them, regardless of the level of connection of the relevant contract with the Member States (Article 2). An idea sustained by those who advocate that arbitral tribunals seated in the EU must decide according to the Rome I Regulation, as the courts of Member States do, is that the issue of the law applicable to the merits of a contractual dispute by arbitrators is included within the scope of application of the Regulation.

In this respect, it is stressed that Article 1(2)(e) of the Rome I Regulation refers only to "arbitration agreements" in contrast with the broader wording of the Brussels I bis Regulation, which excludes "arbitration" in Article 1(2)(d), and it is also noted that the arbitration agreement and the main contract may be subject to different applicable laws.⁴⁰ Additionally, although "agreements on the choice of court" are also excluded, it is not controversial that state courts with jurisdiction on the basis of such an agreement, are bound by the Rome I Regulation.⁴¹ Although Recital 7 of the Rome I Regulation mentions that its substantive scope should be consistent with the Brussels I Regulation and the Rome II Regulation, it is argued that the procedural nature of the Brussels I Regulation and the significance of the 1958 New York Convention only in the context of international procedure favour a restrictive interpretation of the exclusion in Article 1(2)(e) of the Rome I Regulation.⁴² As a further argument to support that the Rome I Regulation regulates the law applicable to the substance of the dispute in international commercial arbitration it is also mentioned that the addressees of Article 3 of the Rome I Regulation are not courts but the parties to a contract.⁴³

⁴⁰ Yüksel *supra* note 30, at 155. With the purpose to support a restrictive interpretation of the exclusion this author notes that the Giulano and Lagarde Report mentions that "the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place" is one of the factors that may lead to establish that a choice-of-law was made by the parties. However, it can be noted that Recital 12 of the Rome I Regulation refers only to an agreement between the parties to confer on one or more "courts or tribunals of a Member State" exclusive jurisdiction to determine disputes under the contract as one of the factors to be taken into account in determining whether a choice-of-law has been clearly demonstrated. On this issue *see* also notes 68 and 70, *infra*.

⁴¹ Plender & Wilderspin *supra* note 36, at 110.

⁴² Mankowski, *supra* note 9, at 30-31 and 38.

⁴³ McGuire *supra* note 35, at 262.

The view that an arbitral tribunal sitting in a Member State is, like a judge, under the duty of applying the Regulation as a Union measure is further based on the idea that the courts of Member States and the arbitral tribunals seated in the Member States exercise similar judicial functions, and the assumption that the EU choice-of-law rules have to be applied by arbitrators under the principle of supremacy of EU law and its uniform application unless otherwise stated by EU law⁴⁴. It has also been stressed that the difference between the legal nature of the Rome Convention and the Rome I Regulation strengthens the argument on the superseding effect of the Rome I Regulation over the specific provisions of the arbitration statutes of Member States⁴⁵. Therefore, according to this view, even if arbitrators were not bound to apply the Rome Convention they are under the duty of applying the Rome I Regulation since directly applicable measures are an integral part of and take precedence over the legal order of each of the Member States⁴⁶. According to these views, the non-application of the Rome I Regulation by arbitrators sitting in the EU would constitute an error of law and a breach of EU law, although it is acknowledged that it would not be a suitable ground for setting aside or refusal of recognition and enforcement of the award due to the limited judicial review of the decisions on choice-of-law by arbitrators. It is also noted that, in the case the Rome I Regulation was not directly applicable to arbitration the effectiveness of mandatory provisions of EU law and the respect to EU public policy could be jeopardized.⁴⁷

Furthermore, the traditional view that arbitrators have to apply the ordinary conflict rules of the law of the seat has also led to consider that arbitral tribunals sitting in the EU should apply the Rome I Regulation.⁴⁸ It has been argued that a refusal to apply the Rome I Regulation

⁴⁴ Yüksel *supra* note 30, at 164-165.

⁴⁵ Mankowski *supra* note 9, at 30.

⁴⁶ Yüksel *supra* note 30, at 171-174. However this author at p. 172 argues that "where the parties have agreed to refer their dispute to institutional arbitration or to settle their dispute according to a set of arbitration rules such as UNCITRAL Arbitration Rules, the choice-of-law provisions of these arbitration rules, rather than the choice-of-law rules of Rome I, will be applied by the arbitrator in order to determine the law applicable to the substance of the dispute since the adaptation of such arbitration rules by incorporation into the contract by the parties is effective under the Rome I Regulation". This attempt to reconcile the alleged binding nature of the Rome I Regulation to arbitrators with arbitration practice seems unconvincing since the Rome I Regulation does not support the enforcement of a choice-of-law clause that refers to the conflict rules of a private instrument.

⁴⁷ McGuire *supra* note 35, at 264-265.

⁴⁸ *Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC) (3 August 2010) (considering that the law applicable to the substance of an arbitration dispute was relevant to establish the

by, arbitrators sitting in a Member State would, endanger certainty and foreseeability,⁴⁹ particularly to the extent that it could lead to different conflict rules being applied to the same dispute depending on the validity or not of the arbitration agreement, and hence it would undermine the possibility to determine the applicable law and the parties' rights and duties at the time of the conclusion of the contract.⁵⁰ However, this argument fails to consider that such "Statutenwechsel" also takes place in other situations, for instance where the validity of a choice of court agreement designating the courts of a third State is challenged since each court would have regard to its own conflict rules.

B. State Courts as Direct Addressees of the Regulation

First, it must be noted that even the assumption that arbitrators must regard the conflict rules of the country of the seat of the arbitration as *lex arbitri*, does not necessarily lead to conclude that the Rome I Regulation is binding on arbitrators seated in EU Member States. National statutes on arbitration and even international texts such as the 1961 Geneva Convention contain special rules on the determination of the law applicable to the substance of arbitral disputes. The EU Regulations would only prevail as the choice-of-law rules of the seat over national statutes to the extent that the Regulations establish the law applicable to the merits not only by state courts but also by arbitrators. Otherwise, the law applicable to the substance in arbitration disputes would remain primarily within the legislative competence of EU Member States, in line with the traditional restraint of the EU to deal with international commercial arbitration given the current international and national legal framework. Therefore, it is basically a question of interpretation of EU law and the relevant instruments to establish to what extent they contain rules intended to regulate international commercial arbitration.⁵¹

connection of the arbitral process with England required to exercise its powers to support arbitration. On the basis that the connecting factor to determine the *lex causae* should be ascertained by the *lex fori*, the Court held that an English seat of arbitration was possible and that English law would be likely to apply in accordance with the Rome Convention). *But see Syska v Vivendi Universal SA & Ors* [2008] EWHC 2155 (Comm) (02 October 2008) (stating clearly and plainly that "the Rome Convention does not apply to arbitration").

⁴⁹ Bělohávek *supra* note 30, at 43.

⁵⁰ Mankowski *supra* note 9, at 37; McGuire *supra* note 35, at 258.

⁵¹ A. Grimm, *Applicability of the Rome I and II Regulations to International Arbitration*, SchiedsVZ (2012), 189, 190.

No indication is found in the wording, history and context of the Rome I Regulation that it was adopted to establish the private international law rules to be applied by arbitrators in international commercial disputes. Since the text of Article 1(2)(e) of the Rome I Regulation is identical to Article 1(2)(d) of the Rome Convention and no changes were introduced on this point, it seems appropriate to consider that the scope of both instruments also with regard to this issue is the same⁵². The exclusion of arbitration is consistent with the view that procedural matters fall outside the classic international contract law⁵³ and that pursuant to Article 1(3) of the Rome I Regulation it does not apply to procedure⁵⁴.

As far as context is concerned, it is significant that the Rome Convention and the Rome I Regulation were adopted at a time when almost all Member States dealt with the law applicable to the substance of international commercial arbitration disputes with specific rules contained in arbitration or procedural statutes or were bound by international conventions having special provisions on the issue, in particular the 1961 Geneva Convention⁵⁵. The implementation of specific national rules on the law applicable to the merits in international commercial arbitration by Member States has taken place even after the Rome Convention and the Rome I Regulation came into force. Although the practices of the Member States may not

⁵² T. Pfeiffer, *Internationales Vertragsrecht vor Schiedsgerichten – Zur Bedeutung der Rom I-Verordnung in der Schiedsgerichtsbarkeit*, in F. Graf von Westphalen (ed.) *Deutsches Recht im Wettbewerb – 20 Jahre transnationaler Dialog*, (Deutscher Anwalt Verein, 2009), 178, 181.

⁵³ S. Schilf, "Römische IPR-Verordnungen – kein Korsett für internationale Schiedsgerichte", 59 *RIW* (2013), 678, 686-688.

⁵⁴ See Plender & Wilderspin *supra* note 36, at 112 (considering on the basis of Article 1(3) that even if arbitral tribunals are addressees of the Regulation an arbitral tribunal is not required in principle to apply the Regulation ex officio if its procedural law requires the parties to plead and prove this law and that the principle of procedural autonomy would, in practice, make it very difficult to challenge a failure, by an arbitral tribunal to apply the Regulation).

⁵⁵ If the Rome I Regulation was deemed to be binding on arbitrators, it should be taken into account with regard to Article VII of the Geneva Convention and its provisions on the law to be applied by the arbitrators to the merits, that the Rome I Regulation "shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations" (Article 25.1), see E. Brödermann, *Paradigmenwechsel im Internationalen Privatrecht - Zum Beginn einer neuen Ära seit 17. 12. 2009*, *NJW* (2010), 807, 809; Plender & Wilderspin *supra* note 36, at 111-112. By contrast with the provisions of the Rome I Regulation, the Geneva Convention allows arbitrators in the absence of choice to determine the rule of conflict that they deem applicable and enable them to act as *amiables compositeurs* when empowered by the parties to do so. Notwithstanding this, some authors claim that the Convention does not contain provisions, which are incompatible with the Regulation, see McGuire *supra* note 35, at 263.

alter the reach of EU legislation⁵⁶, they seem relevant in assessing the legal background against which both the Rome Convention and Rome I Regulation were adopted and in determining whether the legislator intended to target arbitration⁵⁷.

Indeed, approaches prevailing under those national statutes and international conventions and under the arbitration rules adopted by arbitration centres administering international commercial arbitrations disputes in the EU diverge to a considerable extent from the content of the Rome Convention and Rome I Regulation. The latter rests on principles that differ on certain issues from the widespread consensus about the basic features of a modern legislation on the law applicable to substance by arbitrators and hence its binding application by arbitrators could undermine the attractiveness of EU Member States as arbitration seat, since the lack of rigid choice-of-law rules has traditionally been regarded as one major advantage of arbitration⁵⁸. Even if the judicial review of arbitrators' decisions on choice-of-law is very limited, the mandatory application of the Rome I Regulation could affect the choice of the place of arbitration by the parties who might opt for countries outside the EU, since it will conflict with the widespread assumption that arbitrators are not bound by the normal conflict of laws rules which apply in court proceedings at the place of arbitration⁵⁹.

As illustrated by the UNCITRAL Model Law, compared with the Rome I Regulation the prevailing features in modern arbitration statutes include more flexibility as to the choice of the applicable rules by the parties and with regard to the designation of the applicable law or rules by the arbitrators in the absence of choice⁶⁰. Unlike the Rome I Regulation, it is widely accepted that parties may empower arbitrators to decide *ex aequo et bono* or as *amiables compositeurs* and hence allow disputes to be determined based on principles of fairness rather than in particular rules of law⁶¹. In fact, it is to be noted that in some EU Member States the

⁵⁶ Mankowski *supra* note 9, at 34.

⁵⁷ Grimm *supra* note 51, at 191.

⁵⁸ Lew *supra* note 2, at 1.

⁵⁹ F. De Ly, *Forum Shopping and the Determination of the Place of Arbitration*, in F. Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Sellier, 2013), 53, 65.

⁶⁰ On the practical implications of whether or not arbitrators must apply the Rome I Regulation *see* Busse *supra* note 39, at 24-28; and Schilf *supra* note 53, at 680-683.

⁶¹ Hausmann *supra* note 15, at 979 (noting that a strict application of the Rome I Regulation would exclude the possibility to decide *ex aequo et bono*).

widely accepted view without significant discussion is that arbitrators seated in that Member State are unlike ordinary courts not bound by the Rome I Regulation⁶² and that such a view is consistent with the international and national legal framework and with the Rules of arbitral institutions.⁶³ The Rome I Regulation does not provide any indication that suggests that it aims at introducing such a drastic change in the legal systems of the Member States⁶⁴.

The Rome I Regulation, like the other regulations adopted in the framework of the judicial cooperation in civil and commercial matters⁶⁵, is drafted as if its provisions were addressed to the ordinary courts or tribunals of the Member States and gives no indication of its binding nature with regard to arbitrators⁶⁶. Some examples may be illustrative. Recital 6 when discussing the need to improve the predictability of the outcome of litigation refers only to "the free movement of judgments" and to the national law designated by "the court in which an action is brought"⁶⁷; recital 8 speaks about "the law of the Member State in which the court is seised"; Recital 12 mentions an agreement to confer jurisdiction "on one or more courts or tribunals of a Member State"; according to Recital 15 the special provision of article 3.3 on domestic contracts "should apply whether or not the choice-of-law was accompanied by a choice of court or tribunal"; pursuant to Recital 16 "courts should... retain a degree of discretion to determine the law that is most closely connected to the situation"; Recital 37 states that "considerations of public interest justify giving the courts of the Member States the possibility of applying exceptions based on public policy and overriding mandatory provisions"; Article 12(1)(c) on the scope of the law applicable refers to "the limits of the powers conferred on the court by its procedural law". Other linguistic versions of the Rome I Regulation are even

⁶² See P. Mayer, *Le choix de loi dans la jurisprudence arbitrale*, in S. Corneloup & N. Joubert (dirs.), *Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux* (Litec, 2011), 423, 428.

⁶³ See J.C. Fernández Rozas in *Comentarios al Reglamento de la Corte Civil y Mercantil de Arbitraje (2015)*, (CIMA 2016) 303.

⁶⁴ T. Niedermaier, *Schieds- Und Schiedsverfahrensvereinbarungen in Strukturellen Ungleichgewichtslagen* (Mohr Siebeck, 2013), 137.

⁶⁵ On this issue with respect to the Rome II Regulation, see further section III.A), *infra*.

⁶⁶ Pfeiffer *supra* note 52, at 181; G.P. Calliess, *Art. 3 Rome I* in G.P. Calliess (ed.), *Rome Regulations (Commentary)* (Kluwer, 2nd ed., 2015), 99.

⁶⁷ In this connection it has been highlighted that since arbitration is excluded from the Brussels I Regulation, application of the Rome I Regulation by state courts is sufficient to fulfil its aim of preventing forum shopping, see J. von Hein, *Art 1 Rom I-VO*, T. Rauscher (ed.), *EuZPR/EuIPR* (Otto Schmidt, 2016) 75.

clearer in the sense that the references of Recitals 12 and 15 to "court or tribunal" are only made to state courts or tribunals⁶⁸.

It is also noteworthy that the parallel Brussels I (Recast) Regulation makes explicit that the expression "courts or tribunals" does not include arbitrators, as results from Recitals 11 and 12 and the use of the expression "court or tribunal" in many provisions of the Brussels I (Recast), including the first sentence of Article 1(1)⁶⁹. The reference in Recital 12 of the Rome I Regulation to "courts or tribunals" is similar to the expression used in Article 1(1) of the Brussels I Regulation that does not apply to arbitration⁷⁰. Moreover, it is to be recalled that according to the *Nordsee* judgment of the CJEU, an arbitration tribunal established pursuant to a contract between private individuals in situations where the parties are free to opt for arbitration –as it is the case in international commercial arbitration- is not deemed to have a sufficiently close link with the organization of legal remedies through the courts in the Member State of its seat to be considered as a "court or tribunal of a Member State" within the meaning of Article 267 of the TFEU and hence is not authorized to make a request to the CJEU for a preliminary ruling⁷¹. Therefore, it seems fair to conclude that although arbitral tribunals may apply EU law they are not part of the judicial system of Member States and operate outside of the European area of justice.⁷²

C. Scope and Significance

The fact that the Rome I Regulation only refers to "arbitration agreements" among the exclusions from its scope of application in contrast with the broader text of the exclusion in the Brussels I Regulation can be related to a number of factors, including that Rome I deals with

⁶⁸ For instance, the expression "courts or tribunals" in the Spanish text is "órgano jurisdiccional"; in French, "jurisdiction"; in German, "Gericht"; and in Italian, "organi giurisdizionali". See, however, Yüksel, *supra* note 30, at 166 (arguing that the expression "courts or tribunals" in the Rome I Regulation encompasses arbitrators).

⁶⁹ Recital 7 of the Rome I Regulation expressly states that its scope should be consistent with the Brussels I Regulation (Recital 7 of Rome I and Rome II).

⁷⁰ Plender & Wilderspin *supra* note 36, at 110-111 (concluding that the recitals should be regarded as neutral given the vagueness of the reference to "tribunals" in English and the lack of any corroboration in other language versions that arbitral tribunals are included).

⁷¹ Case 102/81, *Nordsee v Reederei*, 1982 E.C.R. 1116, para. 13.

⁷² See *supra* note 16, at 200 (reaching such conclusion after analysing the law and practice on arbitration of all EU Member States).

"contractual obligations", the context of the adoption of the instrument and primarily the nature of arbitration as an alternative dispute resolution system. Given the subject matter of the Rome I Regulation, it seems to be of particular importance with regard to its scope of application the clarification that the Regulation does not apply to a specific kind of contract, such as arbitration agreements.

As the validity and enforceability of arbitration agreements are issues frequently brought before national courts, it was reasonable to address this specific topic in an express way when defining the substantive scope of the Rome Convention and Rome I Regulations. Other arbitration issues, such as recognition and enforcement, are relevant for the purposes of the scope of the Brussels I Regulation but not with respect to the Rome I Regulation and hence there was no need to consider them. Additionally, in the light of the legislative framework in the EU Member States at the time of the adoption of the Rome I Regulation it seems reasonable the drafting by the EU legislator of choice-of-law rules on contracts addressed directly only to state courts without any further reference to arbitration, since the law applicable to the merits in international commercial arbitration was the subject of special rules different from the ordinary conflict rules on contracts in almost all Member States. Therefore, in disputes submitted to arbitration the relevant provisions are primarily the arbitration laws of the *lex arbitri* instead of the ordinary choice-of-law rules that were replaced by the Rome Convention and the Rome I Regulation⁷³.

Furthermore, this approach as to the scope of EU private international law seems consistent with the nature of arbitration as an alternative resolution dispute system in the EU and its Member States. International commercial arbitration has developed as an alternative to state judicial systems. In arbitration the subject matter of the dispute must be capable of settlement and hence it may only deal with issues that the parties would be free to settle between themselves. A dispute can be settled by arbitration where its object is a matter that can be freely negotiated by the parties. Furthermore, unlike ordinary courts arbitral tribunals are not organs of

⁷³ See J. Basedow, *Vertragsstatut und Arbitrage nach neuen IPR* in 1 Jahrbuch für die Praxis des Schiedsgerichtsbarkeit (1987), 3, 16-19. See also G. Schulze, *Art 5 Rome I*, in Callies (ed.) *supra* note 66, at 130.

a specific state. As pointed out by the CJEU, even if arbitration is provided for within the framework of the law and the arbitral tribunal must decide according to law, by contrast with state courts or tribunals, arbitrators do not exercise their functions on behalf of a State and public authorities are not involved in the decision to opt for arbitration nor are they called upon to intervene automatically in the proceedings before the arbitral tribunal⁷⁴.

Therefore, when parties opt for arbitration to decide international commercial disputes, legal systems tend to allow ample freedom to the parties and broader flexibility to the arbitrators in the absence of choice to determine the rules applicable to the merits. Arbitrators may even be empowered to decide *ex aequo et bono* or as *amiables compositeurs* by the parties. The flexibility granted to arbitrators to select the rules applicable to the substance is consistent with the option made by the parties when choosing arbitration, the interests involved and the needs and preferences of the parties⁷⁵. The CJEU has also acknowledged the importance of the supervisory functions of the courts of the Member States concerning arbitration, although it has concluded in the interest of efficient arbitration proceedings that review of arbitration awards is limited in scope and annulment of or refusal to recognise an award is possible only in exceptional circumstances.⁷⁶ At any rate, arbitrators concerned about potential challenges to, and enforceability of, their awards in the EU have at least a strong incentive to respect EU public policy and apply EU overriding mandatory provisions to situations falling within their scope⁷⁷ (see further section VI, *infra*).

The view that arbitral tribunals seated in a Member State unlike national courts are not bound to decide according to the Rome I Regulation, does not undermine that the Rome I Regulation may play a significant role in the determination of the law applicable to the substance by arbitral tribunals in the light of the current regulatory framework and the methods used by arbitrators. The prevailing methods used by international arbitrators to select the applicable law in those situations in which they consider necessary to determine the state law

⁷⁴ See Nordsee *supra* note 71, at para. 12.

⁷⁵ See Busse *supra* note 39, at 40-42.

⁷⁶ Case C-126/97, Eco-Swiss v. Benetton International, 1999 E.C.R. I-3701, at para. 35.

⁷⁷ See, e.g., Blackaby & Partasides *supra* note 1, at 207.

that governs the merits are to a great extent based on the choice-of-law rules of the States having relation to the dispute. Even if arbitrators do not have the duty of applying the Rome I Regulation as an instrument binding on them they have in many situations the capacity to have recourse to its provisions and they tend to do so in many situations in the light of the background, scope, content and influence of the Regulation⁷⁸. Furthermore, this approach does not prejudice that arbitrators may be required -at least from the EU law perspective- to respect EU (and Member States) public policy and to give effect to EU internationally mandatory provisions in line with the increasing role of arbitration as one of the procedural mechanisms for the enforcement of EU mandatory law⁷⁹ (see Sections IV to VI, *infra*).

The arbitration agreements' exclusion in the Rome I Regulation does not affect the choice-of-law rules which must be applied to the main contract by a court of a Member State as far as it has jurisdiction over such contract. For instance, if an arbitration agreement is found not valid there is no doubt that the state court will be bound as usual by the Rome I Regulation as regards the main contract. Moreover, the law of the Member States can impose the application of the Rome I Regulation to issues that are excluded from its scope of application or not covered by it to the extent that those issues remain within the national legislative competence⁸⁰. The finding that the Rome I Regulation does not regulate the determination of the law applicable to the merits in commercial arbitration leads to the conclusion that Member States have for the time being the possibility to maintain or adopt specific provisions such as those briefly discussed in section I.A above⁸¹. The applicability of the rules of the Rome I Regulation beyond

⁷⁸ Mayer *supra* note 62, at 427-428.

⁷⁹ N. Shelkopyas, *The Application of EC Law in Arbitration Proceedings*, (Wolf Legal Publishers, 2003), 294-295. Moreover, such an approach does not undermine that arbitrators may find it necessary to apply EU law if it forms part of the *lex contractus* or the *lex arbitri*, see, e.g., Opinion of Advocate General Wathelet in case C-567/14, *Genentec Inc. v. Hoechst GmbH*, ECLI:EU:C:2016:177, at para. 61.

⁸⁰ The Dutch Civil Code provided until recently an example of such possibility since Article 154, Book 10, expanded the application of the Rome I Regulation to all contractual obligations that are excluded in Article 1(2) of the Regulation. Under that regime Dutch courts had to apply the Rome I Regulation to determine the law governing an arbitration agreement notwithstanding the exclusion of this issue in Article 1(2)(e) Rome I Regulation, see De Boer *supra* note 1, at 74.

⁸¹ J. von Hein, *MüKoBGB*, Bd. 10, *Einl. IPR* (C.H. Beck, 6th ed, 2015), 121-122.

its scope of application to areas still governed by national (and not EU) law can be regarded as a matter of national law.⁸²

Therefore, it cannot be ruled out that instead of establishing special rules for arbitration a Member State may decide that its regular choice-of-law rules, the Rome I Regulation included, shall be applied by arbitrators –as rules of the *lex arbitri*- when determining the law governing the merits of arbitration. However, such an approach would be in sharp contrast with the current trends regarding legislation on arbitration, as illustrated by the UNCITRAL Model Law and its success as blueprint for legislators. A different issue may arise in situations in which the special provisions on the law applicable to the merits in arbitration adopted by Member States use categories, which are also relevant in the framework of the Rome I Regulation. As already noted, in Germany pursuant to § 1051 ZPO and in Portugal according to Article 52(2) of the 2011 Law on Voluntary Arbitration, the arbitral tribunal shall apply the law of the country with which the subject-matter of the proceedings is most closely connected. Therefore, the question may arise as to what extent the interpretation of the closest connection as a connecting factor in the Rome I Regulation may be relevant in the application of such special provisions on the law applicable to the merits by arbitrators⁸³. However, that question with regard to national statutory provisions on arbitration is basically not an issue of EU law.

III. ROME II REGULATION

A. Application

Arbitration disputes are usually contractual in nature: most controversies are submitted to arbitration by virtue of an arbitration agreement concluded in connection with a contractual transaction between the parties. However, given that recourse to arbitration is widely accepted with regard to all issues that the parties would be free to settle between themselves, non-contractual claims are in principle deemed arbitrable. Therefore, the great difficulties posed by the determination of the applicable law for tort claims in a multinational context have also been

⁸² See, in the context of the Rome Convention, Basedow *supra* note 73, at 4.

⁸³ Pfeiffer *supra* note 52, at 181-182; D. Martiny, *MüKoBGB*, Bd. 10, *Vor Art 1 RomI VO*, (C.H. Beck, 6th ed., 2015) 179-180.

acknowledged in arbitration practice⁸⁴. Arbitration proceedings concerning non-contractual disputes are not rare and have expanded as a result of the practice of widening arbitration clauses included in many transactions that tend to be drafted in broad terms, so that they cover any dispute –including any non-contractual obligation- arising out or in connection with the relevant agreement.

Therefore, a controversy has also arisen as to whether arbitrators seated in the EU are bound to apply the Rome II Regulation to determine the law applicable to non-contractual obligations. Unlike the Rome I Regulation, Rome II does not include any reference to arbitration among the exclusions from its material scope and its Recital 8 states that "the Regulation should apply irrespective of the nature of the court or tribunal seised". On the basis of the text of Recital 8 some authors have concluded that arbitrators must apply the Rome II Regulation⁸⁵. In contrast with the rest of the Rome II Regulation that only refers to "courts"⁸⁶, Recital 8 refers to "court or tribunal". However, such arguments do not seem persuasive.

Given the legal framework on arbitration in the Member States at the time of the adoption of the Regulation, the significance of arbitration as an alternative dispute resolution system to national courts, and the other instruments adopted in the field of judicial cooperation in civil matters, the lack of an express exclusion of arbitration in the Rome II Regulation does not seem a convincing argument to establish that arbitral tribunals seated in a Member State are directly bound to apply the Regulation. Recital 8 is to be construed as a confirmation that the Rome II Regulation should apply irrespective of the division of jurisdiction between the several

⁸⁴ See, e.g., final award of 1 August 2003 of the Netherlands Arbitration Institute, 2004 *Y.B. COMM. ARB'N*, 133,153.

⁸⁵ See G. Wagner, *Die neue Rom II-Verordnung*, *IPRax* (2008), 1-17, at 3; See also A.J. Bělohávek, *Arbitration Law of Czech Republic: Practice and Procedure* (Juris, 2013), 1811-1812.

⁸⁶ Recital 6 ("court in which an action is brought"); Recital 10 ("the Member State in which the court is seised"); Recital 14 ("the court seised"); Recital 16 ("Uniform rules should enhance the foreseeability of court decisions"); Recital 22 ("to choose to base his or her claim on the law of the court seised"); Recital 25 ("the Member State in which the court is seised"); Recital 31; Recital 32 ("the courts of the Member States" and "the legal order of the Member State of the court seised"); Recital 33 ("the court seised"); Article 6(2)(b) ("sues in the court of the domicile of the defendant"... "can only choose to base his or her claim on the law of that court" "...affects also the market in the Member State of that court"); Article 15 (d) ("within the limits of powers conferred on the court by its procedural law"); Article 30(1)(i) ("the extent to which courts in the Member States apply foreign law").

types of courts existing in Member States⁸⁷, in line with the use of the same expression in Article 1(1) of the Brussels I bis Regulation and particularly in the light of the wording of Recital 8 in other official languages⁸⁸. The need for such a reference in the Rome II Regulation and its absence in the Rome I Regulation seems reasonable given the importance in some Member States of the distinction between courts dealing with civil, criminal and administrative matters regarding non-contractual liability. It may be recalled in this connection that Article 7.3 of the Brussels I bis Regulation with regard to claims for damages envisages the possibility that courts dealing with criminal proceedings may have jurisdiction over civil claims.

The close relationship between the Rome I and II Regulations and the Brussels I Regulation favours the view that the exclusion of arbitration applies to the three instruments in line with the European legislator's acknowledgement that arbitration is an alternative system of dispute resolution, different from litigation before Member States' courts⁸⁹. As expressly stated in Recital 7 of the Rome II Regulation, its scope and provisions should be consistent with the Brussels I Regulation, the Rome Convention (in force at the time of the adoption of Rome II) and the Rome I Regulation. The close relationship between these instruments is a key factor in the interpretation of the Rome II Regulation⁹⁰. Therefore, in connection with Recital 8 of the Rome II Regulation, it seems very significant that its wording replicates that of Article 1(1) of the Brussels I Regulation. Pursuant to the latter provision, the Brussels I Regulation applies "whatever the nature of the court or tribunal" and there is no doubt that only state courts or tribunals of the Member States are direct addressees of the Brussels I Regulation.

⁸⁷ A. Dickinson, *The Rome II Regulation (The Law Applicable to Non-contractual Obligations)* (Oxford University Press, 2008), 158.

⁸⁸ Recital 8 refers only to "Gerichts" in German; "órgano jurisdiccional" in Spanish "organo giurisdizionale" in Italian; "gerecht" in Dutch; and "tribunal" in Portuguese.

⁸⁹ Busse *supra* note 39, at 35-37.

⁹⁰ S. Francq, *Les champs d'application (matériel et spatial) dans les textes de référence. De la cohérence terminologique à la cohérence systémique. En passant par la théorie générale...* in M. Fallon, P. Lagarde & S. Poillot-Peruzzetto (dirs.), *La matière civile et commerciale, socle d'un code européen de droit international privé?* (Daloz, 2009), 35, 36-48.

Additional arguments, relevant to support that arbitrators are not direct addressees bound by the Rome II Regulation as ordinary courts, have been provided⁹¹. It has been noted that there was no need in the Rome II Regulation for a specific exception for arbitration since those contained in the Brussels I and Rome I Regulations are aimed to ensure consistency between those instruments and international conventions (particularly the 1958 New York Convention). Furthermore, it has been argued that arbitrators are not recognised as a "court or tribunal of a Member State" within the meaning of Article 267 of the TFEU, that adequate protection of EU objectives served by certain provisions of the Rome II Regulation is safeguarded by the role of Member State courts in reviewing arbitral awards and the requirement that arbitrators sitting in a EU Member State give effect to EU mandatory law, and that the binding extension of the Regulation to arbitrators sitting in the EU would place them at a competitive disadvantage in comparison with other venues allowing more flexibility in international commercial arbitration.

A further indication that the direct addressees of the Rome II Regulation as a binding text are the courts of the Member States may be derived from the review clause of Article 30. In the context of the application of the Regulation the clause stresses the importance of considering the way in which foreign law is treated in the different jurisdictions and the extent to which courts in the Member States apply foreign law. The concern for the lack of uniformity regarding the treatment of foreign law among the courts of Member States was also the subject of a Commission Statement published with the Rome II Regulation in the Official Journal. Neither Article 30 nor the Commission Statement contains any reference to the application of substantive law by arbitrators. This is consistent with the scope of the Rome II Regulation and with the fact that for the international arbitrator there is no *lex fori* and foreign law as such. Ascertaining the content of any law to be applied may pose similar problems to state courts and

⁹¹ See Dickinson *supra* note 87, at 158-162 (mentioning that a footnote in an early draft of the Regulation made reference to its applicability in arbitration cases, but such reference was deleted in the following draft and never reinserted).

arbitrators, including the situations in which the applicable law cannot be ascertained, but state courts and arbitrators must solve them differently⁹².

Therefore, in line with the conclusion previously reached regarding the Rome I Regulation, the better view seems that the Rome II Regulation is to be construed as part of EU private international law directly binding on ordinary courts, but it is not intended to regulate the law applicable by arbitrators to the substance of a dispute and hence does not replace Member States' statutes in the field. Although in the absence of EU rules, the scope of such provisions of the *lex arbitri* is an issue of national law⁹³ –and if relevant of the interpretation of the 1961 Geneva Convention-, in general terms such provisions and those of the arbitration rules of the most significant institutions are not drafted as limited to contractual claims and seem to comprise all matters that may be submitted to arbitration⁹⁴.

Moreover, the fact that the Rome II Regulation is not directly binding on arbitral tribunals⁹⁵ does not exclude that this instrument may be very significant in certain disputes on non-contractual claims submitted to arbitration (*see* sections IV and V, *infra*). Furthermore, as previously noted with respect to the Rome I Regulation, that conclusion does not affect either to the arbitrator's duty to render an enforceable award and that the supervisory role of ordinary courts on arbitration proceedings influences the need for arbitrators to respect EU public policy and EU overriding mandatory provisions (section VI, *infra*). In this connection it becomes particularly relevant that the Rome II Regulation includes certain choice-of-law rules that cannot be derogated by the parties.

B. Structure and Mandatory Conflict of Laws Rules

⁹² Y. Derains, *Foreword*, in F. Bortolotti & P. Mayer (eds.), *The Application of Substantive Law by International Arbitrators* (ICC, 2014), 5. On the comparison between the state court approaches to the determination of applicable law and the development of principles on the ascertainment of the substantive law by arbitrators, *see* ILA Committee on International Commercial Arbitration, *Final Report. Ascertainning the Contents of the Applicable Law in International Commercial Arbitration*, Rio de Janeiro, 2008.

⁹³ *See, e.g.*, Niedermaier *supra* note 64, at 138-139 (with regard to § 1051 ZPO).

⁹⁴ Hausmann *supra* note 15, at 983; Schilf *supra* note 53, at 680.

⁹⁵ *See* A. Halfmeier, "Art. 1 Rome II", in Callies (ed.), *supra* note 66, at 469 (noting that even in the absence of direct binding force for arbitral tribunals, an arbitrator could have to apply the Rome II Regulation by virtue of the parties' agreement, certain national law or arbitration rules).

Under the Rome II Regulation, parties may agree to submit certain non-contractual obligations to the law of their choice pursuant to Article 14. The general rule, where there has been no choice-of-law by the parties, is provided for in Article 4 that is based as the rest of the conflict rules of the Regulation in the closest connection principle⁹⁶. Pursuant to Article 4, the law applicable to non-contractual obligations arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Furthermore, Article 4(3) establishes an escape clause under which the law of the country having a manifestly more closely connection with the tort/delict shall apply. It clarifies that such a closer connection might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Special conflict rules that prevail over the general rule in Article 4 are provided for certain matters, including, where the non-contractual obligation arises out of product liability (art. 5), unfair competition or restrictions of competition (art. 6), environmental damage (art. 7) and infringement of an intellectual property right (art. 8). Moreover, Rome II also provides conflict rules for obligations arising out of unjust enrichment (art. 10), *negotiorum gestio* (art. 11) and *culpa in contrahendo* (art. 12).

As an exception to the freedom of the parties to submit non-contractual obligations to the law of their choice granted by Article 14 of the Rome II Regulation, Articles 6(4) and 8(3) provide that the law applicable under those articles may not be derogated from by an agreement. Therefore, unlike other conflict rules of the Regulation, Articles 6 and 8 include mandatory provisions determining the law applicable that cannot be derogated by the parties⁹⁷. The

⁹⁶ A. Junker, *MüKoBGB*, Bd. 11, *Vor Art. 1 Rom II-VO* (C.H. Beck, 6th ed. 2015), 867-869.

⁹⁷ See P.A. De Miguel Asensio, *The Private International Law of Intellectual Property and of Unfair Commercial Practices: Coherence or Divergence?* in S. Leible & A. Ohly (eds) *Intellectual Property and Private International Law*, (Mohr Siebeck, 2009), 137-190.

foundations of the *lex loci protectionis* in the area of intellectual property and the market effects rule in the field of unfair competition and antitrust law are on the basis of such specific choice-of-law treatment and of the mandatory nature of those conflict rules unlike the other conflict rules of the Rome II Regulation⁹⁸.

Unification of the law applicable to the infringement of intellectual property rights in the Rome II Regulation is based on "the universally acknowledged principle of the *lex loci protectionis*", as stated in paragraph 26 of its Preamble. Under Article 8(1) of the Regulation the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed. The rationale behind the inclusion of a specialized choice-of-law rule for intellectual property rights is that the general rules of the Regulation are not compatible with the needs of non-contractual obligations arising from the infringement of those territorially restricted rights and also the idea that a significant consensus exists in the international arena in favour of the *lex loci protectionis*⁹⁹. Article 8(3) reflects the well-established position in most EU Member States that territoriality of intellectual property rights is linked to the mandatory application of the *lex loci protectionis*. This approach is based on the traditional view stressing the links between strict territoriality, the economic system of each country and the absolute prevalence of state interests in that field.

Article 6 of the Rome II Regulation reflects that the respect for the function and purposes of unfair competition and antitrust law require a specific choice-of-law approach. The law dealing with competition is part of the economic framework of a country. Hence, the market constitutes a decisive factor in order to determine the applicable law. The role of competition law as a field of law aimed at regulating the market is connected to the view that its application to acts that produce substantial effects in the market cannot depend on the wishes of the parties. This interpretation is considered essential in order to guarantee the equality of market conditions and non-discrimination between competitors as well as the adequate protection of consumer

⁹⁸ See B. Buchner, *Rom II und das Internationale Immaterialgüter- und Wettbewerbsrecht*, GRUR INT, (2005) 1004-1012; See also S. Koos, *Rom II und das Internationale Wirtschaftsrecht*, 4 ELF 73, (2006) 76-77.

⁹⁹ J. Drexler, *MüKoBGB*, Bd. 11, *IntImmGR*, (C.H. Beck, 6th ed, 2015) 1288-1290.

interests. The application of the same competition rules to all commercial activities targeting a given market is deemed necessary to guarantee that all competitors in a market compete for clients under the same rules. The rules of the country (market) in question cannot be replaced by rules of foreign law and hence Article 6(4) of the Rome II Regulation excludes party autonomy in competition claims¹⁰⁰.

With regard to the choice-of-law rules of the Rome II Regulation that have a mandatory nature, the question emerges as to what extent a failure to have regard to such provisions in arbitral proceedings may result in an award being annulled by the courts of the Member State of the seat of the arbitration or in its enforcement being refused in other Member States¹⁰¹. The issue as to whether the disregard of such mandatory choice-of-law rules may result in an award being in conflict with EU or national public policy may become of great practical importance for arbitral tribunals who are subject to Member States' supervision (*see* section VI, *infra*).

IV. CHOICE-OF-LAW AGREEMENTS: MEANING OF THE ROME I AND II REGULATIONS

A. Limits to Party Autonomy

Party autonomy is favoured by the Rome I Regulation as the preferred option for providing legal certainty to international commercial contracts, and the Regulation is based on a broad acceptance of freedom of choice in Article 3.¹⁰² However, it is generally admitted that the Regulation subjects party autonomy to additional restrictions when compared to modern arbitration statutes and rules, as illustrated by its comparison, for example, with Article 28 of the UNCITRAL Model Law on International Commercial Arbitration and Article 35 of the 2010 UNCITRAL Arbitration Rules. Indeed, as noted in section I, *supra*, it is common in arbitration statutes and arbitration rules to include a broad and simple provision on this issue establishing only that the arbitral tribunal shall decide the

¹⁰⁰ U. Immenga, *MüKoBGB*, Bd. 11, *IntWettbR/IntKartellR* (6th ed, 2015), 1126-1126; see also J. Drexler, *MüKoBGB*, Bd. 11, *IntLautR* (6th ed, 2015), 1214.

¹⁰¹ H. Unberath & J. Cziupka, *Art 1 Rom II-VO* in T. Rauscher (ed.), *supra* note 67, at 660.

¹⁰² See H. Heiss, *Party Autonomy* in F. Ferrari & S. Leible (eds.), *Rome I Regulation (The Law Applicable to Contractual Obligations in Europe)* (Sellier, 2009), 1-16.

disputes in accordance with the (rules of) law chosen by the parties as applicable to the substance of the dispute.

Provisions of this sort both in national legislation and arbitration rules are understood as granting the parties a broader autonomy than Article 3 of the Rome I Regulation, particularly to the extent that parties are allowed to choose non-State rules; select the choice-of-law provisions to be applied; and choose the law applicable in areas beyond contractual (and non-contractual) obligations, provided that the subject matter is capable of settlement by arbitration¹⁰³. Additionally, the parties may empower arbitrators to decide *ex aequo et bono* or as *amiables compositeurs*¹⁰⁴. The lack of binding force on arbitrators seating in the EU of the Rome I Regulation is consistent with the current practice of allowing a wider scope to party autonomy in international commercial arbitration.

Under Article 3 of the Rome I Regulation, the parties may choose a law unrelated to their transaction. It is acknowledged that sometimes a choice is only possible if the parties may refer to a "neutral" law, and that the parties may be interested in choosing a given law because of its superior quality in ordering the relevant transaction or with a view to coordinating the choice-of-law with a choice-of-forum agreement or other transaction. This approach of the Rome I Regulation is in line with the modern trend widely observed in arbitration statutes and rules that do not require that the law chosen by the parties be connected to the legal relationship or to the dispute. However, Article 3 of the Rome I Regulation only allows the parties to choose, as the law of the contract, the law of a country (or a territory having its own rules of law in respect of contractual obligations), and not a mere set of non-State principles and rules of substantive contract law. Therefore, a significant difference, between the Rome I Regulation and the provisions on choice-of-law to the merits in arbitration statutes and rules, appears if the parties wish to choose a non-state body of law.

¹⁰³ Schilf *supra* note 53, at 680-682.

¹⁰⁴ A. M. Al-Hawamdeh, *The Effect of the Rome I Regulation upon the Choice of Non-State Law and "Amiable Composition" by Parties in Arbitration*, 33 BUS. L. REVIEW (2012) 116-119.

Unlike the initial Proposal by the Commission, the final text of the Rome I Regulation addresses this issue only in its Preamble.¹⁰⁵ Recital 13 states that the Regulation does not preclude parties from incorporating a non-State body of law or an international convention by reference into their contract. A so-called conflictual choice of such a body of rules is not allowed. If the choice-of-law clause refers only to non-State law, under the Rome I Regulation such rules are regarded as contract terms and prevail but without prejudice to the application of the provisions of the law of the contract which cannot be derogated from by agreement.¹⁰⁶ Since the issues not covered by the non-State instrument would be governed by the law applicable to the contract in the absence of choice, to the extent that the Rome I Regulation is applicable, parties would be well advised to supplement the choice of a non-State body of law by a particular domestic law.¹⁰⁷

Arbitration statutes and rules, in line with the approach adopted by the UNCITRAL Model Law and UNCITRAL Rules, offer the parties a broader range of choice, including a possible reference to transnational rules, *lex mercatoria*, or principles of international law, as governing the substance of the dispute.¹⁰⁸ Under such arbitration regimes parties can also opt as the law of the contract for a non-state law, such as Sharia law¹⁰⁹ or Jewish law. Unlike State laws non State bodies of substantive law usually do not provide a complete and comprehensive legal order and arbitrators enjoy significant flexibility to address those situations as compared to the obligation of Member States' courts under the Rome I Regulation to have recourse to the

¹⁰⁵ E. Loquin, *Rome I et les principes et règles de droit matériel international des contrats* in S. Corneloup and N. Joubert (dirs.) supra note 62, at 119-136.

¹⁰⁶ Notwithstanding this, it can be noted that to the extent that non-State bodies of law become more elaborated, in practice the application of the law of the contract may be unnecessary, even in proceedings covered by the Rome I Regulation, where the contract terms and the non-State rules chosen by the parties settle all relevant issues in dispute and do not conflict with the mandatory rules of the law of the contract. Moreover, in the current global context, the development and increasing recognition of high quality sets of non-State law, such as the UNIDROIT Principles on Commercial Contracts, favours a progressive development and increasing relevance of this texts even before State courts. See P.A. De Miguel Asensio, *The Law Applicable to Contractual Obligations: The Rome I Regulation in Comparative Perspective* in J. Basedow & K.B. Pissler (eds.), *Private International Law in Mainland China, Taiwan and Europe* (Mohr Siebeck, 2014), 191, 196-197.

¹⁰⁷ UNIDROIT, *Model Clauses for Use of UNIDROIT Principles*, <<http://www.unidroit.org/english/modellaws/2013modelclauses/main.htm>>, Model Clauses No. 1.2 (a) and (b), at pp. 9et seq.

¹⁰⁸ Bělohávek supra note 30, at 40.

¹⁰⁹ Unlike the situations covered by the Rome I Regulation, see, for instance, *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd and others*, where the English Court of Appeal, [2004] 4 All ER 1072, on the basis of the 1980 Rome Convention did not accept Shariah as the governing law of a contract.

law applicable in the absence of choice. The lack of precision and completeness of the principles, rules or usages of such non-State bodies of rules may create uncertainty. The increasing availability of sets of transnational rules drafted by formulating institutions may favour the choice of non-state rules as the law applicable to international commercial contracts. However, it has been noted that the application of the rules of *lex mercatoria*, the general principles of international business law or the UNIDROIT Principles of International Commercial Contracts remains rare in arbitration practice in line with the limited use of such a choice in business practice when drafting international contracts¹¹⁰.

Moreover, those arbitration regimes empower the parties to choose a choice-of-law system, such as the one established in the arbitration rules of a given institution¹¹¹. Such broad freedom makes consistent with the respect to the *lex arbitri* the application by the arbitral tribunal at a second step of a choice-of-law system other than the one established in the *lex arbitri*. The system chosen by the parties is usually the one provided for in the applicable arbitration rules. At any rate, it has already been noted that significant harmonization exists in this area between modern national arbitration statutes and arbitration rules.

An additional difference regarding the scope of party autonomy that results from the lack of binding force of the Rome I Regulation on arbitrators is linked to the fact that many national statutes and arbitration rules, in line with Article 28(4) of the UNCITRAL Model Law and Article 35(3) of the UNCITRAL Rules, direct arbitrators to decide "in all cases" in accordance with the terms of the contract¹¹². Therefore, it can be argued that the prevalence of the contract terms may restrict the application of the law chosen by the parties in commercial arbitration beyond what is usual before state courts¹¹³. The terms of the contract may prevail even over mandatory provisions of the law chosen to govern the contract without prejudice to the need to ensure due regard to the relevant internationally mandatory provisions. This approach is consistent with the idea that application of domestic laws in the

¹¹⁰ Mayer *supra* note 62, at 437-438.

¹¹¹ Hausmann *supra* note 15, at 979-980.

¹¹² Article 31(2) of the ICDR Rules clarifies that such indication only applies "in arbitrations involving the application of contracts".

¹¹³ Caron & Caplan *supra* note 17, at 117.

traditional conflict of laws framework, including for instance certain restrictions on contract terms based on legislative policies aimed at protecting weaker parties, may prove unable to satisfy the legitimate needs for party autonomy of international business transactions¹¹⁴.

In order to achieve a proper balance between the freedom of the parties to choose the law of the contract and the protection of other relevant interests, the Rome I Regulation imposes certain restrictions on party autonomy. In particular, in the context of commercial transactions, it is noteworthy that Article 3(4) is intended to safeguard the application of EU mandatory law in situations where all relevant elements are located in one or more Member States, but are subject to the law of a third country due to a choice-of-law by the parties. Moreover, protection of the public interests of the forum (including those of the EU) may justify recourse to the exceptions based on public policy (Article 21) and overriding mandatory provisions that prevail over the law of the contract (Article 9). Furthermore, with a view to taking account of the public interests of States other than the forum and that of the law of the contract, the Regulation allows giving effect to the overriding mandatory provisions of the law of the country of performance of the contractual obligations (Article 9(3)). As far as these restrictions are related to the application of overriding mandatory provisions and public policy they may influence the assessment whether an award is in conflict with EU or Member States public policy and hence may be significant to international commercial arbitration even if arbitrators are not bound by the Rome I Regulation (*see* Section VI, *infra*).

B. Source of Guidance

Party autonomy is a common basic feature of arbitration statutes and rules. However, it has been noted that arbitration statutes and rules usually do not address significant issues that may become problematic in connection with a choice-of-law by the parties¹¹⁵. Those issues include whether a choice must be express or if it may result implicitly of the circumstances of

¹¹⁴ See M.A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 MICH ST. J. INT'L L (2010) 453, 475-476.

¹¹⁵ Silberman & Ferrari *supra* note 4, at. 274-277.

the case, the time of choice and the possibility to change the law chosen, or the law applicable to determine the existence and validity of the consent of the parties as to the choice of the applicable law. Furthermore, arbitration statutes and rules usually lack indications about other relevant issues, such as the matters that fall within the scope of the law applicable to the contract.

By contrast with arbitration statutes and rules of arbitral institutions, Article 3 of the Rome I Regulation and its relevant recitals address those issues¹¹⁶. For instance, Article 3 provides that the choice can be express or tacit, if clearly demonstrated by the terms of the contract or the circumstances of the case¹¹⁷; may refer to the law applicable to the whole or to only part of the contract; and that parties may choose (change) the law of the contract at any time, provided that it does not prejudice the rights of third parties. Article 3(5), together with Article 10 of the Rome I Regulation, provides a rule as to the law applicable to the existence and validity of the choice-of-law agreement. Furthermore, Article 12 of the Rome I Regulation on the scope of the applicable law lays down a non-exhaustive list of issues governed by the law applicable to a contract.

Regarding those questions usually not addressed in arbitration statutes or rules, the Rome I Regulation may provide a relevant source of guidance for arbitrators to the extent that such issues may arise in similar terms before ordinary courts and arbitral tribunals¹¹⁸. Although such an influence may be particularly important with respect to arbitral tribunals seated in the EU and disputes involving only parties domiciled in EU Member States, it is to be noted that beyond Europe the Rome Convention and Rome I Regulation have been used as a blueprint by national and international legislators and it is widely considered a very influential model.

¹¹⁶ Hausmann *supra* note 15, at 980-981.

¹¹⁷ Blackaby & Partasides *supra* note 1 at 231.

¹¹⁸ For instance, concerning the significance of Article 10 of the Rome I Regulation as guidance where the validity of the choice-of-law clause in a contract is at issue before an arbitral tribunal; *See De Boer supra* note 1, at 80. An example in practice of this use of the Rome Convention is provided by interim award of 10 February 2005 (Netherlands Arbitration Institute), 2007 *Y.B. COMM. ARB'N.* 93, 100. Furthermore, even after acknowledging that it is obvious that such provisions of the Rome I Regulation do not apply to arbitration clauses, arbitral tribunals seated in the EU in disputes between parties domiciled in EU Member States have invoked those rules as stating a broader principle with respect to the validity of arbitration agreements including a choice-of-law, *see* final award in case no. 7221, 24 september 2013, of the Chamber of National and International Arbitration of Milan, 2014 *Y.B. COMM. ARB'N.* 263, 270.

Notwithstanding this, the regional character of the Rome I Regulation may hinder the characterization of its provisions as expression of general principles on choice-of-law internationally accepted, particularly in comparison with principles drafted in the framework of global institutions and that are intended to be applied by arbitrators.

In this context, the Principles on Choice-of-law in International Contracts approved by the Hague Conference on Private International Law on 19 March 2015¹¹⁹ deserve particular attention. According to its Preamble, the Hague Principles may be used to interpret, supplement and develop rules of private international law and may be applied by arbitral tribunals.

The Rome I Regulation has significantly influenced the drafting of the Hague Principles and many similarities may be found between both instruments, for instance, regarding the time of choice, lack of connection requirement between the law chosen and the parties or their transaction, express and tacit choice, severability, exclusion of renvoi, scope of the law of the contract, assignment and public policy. However, relevant differences may also be identified, since under the Hague Principles "the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral or balanced set of rules unless the law of the forum provides otherwise" (Art. 3). The reference to the law of the forum is intended to combine such a possibility commonly allowed by arbitration statutes and arbitration rules with the fact that national laws –such as the Rome I Regulation- have not allowed the same choice in disputes brought before state courts¹²⁰. Other differences concern that under the Principles a choice-of-law is not subject to any requirements as to form unless otherwise agreed by the parties (Art. 5) and there is a special provision concerning battle of forms (Art. 6.1.b).

It has been noted that from the perspective of international commercial arbitration, the Hague Principles can be chosen by the parties as their conflicts regime in addition to a choice of a substantive law, may be used by arbitrators as general principles of private international law in

¹¹⁹ Available at www.hcch.net.

¹²⁰ See Hague Conference on Private International Law, *Commentary on the Principles on Choice-of-law in International Commercial Contracts*, The Hague, 2015, para. 3.14.

situations in which a choice-of-law by contract parties is relevant in the context of international commercial arbitration, and may offer guidance to arbitrators with respect to the application or taking into account of overriding mandatory provisions¹²¹. However, in comparison with the Rome I Regulation, the effective application of the Hague Principles remain uncertain and there is no significant body of case-law ensuring uniform interpretation.

C. Non-Contractual Obligations

Choice-of-law agreements concerning non-contractual obligations are not rare in international business practice. Parties bound by a contract or an on going relationship may be interested in determining in advance the law which governs all their disputes, including contractual as well as non-contractual obligations. Inserting a governing law clause also for non-contractual disputes enhances legal certainty¹²². The wording of the choice-of-law clause is essential to ensure that its scope covers both the contractual obligations arising out of the contract as well as other controversies that can arise in any way related to the agreement between the parties or its formation.

Parties may also agree to submit to arbitration all their disputes arising out or in connection with the relevant transaction. Particularly, in this context, choice-of-law agreements regarding non-contractual obligations are significant in international commercial arbitration practice. A governing law clause in a contract drafted in broad terms may cover liability resulting from the dealings prior to the conclusion of a contract, such as in cases of a violation of the duty of disclosure or tort arising of statements made during the negotiations. It can also encompass non-contractual obligations that may arise between the parties from their conduct after the contract is entered into and that are in any way related to their contract. Furthermore, choice-of-law concerning non-contractual claims may be particularly convenient in the

¹²¹ T. Pfeiffer, *Die Haager Prinzipien des internationalen Vertragsrecht – Ausgewählte Aspekte aus der Sicht der Rom I-VO* in *Festschrift für Ulrich Magnus zum 70. Geburtstag* (Sellier 2014) 501, 511-513.

¹²² *But see* S.C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective in Convergence and Divergence* in K. Boele-Woelki et al (eds), *Private International Law – Liber Amicorum Kurt Siehr* (Eleven, 2010) 513, 541 (on the risks of predispute choice-of-law agreements where an unsophisticated party is involved).

arbitration context with respect to contracts governed by a non-state body of law that lacks rules on torts.

As regards litigation in state courts, one of the most significant features of the Rome II Regulation from the comparative perspective is that it permits parties to make a choice as to the law governing certain non-contractual obligations in the terms of Article 14. The Regulation establishes freedom of choice regarding the law governing non-contractual obligations as a means to respect the principle of party autonomy and to enhance legal certainty, but currently most national systems of private international law outside the EU do not envisage such possibility. Pursuant to Article 14(1) an agreement between the parties on the law governing the non contractual obligations may be entered into after the event giving rise to the damage occurred; or where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. No particular connection with the chosen state is required under Article 14¹²³. The inclusion of a choice-of-law clause in the contract usually suffices the requirements of Article 14, since the Rome II Regulation does not impose special formalities on the choice-of-law clause, but it demands that the choice be expressed or demonstrated with reasonable certainty by the circumstances of the case¹²⁴.

The Rome II Regulation imposes significant restrictions on freedom of choice¹²⁵. Regarding commercial activities, it is noteworthy that pursuant to Article 14(1)(b) even where all the parties are pursuing a commercial activity, a choice-of-law before the event giving rise to the damage occurred is only admitted by an agreement "freely negotiated". Although to what extent choice-of-law is possible by accepting the general terms and conditions of an agreement may be controversial under that provision, the better view seems to be that in the context of commercial transactions free negotiations are not required to be individual and hence choice-of-law in general terms and conditions is possible under Article 14(1)(b) unless one party was in a

¹²³ A. Junker, *MiKoBGB*, Bd. 10, Art. 14 RomII-VO (C.H. Beck, 6th ed, 2015), 1008.

¹²⁴ In the absence of special provisions concerning the law applicable to the existence and validity of the choice-of-law agreement, the approach adopted in Articles 3(5) and 10 of the Rome I Regulation could be applied. See T. Kadner Graziano, *Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation*, in J. Ahern & W. Binchy (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Martinus Nijhoff, 2009), 113,123.

¹²⁵ T.M. de Boer, *Party Autonomy and its Limitations in the Rome II Regulation*, *YPIL*, (2007), 9-29.

position to force the other to accept the terms containing the clause¹²⁶. Furthermore, the parties' choice shall not prejudice the rights of third parties (Art. 14 (1)). Some relevant restrictions in Article 14 are similar to others previously discussed in relation to Article 3 of the Rome I Regulation. In particular, Article 14 only allows the choice of a law of a country and hence the law applicable to non-contractual obligations under the Regulation cannot be general principles of law, religious law or other non-State body of law.¹²⁷ Moreover, Article 14 (2) and (3) are intended to safeguard the application of national and European mandatory provisions to domestic situations and those where all relevant elements are located in the European Union. Additionally, pursuant to Article 16 and 26 of the Rome II Regulation, the public policy of the forum and its overriding mandatory provisions in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation shall always prevail. Finally, pursuant to Article 17, account is to be taken of the rules of safety and conduct, which were in force at the place, and time of the event that gave rise to the liability.

Provisions on the law applicable to the substance of a dispute by arbitrators both in national statutes and arbitration rules are usually drafted in broad terms and hence are not limited to contractual disputes, even if arbitration is particularly relevant in the field of contracts. Unless there is a clear indication to the contrary, provisions in national statutes and arbitration rules based on Article 28 of the UNCITRAL Model Law or Article 35 of the 2010 UNCITRAL Arbitration Rules determine the rules to be applied by arbitrators to the substance of a dispute also with regard to non-contractual obligations submitted to arbitration.

Therefore, a consequence of the lack of binding force of the Rome II Regulation on arbitrators seated in the EU is that party autonomy based on national statutes on arbitration or arbitration rules would in principle not be subject to the restrictions on freedom of choice laid down in the Rome II Regulation. Notwithstanding this, as far as some of those limitations, including that party autonomy does not extend to unfair competition, acts restricting free competition and infringement of intellectual property rights, may concern the safeguard of

¹²⁶ I. Bach, *Art. 14* in P. Huber (ed.), *Rome II Regulation (Pocket Commentary)* (Sellier 2011), 336-337.

¹²⁷ Dickinson *supra* note 87, at 552.

overriding mandatory provisions or national or EU public policy, arbitrators that may be under the supervision of the courts of EU Member States shall endeavour to render an award that does not conflict with EU or Member States' public policy and hence some of those restrictions are significant to international commercial arbitration (see Section VI, *infra*).

From a broader international perspective the acceptance in Article 14 of the Rome II Regulation of the freedom of the parties to select the law governing non-contractual obligations as a conflict rule generally applicable also to unjust enrichment, *negotiorum gestio*, and *culpa in contrahendo*, must be regarded as a very significant development also for arbitration practice, even if arbitrators are not bound by the Regulation. In many national systems the conflict provisions on non-contractual obligations do not envisage party autonomy at all or enforce only post dispute agreements¹²⁸, and the *lex loci delicti* rule remains the basic approach in the private international law of torts¹²⁹.

However, to the extent that arbitrators seated in jurisdictions outside the EU enjoy more flexibility than national courts to determine the law applicable to the merits according to the relevant arbitration provisions, freedom of choice regarding non-contractual obligations may become an issue before arbitration tribunals. In this context, even regarding other areas of the world, such as the Asia-Pacific region, it has been noted that the acceptance of party autonomy in the Rome II Regulation, as a regional instrument that has successfully unified the choice-of-law rules in almost thirty European states, may be taken into account by arbitrators to support the view that commercial parties may choose the law applicable to non-contractual obligations.¹³⁰

V. METHODS TO DETERMINE THE LAW APPLICABLE IN THE ABSENCE OF CHOICE

¹²⁸ See Symeonides, *supra* note 122, at 541-544 (even in the US the enforceability of pre-dispute choice-of-law agreements encompassing non-contractual claims is not uniformly answered).

¹²⁹ See Plender & Wilderspin *supra* note 36, at 790 (noting that the proposition that the parties may choose the law governing a non-contractual obligation may, at first sight, strike the common lawyer as shocking).

¹³⁰ See S. Greenberg, C. Kee & J.R. Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) 116.

A. General Considerations

The provisions on the law applicable to the substance by arbitral tribunals inserted in modern national statutes and arbitration rules grant ample discretion to arbitrators in the absence of a choice by the parties to select a national law or a set of legal rules. As previously discussed in Section I, two main approaches can be found. The so-called direct approach refers the arbitral tribunal to apply the rules (or a law) that it determines to be appropriate without having to lean on any system of conflict of laws rules. Under the indirect approach arbitrators are to rely on the conflict rules that they deem applicable or appropriate to select the applicable law (or rules). A variant of the latter approach requires arbitrators to apply the law (or rules) with the closest connection to the dispute and hence directs arbitrators to use a specific but flexible conflict rule.

It can also be noted that it is not rare that in the absence of a choice by the parties arbitration disputes are decided without identifying the applicable law, as it may be the case where no true conflict exists because under the laws of all relevant countries the issue is resolved in the same manner or a dispute can be decided on the basis of the terms of a given contract. In contractual disputes, the law of the contract is relevant basically to supplement the contract terms when they are silent with regard to relevant issues and also to the extent that the existence or validity of a contract is controversial. Furthermore, particularly where arbitrators are not obliged to select a national law as applicable to the substance and can adopt a direct approach, they may have recourse to *lex mercatoria*, transnational law, general principles or the UNIDROIT Principles and avoid identifying a system of national law as applicable to the dispute¹³¹, as it happens also with the *tronc commun* method where the relevant national substantive rules are very similar.

Where arbitrators are entitled to adopt a direct approach they may choose the law (or rules) that deem appropriate or applicable with no need to rely on choice-of-law provisions. However, even in the context of a direct approach when arbitrators deem necessary to determine

¹³¹See the final award in ICC case no. 16816, 2015 *Y.B. COMM. ARB'N* 236, 264 (exemplifying the recent practice of awards establishing that the *lex mercatoria* as reflected in the UNIDROIT Principles were the appropriate rules of law to apply).

the law of a state as the law governing the merits of a dispute, such a choice is usually based on the connection between that legal system and the dispute, in the light of the parties involved, the subject matter of the dispute and the interests concerned. When adopting a direct approach it is uncommon that an arbitral tribunal determines the applicable law just on the basis that it is the law of the seat. Therefore, even in those situations recourse to a conflict of laws methodology may be significant to favour predictability and legal certainty to the extent that arbitrators deem necessary to determine a State law as applicable to the dispute¹³². Moreover, in some situations in which arbitrators have recourse to the *lex mercatoria* it may be appropriate to assess that it does not lead to results that contradict the national law designated by the appropriate conflict rules¹³³.

An arbitral tribunal may use several methods to determine the conflict-of-law rules it considers applicable¹³⁴. Some possibilities that have been suggested to identify the applicable or appropriate conflict of law rules are rarely used in current practice or are widely regarded as inappropriate. Such methods include having recourse to: the conflict rules of the arbitrator's home State; the conflict rules of the State which would have had jurisdiction in the absence of the arbitration clause; the conflict rules of a State where the award will be enforced; the conflict rules of the country most closely connected with the dispute; and even the ordinary conflict rules of the seat of the arbitration where the seat has not been chosen by the parties¹³⁵.

Two methods can be singled out as the preferred approaches by arbitral tribunals in current practice to determine the applicable or appropriate conflict of law rules¹³⁶. The so-called cumulative application method resorts to choice-of-law rules that are common to the countries

¹³² B. Wortmann, *Choice-of-law by Arbitrators: The Applicable Conflict of Laws System*, 14 ARB. INT'L (1998) 97, at 101-104; Silberman & Ferrari *supra* note 4, at 296.

¹³³ Caron & Caplan *supra* note 17, at 116.

¹³⁴ See P. Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, *Revue de l'arbitrage* (1976) 155, 160-83; Wortmann *supra* note 132, at 97-113; E. Gaillard & Savage (eds.) *supra* note 2, at 871-876; Poudret & Besson *supra* note 12, at 581-589; Silberman & Ferrari *supra* note 4, at 277-293; Born *supra* note 2, at 2637-2661; De Boer *supra* note 1, at 81-85.

¹³⁵ See, e.g., V. Danilowicz, "The Choice of Applicable Law in International Arbitration" 9 HASTINGS INT'L & COMP. L. REV (1985-86) 235, 259-263.

¹³⁶ See Y. Derains, *Les tendances de la jurisprudence arbitrale internationale*, J.D.I. (1993), 829, 843; Grigera Naón *supra* note 2, at 232-233; Petsche *supra* note 114, at 480-481.

connected to the subject matter of the arbitration, and particularly the countries of the parties' respective residences or nationalities. The general principles method is based on the application of conflict rules that reflect international standards. By contrast with the cumulative application approach, the general principles method does not restrict its analysis to the rules of the jurisdictions connected with the dispute but search for conflict rules that are accepted in the most significant choice-of-law systems and international instruments in the field. Although these two methods may enable arbitrators to avoid choosing any single system of conflict rules, the provisions of the Rome I and Rome II Regulations may play a relevant role for arbitrators having recourse to any of the two methods.

B. Contracts

The cumulative approach is based on the assessment by the arbitral tribunal whether the choice-of-law systems of the States connected to the dispute lead to the same result. As far as that question is responded in the affirmative, the method provides an answer and its use has reached widespread acceptance as the preferred option by international arbitrators having to establish the national law applicable to the merits. Certain differences have been identified in the application of this method with regard to the selection of the States that are deemed to have a relevant connection with the dispute so that their choice-of-law systems must be considered in the comparison¹³⁷. Some arbitral tribunals take into account only the conflict rules of the States connected to the object of the dispute, that basically include the countries of the parties' respective residences or nationalities and, if considered appropriate, the country or countries of performance. Others also take into consideration the conflict rules of the arbitration seat, particularly if the parties have chosen it, although the application of the cumulative method has also been influenced by the trend to restrict the significance of the place of arbitration when determining the law applicable to the merits of a dispute.

Given that the Rome I Regulation (and previously the Rome Convention) has succeeded in establishing conflict rules common to its Member States, its existence especially justifies

¹³⁷ See Y. Derains, *L'application cumulative par l'arbitre des systems de conflit de lois intéressés au litige*, *Revue de l'arbitrage* (1972), 99, 105-115.

recourse to the so-called cumulative approach where all the States having a relation with the dispute belong to the EU, or even where all parties involved in the arbitral proceedings are domiciled in Member States to the Rome I Regulation¹³⁸. Therefore, the unification achieved by the 1980 Rome Convention has been a significant development to provide further certainty on the basis of the cumulative method regarding the law applicable in the absence of choice to arbitral disputes concerning contracts between parties located in the EU¹³⁹. The lack of binding force of the Rome I Regulation on arbitral tribunals seated in the EU does not exclude that the Regulation may be regularly used by international arbitrators as a result of the cumulative approach in situations in which all parties involved in the dispute are established in EU Member States¹⁴⁰.

Many examples may be found of the application by arbitral tribunals of provisions of the Rome Convention or the Rome I Regulation on the basis of this method. The interim award of 10 February 2005 (Netherlands Arbitration Institute) provides an illustration of application of the conflict rules of the 1980 Rome Convention dealing with the law applicable to the existence and validity of a contract and the law applicable to the contract in the absence of choice to a sale contract between a Dutch seller and an Italian buyer¹⁴¹. Another example of the application of the 1980 Rome Convention on the basis of the cumulative method is to be found in the partial final award of 17 May 2005 of the Netherlands Arbitration Institute, where the provisions of the Rome Convention on the law applicable to legal subrogation were applied to a dispute between Dutch and Italian parties by an arbitral tribunal seated at The Hague after noting that the Rome Convention was applicable both in The Netherlands and Italy¹⁴².

In disputes in which one or more parties are not established in a EU Member States, the Rome I Regulation can only be relevant for the purposes of the cumulative approach as far as it represents the choice-of-law system of one (or several) States connected to the dispute and hence its solution should only be applicable on the basis of this method to the extent that the

¹³⁸ De Boer *supra* note 1, at 83.

¹³⁹ See ICC case no 4996 of 1985 French Agent v. Italian Principal, J.D.I. (1986), 1131-1136.

¹⁴⁰ Mayer *supra* note 62, at 428.

¹⁴¹ 2007 *Y.B. COMM. ARB'N* 93, 106.

¹⁴² 2006 *Y.B. COMM. ARB'N* 172, 179.

private international law systems of the other relevant States provide the same solution that the Regulation¹⁴³. The final award in ICC case no. 6283 offers an example where Article 4 of the Rome Convention was taken into consideration in combination with the Restatement (second) on the law of conflict of laws (US) to support that the choice of Belgian law as the law applicable to a dispute between a Belgian and a US party was consistent with the system of private international of The Netherlands (place of arbitration), Belgium and the United States¹⁴⁴.

Insofar as the choice-of-law systems of the States connected to the dispute do not lead to the same result, international arbitrators tend to have recourse to the so-called general principles method to determine the appropriate choice-of-law rule. The main limitation of the general principles method has usually been connected to the fact that with the exception of a few principles, such as party autonomy in international commercial contracts, very few conflict rules may be regarded as recognized internationally¹⁴⁵. Unification of choice-of-law rules by means of the 1980 Rome Convention has traditionally been regarded as a first step towards the development of generally accepted rules of conflict of laws even in the context of international commercial arbitration¹⁴⁶. When following an approach based on having recourse to general principles of conflict of laws, arbitrators often apply the provisions of international instruments such as the Rome Convention¹⁴⁷. The adoption in Article 4(1) of the 1980 Rome Convention of the closest connection test has been considered an illustration that the proper law doctrine has become the dominant conflict of law method.¹⁴⁸ A basic underlying principle of Article 4 both in the Rome Convention and the Regulation is the so-called proximity principle that is founded on the idea that the applicable law should be that of the country with which the contract is most closely connected.

¹⁴³ As an example of a reference to the Rome Convention in this context, even before its entry into force, to support that the choice-of-law systems of France, Switzerland and Yugoslavia adopted similar criteria to determine the law applicable to contractual obligations, *see* ICC award no. 2930 of 1982, 1984 *Y.B. COMM. ARB'N* 105, 106.

¹⁴⁴ 1992 *Y.B. COMM. ARB'N* 178, 179.

¹⁴⁵ Danilowicz, *supra* note 135, at 267.

¹⁴⁶ O. Chukwumerije, *Applicable Substantive Law in International Commercial Arbitration*, 23 *ANGLO-AM. L. REV.* (1994) 265, 303.

¹⁴⁷ Petsche *supra* note, 114 at 481; Poudret & Besson *supra* note 12, at 584-585; and Born *supra* note 2, at 2652-2653.

¹⁴⁸ Chukwumerije *supra* note 146, at 309.

The potential role of the Rome Convention and Rome I Regulation in the framework of the general principles method must be assessed not only in the light that the EU has succeeded in unifying the conflict provisions on contracts in almost thirty States, but also that these instruments have proved to be a very influential model, frequently used outside the European Union as a blueprint when drafting national provisions or international texts in this field. The Convention and the Regulation have been a reference for national and international legislators in Europe and beyond. For instance, such influence is widely acknowledged with respect to the recent law reforms in the field of private international law in many countries, such as Japan¹⁴⁹, China¹⁵⁰, Taiwan¹⁵¹, Albania, Dominican Republic, Ecuador, Iceland, Israel, Korea or Montenegro¹⁵². The enlargement of EU membership and the broader legislative competence of the EU in this field has reinforced the model role of EU legislation for the codification and reform of private international law in other regions of the world.¹⁵³

Furthermore, the influence of these EU instruments is supported by the widespread view that they include a comprehensive set of high quality rules. Given that the EU has not adopted a single instrument establishing common general provisions on choice-of-law, the Rome I Regulation contains provisions on general issues, such as application of mandatory provisions, *renvoi*, public policy, non-unified legal systems and habitual residence. Additionally, other rules of the Rome I Regulation concern matters not addressed in arbitration statutes or arbitration rules or less sophisticated systems of private international law, such as Article 11 on questions of form¹⁵⁴, Article 12 with regard to the scope of the law applicable to the contract¹⁵⁵, Article 14

¹⁴⁹ See M. Dogauchi, *Historical Development of Japanese Private International Law* in J. Basedow, H. Baum & Y. Nishitani (eds.), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck, 2008) 27, 53.

¹⁵⁰ Qisheng He, *Recent Developments of New Chinese Private International Law With Regard to Contracts*, in Basedow & Pissler (eds.), *supra* note 106, at 157-180.

¹⁵¹ D.J.W. Wang, *The Revision of Taiwan's Choice-of-law Rules in Contracts* in Basedow & Pissler (eds.), *supra* note 106, at 181-190.

¹⁵² See the respective national reports in J. Basedow, G. Rühl, F. Ferrari and P.A. De Miguel Asensio (eds.), *supra* note 14.

¹⁵³ See R.A. Brand, *The European Union's New Role in International Private Litigation*, 2 *LOYOLA U. CHI. INT'L. L. REV.*, 277, 293 (2004–2005); see also J. Basedow, *The Law of Open Societies – Private Ordering and Public Regulation of International Relations*, (Brill-Nijhoff, 2015), at 510.

¹⁵⁴ See final award in ICC case no. 13756, 2014 *Y.B. COMM. ARB'N* 118, 128, at paras. 32 and 33.

¹⁵⁵ See M.A. Petsche, *Punitive Damages in International Commercial Arbitration: A Conflict of Laws Lesson*, *Journal of International Arbitration*, 30, no. 1 (2013), 31, 38 (discussing on the basis of the Rome

on voluntary assignment and contractual subrogation, and Article 15 on the law applicable to legal subrogation.

Therefore, it is not rare that arbitrators have recourse to choice-of-law provisions of the Rome instruments on contracts on the basis that they reflect general principles of private international law, even in situations related to countries that are not Member States¹⁵⁶. Notwithstanding this, a cautious approach is to be adopted with regard to the application of provisions of the Rome Convention and Rome I Regulation as expressions of general principles of private international law from a global perspective.

Those instruments remain regional and even if they have significantly influenced developments in many systems some differences in approach or tradition may lead to different results between systems influenced by a same model. Even within the EU the adoption of the Rome I Regulation resulted in the introduction of relevant amendments in the text of the Convention concerning the law applicable in the absence of choice. The changes introduced in Article 4 were to a great extent influenced by the nature of the Rome I Regulation as an instrument of European integration. The amendments were aimed at achieving a clearer and more precise balance between conflicts justice – or proximity – and legal certainty with a view to ensuring a high level of predictability. Compared to the Rome I Regulation, the extreme flexibility of the similar provisions in the recent Chinese and Taiwanese PIL Acts –that also use as connecting factors the domicile of the party who effects the characteristic performance and the closest connection- grants a high degree of discretion to courts that may lead in certain situations to differences in result with the Rome I Regulation¹⁵⁷.

I Regulation the applicability of the law of the contract to the question of the availability of punitive relief in contract claims in commercial arbitration).

¹⁵⁶ See, e.g., Grigera Naón *supra* note 1, at 240 (reporting Third Partial Award of 1998 in ICC Case 7472, an example of an arbitral tribunal sitting in Paris that after stating that the general principles of private international law in contractual matters applied to the case, had recourse to the Rome Convention to determine the law applicable in the absence of choice to a contract -concluded before the Convention had entered into force- between a Belgian claimant and Iraqi defendants stressing that it forms the common law for the rules of conflict of laws in the EU).

¹⁵⁷ De Miguel Asensio *supra* note 106, at 201-207.

Therefore, it has been noted that arbitrators should exercise caution with respect to the possibility of relying on the Rome I Regulation when applying the general principles method in disputes involving EU and third States parties, since such an approach could be perceived as favouring the application of the choice-of-law system of the party established in the EU¹⁵⁸.

As an expression of this cautious approach, in disputes involving parties from the EU and third States it is not rare that provisions of the Rome Convention or the Rome I Regulation are mentioned cumulatively with other international instruments leading to the same result. The final award in ICC case no. 10274 (place of arbitration, Denmark) involving a Danish claimant and an Egyptian respondent offers an example in which Article 4 of the Rome Convention was used cumulatively with Article 3 of the 1955 Hague Convention on the Law Applicable to International Sales of Goods to establish the law of the country of the seller as the law applicable to a contract in the absence of choice by the parties¹⁵⁹.

Given the ample freedom that arbitrators enjoy and the trend in practice to combine more than one method and to provide several reasonings supporting their selection of the applicable law, it is not rare that the Rome I Regulation be invoked as only one among several elements influencing the selection even in cases where arbitrators seem to have recourse to the so-called *voie directe*, but they motivate their selection. Also in these situations rules of the Rome I Regulation are not applied as binding provisions but followed as the expression of conflict principles that have achieved considerable acceptance from an international perspective, and hence its position and significance for arbitrators is not comparable to its ordinary application by State courts¹⁶⁰.

In fact, in this context, it may happen that recourse to certain approaches that are also present in the Rome I Regulation may lead to a different result than in the Regulation. Unlike the Rome I Regulation, where arbitrators have recourse to the characteristic performance

¹⁵⁸ See Mayer *supra* note 62, at 428, (with a critique of the reasoning of the 1998 arbitral award in case ICC n° 9636 -*Bulletin de la Cour internationale d'arbitrage de la CCI*, vol. 19, n° 1, 117- since it applied the Rome Convention to a dispute between a French party and a Turkish party on the basis that the Convention was in force in most EU Member States).

¹⁵⁹ 2004 *Y.B. COMM. ARB'N* 89, 93.

¹⁶⁰ Mayer *supra* note 62, at 431-433.

doctrine it is not rare to use as connecting factor its place of performance instead of the law of the country where the party required to effect the characteristic performance has his habitual residence¹⁶¹, particularly where that connection is deemed as more significant to determine the country having the closest connection to the dispute. Such a solution does not seem compatible with the view that the appropriate choice-of-law rule selected by the arbitrators in that case is based on the Rome I Regulation unless exceptionally such a deviation could be the result of finding that the contract is manifestly more closely connected to the place of performance, but such possibility in Article 4(3) of the Rome I Regulation is subject to a restrictive interpretation¹⁶².

Particularly where neither the cumulative approach nor the general principles method lead the arbitral tribunal to select a choice-of-law rule, it remains an option for international arbitrators searching for the applicable conflict rule to have recourse to the general choice-of-law rules of the seat of the arbitration, particularly where the parties have chosen the place of arbitration. In this context, also arbitral tribunals seated in the EU have recourse to the Rome I Regulation as the applicable conflict of laws rules on the basis that such instrument provides the conflict rules of the situs of the arbitration¹⁶³. The widespread opinion that the Rome I Regulation provides a comprehensive system of highly developed conflict of laws rules seem to favour recourse to this instrument by arbitrators seated in the EU¹⁶⁴.

Finally, it can be noted that Article 4 of the Rome I Regulation may also be relevant in the framework of the application of the special provisions on the law applicable to the substance by arbitrators adopted in EU Member States –and certain arbitral institutions- that rest on an “indirect approach” but, unlike the UNCITRAL Model Law, establish a specific connecting

¹⁶¹ See, with further references, Mayer, *supra* note 62, at 434; and De Boer, *supra* note 1, at 83-84.

¹⁶² De Boer, *supra* note 1, at 84.

¹⁶³ See final award in ICC case no. 9771 of 2001 (place of arbitration, Sweden) 2004 *Y.B. COMM. ARB’N* 46, 54 (offering an example of such practice but noting that the Rome Convention was not directly applicable to the arbitration dispute)

¹⁶⁴ See *e.g.*, final award in ICC case no. 13756, 2014, *Y.B. COMM. ARB’N* 118, 128, esp. paras 32 and 33 (taking general guidance from the 1980 Rome Convention, as part of the private international law of the seat -Sweden-, as to what the proper law should be with respect to the question of the formal validity of the contract in a dispute between a US and a Russian party, after noting that the ICC Rules do not contain any method other than the direct method of choosing the applicable law).

factor, based in the closest connection test, such as § 1051 ZPO in Germany and Article 52(2) of the 2011 Portuguese Law on Voluntary Arbitration. These national legislations grant more flexibility to arbitrators than to state courts as regards the application of the closest connection criterion, but Article 4 of the Rome I Regulation may provide guidance in the application of those special provisions¹⁶⁵. Such rules should not be an obstacle to having recourse to the Rome I Regulation on the basis of the cumulative method with respect to disputes between parties located in EU Member States¹⁶⁶.

C. Non-Contractual Obligations

Beyond contractual issues, it has been suggested that arbitrators should adopt a more cautious approach regarding the so-called direct approach to select the law applicable to the merits and the potential recourse to *lex mercatoria* or non-state rules. This position is related to the lower development of non-national bodies of substantive law in the field of non-contractual obligations but also to the policy objectives served by certain conflict rules in this area. Even those advocating greater flexibility in the selection of substantive law in commercial arbitration disputes, have traditionally acknowledged that when confronted with the need to determine the law applicable to the substance of non-contractual claims, arbitrators should opt for methods based on the application of a state law as a result of considering a established choice-of-law system or a cumulative approach¹⁶⁷. To the extent that it may be functional, recourse to the cumulative method seems particularly suited to this area¹⁶⁸.

The Rome II Regulation has succeeded in establishing common rules on the law applicable to non-contractual obligations in civil and commercial matters in all EU Member States except Denmark. Moreover, its rules have universal application and hence replace the

¹⁶⁵ Hausmann *supra* note 15, at 982-983 (concerning § 1051 ZPO); Pfeiffer *supra* note 52, at. 181-182; and D. Martiny, *MüKoBGB*, Bd. 10, *Vor Art. 1 RomI-VO*, (6th ed, 2015), 179-180.

¹⁶⁶ Hausmann *supra* note 15, at 982-983 (noting that in those situations a deviation from Article 4 of the Rome I Regulation on the basis of § 1051 ZPO would require at least that the arbitrator provides specific grounds for it).

¹⁶⁷ See B. Goldman, *Les conflit de lois dans l'arbitre international de droit privé*, 109 R. DES C. (1963), 347, 393; Lalive *supra* note 134, at 182.

¹⁶⁸ See Derains *supra* note 136, at 105 (on the application of the cumulative method to determine the law applicable to an unfair competition issue in ICC award n° 1990).

conflict rules of the Member States in all matters falling within its scope of application ("non-contractual obligations arising out of violations of privacy and rights relating to personality" are the most significant exception). Therefore, this instrument has changed significantly the European landscape regarding the possibility for arbitrators to have recourse to the cumulative method to determine the law applicable to non-contractual disputes. Unlike the previous situation, in which significant differences existed among the conflict rules of EU Member States regarding non contractual obligations¹⁶⁹, nowadays it is generally admitted that in disputes between parties established in Member States of the Rome II Regulation the cumulative method provides the best option to determine the appropriate conflict of laws rule in the arbitration context and will usually lead to the application of the provisions of the Rome II Regulation¹⁷⁰.

The position of the Rome II Regulation, as a milestone in private international law, and the most comprehensive instrument of its kind in the world¹⁷¹ determines its significance as a model for many national legislators and for regional and international efforts in the field¹⁷². Such a development may favour recourse by arbitral tribunals to the cumulative approach also regarding disputes connected to third States on the basis that the Rome II Regulation and the conflict rules of the other States related to the dispute lead to the same result. However, a cautious approach should also prevail in this regard. Systems based on similar principles may not always lead to a same result with regard to specific situations, and compared to the Rome II Regulation and its highly predictable conflict rules other less developed systems tend to result in more flexibility and uncertainty.

The main influence of the Rome II Regulation as a source of appropriate conflict rules in the context of international arbitration beyond the EU is to be expected in its potential

¹⁶⁹ Dickinson, *supra* note 87, at 8-23; and T. Kadner Graziano, "Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung", *RebelsZ* (2009), 1, 4.

¹⁷⁰ S. Sánchez Lorenzo, *Derecho aplicable al fondo de la controversia en el arbitraje comercial internacional*, LXI *REDI* (2009) 39, 54.

¹⁷¹ Dickinson, *supra* note 87, at p. IX.

¹⁷² In fact the Rome II Regulation has already influenced the recent evolution of national systems of private international law in a number of countries outside the EU. *See, e.g.*, Basedow, Rühl, Ferrari and De Miguel Asensio (eds.) *supra* note 14 (containing national reports on Albania, Dominican Republic, Macedonia and Montenegro).

significance to provide guidance as to certain general principles of private international law for torts. This possibility has already been highlighted regarding other regions of the world¹⁷³, on the basis that the Regulation reflects modern trends as to the evolution of the *lex loci delicti* principle as the basic rule and its exceptions as well as the development of well-balanced specific rules for certain torts. Also guidance in the Rome II Regulation has been sought in the context of commercial arbitration in order to ascertain, on the basis of Article 15, the matters that fall within the scope of the law applicable to non-contractual obligations, in particular in situations in which the need arises to distinguish between procedural and substantive matters¹⁷⁴.

Non-contractual disputes submitted to arbitration are usually related to a previous relationship, most commonly a contract, between the parties, and certain provisions of the Rome II Regulation seem to contain principles relevant in such disputes. In particular, one of the most relevant principles to determine in the context of arbitration the law applicable to non-contractual obligations in the absence of choice is the so-called accessory connection¹⁷⁵. In those situations in which a tort claim is related to an agreement, this principle favours the application of the same law to the contract and tort claims. The principle appears as an exception to the general *lex loci delicti* rule in the escape clause of Article 4(3) of the Rome II Regulation that envisages that a manifestly closer connection with another country may be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question.

Other relevant choice-of-law issues in arbitration disputes may involve *culpa in contrahendo* or claims for compensation related to dealings prior to the conclusion of a

¹⁷³ On the potential use of the Rome II Regulation by arbitrators in the Asia-Pacific region for guidance as to the general principles of private international law to determine the law applicable to tort claims in the absence of choice, *see* Greenberg *supra* note 130, at 116-119.

¹⁷⁴ *See* Petsche *supra* note 155, at 38 (this author invokes that under the Rome II Regulation the law governing a non-contractual obligation applies to "the existence, the nature and assessment of damage or the remedy claimed" in order to maintain that the availability of punitive relief in non-contractual claims is a substantive law issue governed in international commercial arbitration by the law applicable to the obligation arising from the tortious behaviour).

¹⁷⁵ *See* final award of 1 August 2003 of the Netherlands Arbitration Institute, 2004 *Y.B. COMM. ARB'N* 133, 154 (referencing the private international law principle of "accessorial connection" to determine the law applicable to tort liability related to a contract between the parties).

contract¹⁷⁶. The primary connecting factor in Article 12 of the Rome II Regulation reflects a principle that has achieved notable acceptance and seems to be also appropriate in arbitral proceedings. Under that provision the law applicable to non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract is the law that applies to the contract or that would have been applicable to it had it been entered into. This approach leads to the application of the same law to the formation of the contract and to the liability that may arise therefrom. Moreover, under this model the doubts as to the characterization of such claims as contractual or non-contractual become less relevant. For instance, under the Hague Principles on Choice-of-law in International Commercial Contracts (Art. 9.1.g), pre-contractual obligations may be characterized as contractual and hence fall within the scope of the law applicable to the contract. By contrast, under the Rome I (Art. 1.2.i) and Rome II (Arts. 2.1 and 12) Regulations, obligations arising out of dealings prior to the conclusion of a contract are characterized as non-contractual. However, differences in characterization does not lead to diverse results since under Article 12(1) of the Rome II Regulation the governing law is the law that applies to the contract or that would have been applicable to it had it been entered into.¹⁷⁷

VI. INTERNATIONAL MANDATORY RULES AND MANDATORY CONFLICT OF LAWS RULES

A. The Rome Instruments and the Protection of EU Public Policy in Arbitration

The Rome I and Rome II Regulations contain special provisions concerning the overriding mandatory provisions and the public policy (*ordre public*) of the forum that prevail over the law applicable to the contract (Arts. 9.2 and 21 Rome I) and to the non-contractual obligations (Arts. 16 and 26 Rome II). Unlike the Rome II Regulation that refers only to the overriding mandatory provisions of the forum, Article 9(3) of the Rome I Regulation establishes the possibility of giving effect to the overriding mandatory provisions of a country that is not

¹⁷⁶ See P. Capper, K. Ljungström & P. Dépinay, *Proving the Contents of the Applicable Substantive Law(s)* in Bortolotti & Mayer (eds.), supra note 92, 31, at 36.

¹⁷⁷ Pfeiffer, supra note 121, at p. 509.

the forum and whose law is not the law of the contract.¹⁷⁸ In the light of these provisions, and particularly those regarding the public policy and overriding mandatory provisions of the forum, the question arises whether the direct applicability of the Rome I Regulation as the choice-of-law regime in arbitration is required to safeguard the respect of EU public policy¹⁷⁹.

Given the absence of a proper forum in international commercial arbitration and the lack of direct binding force of the general conflict of law rules on arbitrators, the need for arbitral tribunals to consider the overriding mandatory provisions and the public policy rules of the legal systems within which they operate is not a consequence of the application of the Rome I and Rome II Regulations.¹⁸⁰ Regardless of these instruments, from the perspective of EU law it can be considered that arbitrators should apply EU public policy provisions to situations where they are mandatory as a result of the nature of such provisions and in connection with the duty of the courts of Member States to ensure the respect for EU (and forum) public policy when exercising its supervisory role over arbitral proceedings, particularly when deciding if an award is to be set aside or enforcement of an award rendered abroad is to be refused. From the arbitral perspective, provisions on the law applicable to the substance in arbitration statutes and rules, regardless of the adoption of a direct or indirect approach, grant sufficient flexibility to arbitrators to consider the potential impact of relevant overriding mandatory provisions over the dispute, particularly in connection with the arbitrators' duty to resolve the dispute between the parties and render an enforceable award.¹⁸¹

The content of the public policy of EU Member States is to be determined mainly by each Member State according to its own conceptions, even if a restrictive interpretation usually prevails for the purposes of Article V of the New York Convention and the relevant provisions

¹⁷⁸ A similar possibility is also envisaged by the Hague Principles on Choice-of-law in International Commercial Contracts. To take account of the peculiar position of arbitral tribunals, Article 11(5) includes a specific provision stating that the Principles shall not prevent an arbitral tribunal from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

¹⁷⁹ McGuire *supra* note 35, at 265.

¹⁸⁰ *But see* Mankowski *supra* note 9, at 42-44 (on the view that Article 9 of the Rome Regulation is equally binding on the courts of the Member States and arbitrators seated in a Member State).

¹⁸¹ *See* N. Voser, *Mandatory rules of law as a limitation on the law applicable in international commercial arbitration*, 7 AM .REV. INT'L ARB. (1996) 319, 341-342; Born *supra* note 2, at 2699-2703.

on the setting aside of awards. In most legal systems a mistaken application of the law not involving an offence against public policy cannot be rectified in proceedings to have the award set aside or when enforcement of foreign award is sought. Concerning the application by arbitral tribunals of EU internationally mandatory provisions, the CJEU has highlighted that the courts of the Member States may examine that there is no conflict with EU public policy during the review of the arbitral award in the event of an appeal for setting aside or in the framework of the recognition and enforcement of a judgment.¹⁸² The need for the arbitral tribunal to respect public policy and to apply EU provisions having a public policy or mandatory nature for purposes of private international law is linked to the arbitrator's duty to render an enforceable award combined with the relevant EU law provisions¹⁸³. Therefore, it has been noted that the most pressing reason that compels arbitral tribunals connected with the EU to take EU public policy rules into account is the risk that the award will not be upheld if it is submitted for enforcement or annulment to a court of a Member State¹⁸⁴.

The finding that certain EU rules are to be considered as fundamental provisions that may be regarded as a matter of public policy for the purposes of Article V of the New York Convention or when assessing the grounds for an arbitral award to be set aside by the courts of the Member States does not require the consideration of the Rome I and Rome II Regulations as binding instruments for arbitrators. Such a finding results from the nature, purpose and functions of those provisions, as illustrated by the case-law of the CJEU on the characterization of certain EU rules as falling within public policy in the context of arbitration¹⁸⁵ or as overriding mandatory provisions that require that they be applied where the situation is closely connected with the EU.¹⁸⁶ The courts of the Member States have the possibility to control that such EU

¹⁸² See Nordsee *supra* note 71, at para. 14; see also Eco-Swiss *supra* note 76, at para. 32.

¹⁸³ For instance, pursuant to Article 41 of the ICC Rules, the arbitral tribunal "shall make every effort to make sure that the award is enforceable at law".

¹⁸⁴ Y. Brulard & Y. Quintin, *European Community Law and Arbitration (National Versus Community Public Policy)*, 18 J. INT'L ARB. (2001) 533, 547.

¹⁸⁵ See Eco-Swiss *supra* note 76, at paras. 36 and 39.

¹⁸⁶ Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, 2000 E.C.R. I-9311, at paras 24 and 25. Although it falls beyond the scope of this paper that deals with international commercial arbitration, it is clear that the EU legislator may restrict the possibility to have recourse to arbitration in consumer disputes by means of rules that are to be regarded as mandatory. See Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, 2006 E.C.R. I-10421; Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, EU:C:2009:615, paras 51-53; ; and Case C-

law provisions have been observed even when the arbitral tribunal was empowered to decide as *amiable compositeur*¹⁸⁷. Since public policy is the most significant ground for the exercise of the control over compliance with EU law by arbitrators at the setting aside or enforcement stage¹⁸⁸, it becomes of great importance for arbitral practice to determine the scope of public policy.

B. Effect of Overriding Mandatory Provisions

The lack of direct binding force of the Rome I and Rome II Regulations on arbitration tribunals does not preclude that these instruments may be of significance for arbitrators when deciding whether to give effect to mandatory provisions¹⁸⁹. An issue in which the framework provided by the Rome I and Rome II Regulations may offer guidance to arbitrators concerns the identification of the relevant mandatory provisions and public policy principles. Particularly significant is the traditional distinction between rules that may be regarded as mandatory only in the domestic context and provisions that are mandatory in international situations, regardless of the law applicable to the dispute. The second group relates to public policy from a private international law perspective.¹⁹⁰ Although the distinction seems to lose part of its significance for arbitrators given that they are not state organs, it may be useful for them to assess what mandatory rules may be part of a State (or EU) public policy for the purposes of the setting aside or the refusal of enforcement of an award. The Rome I and Rome II Regulations make clear that mandatory rules may have a different amount of imperative strength and distinguish the concept of "overriding mandatory provisions" from ordinary mandatory norms that cannot be derogated from by agreement in domestic situations¹⁹¹. Unlike the latter, overriding mandatory provisions is a more restrictive and exceptional category of provisions that reflect

342/13, 2014, *Katalin Sebestyén v Zsolt Csaba Kővári and Others*, EU:C:2014:1857. *See also* Schilf *supra* note 53, at 688-689.

¹⁸⁷ Case C-393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*, 1994 E.C.R. I-1520, para 23.

¹⁸⁸ *Shelkopyas supra* note 79, at 360-368.

¹⁸⁹ *Voser supra* note 181, at 330.

¹⁹⁰ *See*, P. Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *ARB. INT.* (1986) 274, 275; *see also* N. Shelkopyas, *European Community Law and International Arbitration: Logics That Clash*, 3 *European Business Organization Law Review* (2002) 569, 579-580.

¹⁹¹ *See* Art. 3(3) and 9 and Recital 37 of the Rome I Regulation and Articles 14(2) and 16 and Recital 32 of the Rome II Regulation.

considerations of public policy. In fact, the traditional distinction between public policy and overriding mandatory provisions has, to a great extent, disappeared since both are intended to impose unilaterally certain values and principles of the forum State¹⁹².

As an innovation to the Rome Convention, Article 9(1) of the Rome I Regulation defines "overriding mandatory provisions" as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation".¹⁹³ Therefore, a basic feature of overriding mandatory provisions is that they are intended to be applied regardless of the applicable law within their special scope of application. The fact that arbitrators do not consider themselves bound by the Rome I and Rome II Regulations is not an obstacle for arbitral tribunals to consider that the statements in Article 9(2) of the Rome I Regulation and Article 16 of the Rome II Regulation, that certain overriding mandatory rules must be applied regardless of the applicable law, are the expression of a more general principle that must be respected by arbitrators.¹⁹⁴ However, they remain in a different position than the ordinary courts of the Member States.

In light of the definition in Article 9(1), it is clear that issues, such as whether a rule falls within the category of "overriding mandatory provision" and its spatial extent of application, are to be established according to the substantive law of the country (or the EU) that adopted the relevant provision. Although the criteria for assessing the public policy character of EU provisions remain ambiguous in the light of the case-law of the CJEU, after the *Eco-Swiss* judgment, it is clear that Article 101 TFEU is not an ordinary mandatory provision but is part of public policy from a private international law perspective.¹⁹⁵ Data protection legislation

¹⁹² See Basedow, *supra* note 153, at p. 476.

¹⁹³ See Joined cases C-369/96 and C-376/96, *Arblade*, 1999 E.C.R. I-8499, at para. 30 (for the origin of the definition in the context of the protection of employees).

¹⁹⁴ See, e.g., the final award in case no. 158/2011 SCC Arbitration Institute Sweden, 2013 *Y.B. COMM. ARB'N* 253, 269, esp para. 60 (regarding the application of French mandatory provisions –that can not be displaced by the parties' choice-of-law- to an agreement between EU parties for the distribution of products in France governed by the law of Sweden).

¹⁹⁵ L.G. Radicati di Brozolo, *Arbitration and Competition Law: the Position of the Courts and of Arbitrators*, 27 *ARB. INT'L*. (2011) 1-26.

provides another significant example of a field of law containing overriding mandatory provisions. Express rules on the scope of application of EU data protection law determine in which situations, including contractual and non contractual claims such legislation is deemed mandatorily applicable irrespective of the law otherwise applicable.¹⁹⁶ In the absence of express scope rules, the classification of the measures falling within that category may raise uncertainties. However, other examples of overriding mandatory provisions for the purposes of the Rome I and Rome II Regulations, that may be relevant in the context of international commercial arbitration, include measures implementing trade embargoes, restrictions on the export of dual-use technologies, certain measures for the protection of cultural heritage, public health or animal life, and measures for the protection of agents.¹⁹⁷

The different legal position of arbitral tribunals that are not state organs, as compared with the ordinary courts of EU Member States, demands a specific analysis as regards the identification of the potentially applicable overriding mandatory norms and the treatment of such rules. The absolute prevalence of the overriding mandatory provisions of the *lex fori* over the *lex causae* (and the contract terms), as established in Article 9(2) of the Rome I Regulation and Article 16 of the Rome II Regulation, would appear inconsistent with the lack of a *lex fori* and with the well established practice in international commercial arbitration of choosing a neutral seat with no significant connection with the dispute.¹⁹⁸ In arbitration there is a *lex arbitri* but not a *lex fori*. Additionally, mandatory rules of arbitral procedure of the law of the seat have less impact than the *lex fori* in litigation before ordinary courts, even if the arbitrators must respect them.¹⁹⁹ Therefore, the basic distinction between mandatory provisions of the *lex fori* and foreign mandatory provisions underlying Article 9 of the Rome I Regulation and Article 16 of the Rome II Regulation loses most of its significance in the context of international commercial arbitration.

¹⁹⁶ Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, EU:C:2016:612

¹⁹⁷ Case C-381/98, Ingmar, 2000E.C.R. I-9307.

¹⁹⁸ Hausmann *supra* note 15, at 985.

¹⁹⁹ G.A. Bermann, *Mandatory rules of law in international arbitration*, in F. Ferrari & S. Kröll (eds.) *supra* note 4, 325, at 330-331.

However, even if it is claimed that all mandatory rules may be regarded as foreign by arbitrators, the overriding mandatory provisions of the law of the seat may deserve special consideration by them due to the connection of the seat with the state courts having jurisdiction regarding the setting aside of the award. In fact, a trend has been identified in practice to favour the application of the mandatory rules of the place of arbitration.²⁰⁰ The incompatibility of an arbitral award with the public policy of the seat may lead to setting aside the award. Notwithstanding this, it is noteworthy that, in situations in which the place of arbitration has no additional connections with the dispute, it may happen that its overriding mandatory provisions are not intended to be applied to the dispute, and, hence, giving effect to them is not even a requirement for the award to be held valid by the ordinary courts of the seat. A crucial element in the assessment by arbitrators concerning the overriding mandatory provisions of the place of the seat is to prevent the risk of having the award set aside according to the arbitration law of the seat. However, such objective must be balanced with others that may favour giving effect to overriding mandatory provisions of other countries, such as those where the enforcement of the award may be sought to prevent enforcement being refused on public policy grounds.

Neither Rome I nor Rome II indicates in which circumstances the mandatory rules of the *lex causae* apply. Both Regulations seem based on the idea that referral to the *lex causae* also includes its mandatory provisions, although given the peculiar characteristics of overriding mandatory provisions it seems appropriate to consider that this exceptional group of rules should in principle be applied as part of the *lex causae* only to the extent that such legal order demands them to be applied to the situation.²⁰¹ This criterion seems also relevant in the context of international commercial arbitration.²⁰² Moreover, the fact that usually statute provisions and arbitration rules establish that in all cases arbitrators shall decide in accordance with the terms

²⁰⁰ See Voser *supra* note 181, at 338-339, with references.

²⁰¹ The final award in ICC case no. 14046, (regarding a non-competition clause contained in a contract between Italian parties) provides an example of the application of Italian (and EU) anti-trust laws as mandatory provisions by an arbitral tribunal seated in Switzerland on the basis that EU antitrust law was part of the public policy of the *lex causae*, namely Italian law; 2010 *Y.B. COMM. ARB'N* 241, 251.

²⁰² Article 3(4) of the Rome I Regulation and Article 14(3) of the Rome II Regulation may provide guidance that in certain situations there may be no reason for an arbitral tribunal to entirely disregard a choice-of-law provided that it can ensure that the mandatory rules which the parties sought to circumvent and which are substantially connected to the situation, are applied. See Chukwumerije *supra* note 146, at 269, (referring to article 3(3) of the 1980 Rome Convention).

of the contract provides further support to the idea that the application of the contract terms should not be undermined by the overriding mandatory provisions of the law of the contract unless the situation falls within their scope of application and hence the overriding mandatory provisions are intended to be applied to the situation.

Article 9(3) of the Rome I Regulation addresses the possibility for courts of the Member States to give effect to third country overriding mandatory provisions. Unlike Article 9(3) of the Rome I Regulation, the Rome II Regulation provides no basis for the application of third country mandatory rules.²⁰³ This issue has been subject to significant controversy within the EU. While Article 7(1) of the Rome Convention refers to the possibility of giving effect to the mandatory rules of the law of "another country with which the situation has a close connection", Article 9(3) Rome I Regulation restricts such a possibility to "the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful".. Article 9(3) Rome I Regulation keeps granting ample discretion to the courts of Member States as to the effect to be given to those provisions and the factors to be taken into account. In considering whether to give effect to those provisions, pursuant to Article 9(3) regard shall be had to their nature and purpose and to the consequences of their application or non-application. It is noteworthy that the CJEU has established that Article 9(3) does not preclude a court of a Member State from taking overriding mandatory provisions other than those of the country where the obligations arising out of the contract have to be or have been performed into account as matters of fact in so far as this is provided for by the national law that is applicable to the contract.²⁰⁴

The expression "effect may be given" in contrast with the mere straightforward application of foreign law introduces a significant element of flexibility that allows to consider foreign law as a relevant fact, for instance to establish that a party is not in a

²⁰³ See Dickinson, *supra* note 87, at 636-638.

²⁰⁴ Case C-135/15, Republik Griechenland v Grigorios Nikiforidis, ECLI:EU:C:2016:774.

position to perform its obligations under the contract, that may also be useful for arbitration disputes. Moreover, the idea that in considering whether to give effect to mandatory rules, "regard shall be had to their nature and purpose and to the consequences of their application or non-application" suggests a functional approach that would also be useful for arbitrators²⁰⁵. However, the restrictive approach adopted in Article 9(3) of the Rome I Regulation, influenced by the reluctance of state organs to give effect to foreign overriding mandatory provisions, limits the potential role of the Rome I Regulation as guidance for international commercial arbitration where a stronger case for giving effect to third State overriding mandatory provisions is related to the fact that arbitrators have a lesser degree of obligation to a single State than ordinary courts²⁰⁶. The different position between state courts and arbitral tribunals and the concern of the latter with the enforceability of the award influence that the factors to be considered in deciding whether to give effect to overriding mandatory provisions may not be the same.

The lack of a proper forum in arbitral disputes and the fact that overriding mandatory provisions are intended to be applied regardless of the applicable law but only where there is certain connection between the dispute and the State that adopted such rules, lead to a situation in which, unlike in Article 9 of the Rome I Regulation, all legal orders connected to the dispute are in principle in a similar position as a potential source of overriding mandatory provisions²⁰⁷. Therefore, arbitrators may consider giving effect not only to mandatory provisions of the law of the seat, the *lex causae* or the place of performance of obligations, but also of other legal systems so closely connected to the dispute that the need to respect its mandatory provisions was foreseeable for the parties²⁰⁸. Furthermore, to ensure the enforceability of the award an arbitrator might need to give effect to overriding mandatory provisions of third states without taking into consideration the strict

²⁰⁵ See Voser *supra* note 181, at 348.

²⁰⁶ See Bermann *supra* note 199, at 333.

²⁰⁷ A.K. Schnyder, *Anwendungen ausländischer Eingriffsnormen durch Schiedsgerichte (Überlegungen zu einem Grundsatzentscheid des Schweizer Bundesgerichts)*, 59 *RabelsZ* (1995) 293, 299.

²⁰⁸ S. Sánchez Lorenzo, *Choice-of-law and Overriding Mandatory Rules in International Contracts After Rome I*, 12 *Y.B. PIL* (2010) 67, 88.

requirements of Article 9.3 Rome II Regulation.²⁰⁹ The relevance of a plurality of mandatory laws from different legal systems raise particular challenges in the absence of principles on the coordination of conflicting mandatory laws that may guide arbitrators²¹⁰.

The factors to be considered by arbitrators in deciding whether effect is to be given to such provisions may differ from the analysis of state courts under Article 9(3). When considering the "purpose and nature" of the foreign measure, state courts tend to assess if the interests that the foreign rule intends to protect are shared by the forum. In the context of arbitration such analysis loses most of its significance and the assessment whether the relevant provisions is intended to the protection of universally recognized interests may play a greater role²¹¹. It can be recalled that the concern of arbitrators with the enforceability of their award leads them to consider potential infringements of the public policy of the country of the seat and other countries where the enforcement of the award is probable. Concerning monetary awards, the identification of the potential places of enforcement may become particularly complex where the debtor has assets in many countries. The trend to favor mandatory rules of the law of the State of the seat of arbitration seems related to the fact that an award which has been set aside will usually not be enforceable in other States, although Article V(1)(e) of the New York Convention does not require the refusal of enforcement.²¹²

C. Bilateral Conflict Rules and Scope of Public Policy Provisions

Article 16 of the Rome II Regulation makes only reference to the overriding mandatory provisions of the forum and therefore Rome II does not envisage the possibility of giving effect to the overriding mandatory provisions of a country which is not the forum or whose law is not the law governing the non-contractual obligation²¹³. However, other

²⁰⁹ Hausmann *supra* note 15, at 985-986.

²¹⁰ L.G, Radicati di Brozolo, *Mandatory Rules and International Arbitration*, 23 AM. REV. INT'L ARB (2012) 49, 69.

²¹¹ Voser *supra* note 181, at 351-352.

²¹² Moreover, the application by arbitral tribunals of public policy of other countries has been subject to strict judicial scrutiny by the courts of the place of arbitration, *see*, with further references, Born *supra* note 2, at 2716.

²¹³ *See* Hamburg Group for Private International Law, *Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations*, *RabelsZ* (2003) 1, 42.

than Article 16 on overriding mandatory provisions and 26 on public policy, the so-called mandatory conflict rules of the Rome II Regulation, that exclude party autonomy, seem to be of great significance also for arbitrators to assess the reach of EU public policy provisions and the countries whose mandatory laws may be appropriate to consider.

In the arbitration context it has been highlighted that recourse to public policy rules of third countries may be particularly relevant with regard to non-contractual claims, particularly in situations where arbitration extends beyond contractual disputes and cover statutory causes of action arising under the law of a country other than the country whose law is applicable to the contact²¹⁴. In this connection, Article 6 of the Rome II Regulation may be regarded as a choice-of-law rule determining the scope of application of certain overriding mandatory rules.

Under Article 6(1) of the Rome II Regulation the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected²¹⁵. As already noted, the mandatory nature of the special rule is consistent with the function of unfair competition law²¹⁶. The CJEU has stated that Article 4(3) of the Rome II Regulation, under which the law of another country applies if it is clear from all the circumstances that the tort/delict is manifestly more closely connected with a country other than that indicated in Article 4(1) of the Regulation, cannot interfere with the application of Article 6(1) of the Rome II Regulation, since the latter aims to protect collective interests by providing for a rule specifically suited to the matter of unfair competition²¹⁷.

²¹⁴ Bermann *supra* note 199, at 334.

²¹⁵ However, it is to be noted that Article 6(2) of the Rome II Regulation contains a special rule. Unlike the rest of unfair competition claims, acts of unfair competition that affect exclusively the interests of a specific competitor are subject to the general rule of Article 4. In the situations referred to in Article 6(2) the main consequence will usually be an economic loss produced at the domicile of the victim, and hence the reference to Article 4 seems appropriate. See S. Leible & M. Lehmann, *Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht (Rom II)*, RIW (2007) 721, 729.

²¹⁶ C. Honorati, *The Law Applicable to Unfair Competition* in A. Malatesta (ed.), *The Unification of Choice-of-law Rules on Torts and Other Non-Contractual Obligations in Europe* (CEDAM 2006) 127-158, at 148; and C. Handig, *Neues im internationalen Wettbewerbsrecht – Auswirkungen der Rom II-Verordnung*, *GRUR INT*, (2008) 24, 26.

²¹⁷ Case C-191/15 *supra* note 196, paras. 44-45.

Also Article 6.3(a) of the Rome II Regulation lays down the market effects principle as basic conflict rule in this area, although article 6(3)(b) allows the possibility to adjudicate certain multi-state claims resulting from restrictions of competition under a single law (the law of the forum). The trend to favour private actions for damages concerning infringements of EU competition law²¹⁸, as illustrated by the *Courage* and *Manfredi* judgments of the CJEU²¹⁹, and the potential cross-border reach of such claims increase the importance of choice-of-law rules concerning non-contractual obligations arising out of multi-state restrictions of competition. As noted by Advocate General Jääskinen in its Opinion in the *Cartel Damage Claim* case²²⁰, the application of arbitration clauses is not in itself an obstacle to the effectiveness of Article 101 TFEU to the extent that they do not deprive those affected by damage of obtaining full compensation in accordance with EU antitrust law. Application of antitrust law to private disputes may also be of great importance with regard to contractual disputes falling outside of the scope of the Rome II Regulation, since pursuant to article 101.2 TFEU, any agreements or decisions prohibited pursuant to the rules on competition are automatically void.

In this context, Article 6 of the Rome II Regulation becomes a basic rule establishing the territorial reach of EU competition law and to what an extent competition rules, as overriding mandatory provisions, are applicable to any situation falling within their scope. From the arbitrators' perspective it will be important that to the extent that arbitral proceedings may be subject to supervision by the courts of EU Member States, this conflict rule shall determine the scope of public policy also where the issue of the application of competition law arises in proceedings to set aside or to enforce an arbitral award. From the arbitrators' perspective the bilateral drafting of Article 6 of the Rome II Regulation seems relevant also as an indication of the development of the market effects doctrine as a general principle of choice-of-law that

²¹⁸ J. Basedow, S. Francq & L. Idot, (eds.), *International Antitrust Litigation – Conflict of Laws and Coordination* (Hart 2012).

²¹⁹ Case C-453/99, *Courage and Crehan*, 2001 E.C.R. I-6314; Case C-295/04 to T-298/04, *Manfredi and Others*, 2006 E.C.R. I-6641. See also Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349, p. 1.

²²⁰ Opinion delivered on 11 December 2014, EU:C:2014:2443, esp. para. 125. In its later judgment the Court considered that it did not have sufficient information at its disposal in order to provide a useful answer to the question on this issue Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, EU:C:2015:335.

influences not only the determination of the scope of mandatory application of EU (and Member States) competition law but may support the application of the laws of other affected markets.

This result is compatible with the view that the implications on public policy of the broad the exclusion of party autonomy concerning claims arising out of competition law (Article 6) and the infringement of intellectual property rights (Article 8) in the Rome II Regulation should require further analysis²²¹. Certain minor deviations in arbitration proceedings from the prohibition of party autonomy established in those provisions may not be regarded as an infringement of EU (or Member State) public policy given the exceptional nature of public policy as a ground for the setting aside of an award or the refusal of enforcement.

Even if the policies and interests underlying intellectual property and unfair competition and antitrust law decisively affect legislation on the existence and protection of those exclusive rights or the prohibition of certain commercial practices, the use of limited party autonomy in certain cross-border arbitration disputes could be compatible with the respect of such basic policies and interests, even if not allowed under the Rome II Regulation (a limited exception has already been inserted in Article 6(3)(b) of the Rome II Regulation). For instance, freedom of choice restricted to the law applicable to the remedies or the compensation resulting from the infringement of those rights or rules of conduct between parties that pursue a commercial activity may not be an obstacle for those affected by damage to obtain compensation and may facilitate claims regarding multistate conducts. In this connection, it has been noted that the public policy reasons mandating the exclusive application of *lex protectionis* with regard to the subject matter of intellectual property do not extend to the remedies that affect primarily private

²²¹ For instance, unlike the Rome II Regulation, Article 110(2) of the Swiss Private International Law explicitly allows limited party autonomy regarding the law applicable to the consequences of the infringement of intellectual property rights. This option has also been advocated by the CLIP Principles on Conflict of Laws in Intellectual Property (Article 3:606).

interests and that the possibility to agree on a single law for computing damages would foster legal certainty particularly when an infringement extends over a large number of States²²².

VII. CONCLUSION

The prevailing opinion is that the Rome I and Rome II Regulations are part of general EU private international law directly binding on ordinary courts, but not intended to directly regulate the law applicable by arbitrators to the substance of a dispute and to replace Member States' statutes in the field. This opinion seems consistent with the nature of arbitration as an alternative resolution dispute system in the EU and its Member States. In line with global trends, national codes or statutes in almost all EU Member States contain provisions on the law applicable to the substance in international commercial arbitration, which are drafted to respond to the particular needs of arbitration and which deviate from the regular choice-of-law rules for State courts. These special provisions found in the legislation of most EU Member States are generally intended to be applied as part of the *lex arbitri* and seem to be based on the express assumption that ordinary conflict rules are not binding on arbitral tribunals that are not official state organs. Pursuant to these statutory provisions and arbitration rules, arbitral tribunals enjoy ample discretion regarding the law applicable to the substance of the dispute.

The view that arbitral tribunals seated in a Member State are not bound, as if they were national courts, to decide according to these EU instruments does not undermine that the Rome I and Rome II Regulations may play a significant role in the determination of the law applicable to the substance by arbitral tribunals. In fact it is not rare for arbitrators to have recourse to provisions of these instruments, since they are benchmarks in the development of private international law. Therefore, such instruments influence arbitral decisions in many situations, for instance, where arbitrators adopt the general principles of choice-of-law method. Moreover, their role in unifying European conflict rules may justify recourse to the so-called cumulative method to determine the law applicable to the dispute, where all the States having a relation

²²² A. Kur, *Article 3:606: Freedom of Choice for Remedies* in Max-Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property -The CLIP Principles and Commentary* (Oxford University Press 2013), at 347.

Pedro A. De Miguel Asensio, "The Rome I and Rome II Regulations in International Commercial Arbitration", *The Impact of EU Law on International Commercial Arbitration*, New York, Juris, 2017, pp. 177-243

with the dispute belong to the EU. Finally, the significance of the rules on mandatory provisions and public policy of the Rome I and Rome II Regulations have to be assessed especially in the light of the arbitrators' concerns to render an enforceable award and the supervisory role of Member State courts on arbitration proceedings.