CHAPTER 29

Mandatory Private Treaty Application? On the Alleged Duty of Arbitrators to Apply International Conventions

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§29.01 INTRODUCTION

International arbitration, an institution that *Pierre Karrer* has shaped and influenced through his practical work as a leading international arbitrator as well as through his scholarly writings,[1] aims at the peaceful settlement of disputes by practical, foreseeable and reasonably fast decisions,[2] thereby eventually serving the development of international trade.[3] The creation of uniform commercial law by way of international conventions is driven by a very similar aim, namely the removal of legal barriers in and the promotion of the development of international trade through the adoption of uniform rules governing international contracts.[4] International arbitration and uniform law conventions generally act in a complementary manner by following reasonably consistent policy norms,[5] one as a means of international dispute settlement, the other

1. Recently in particular Pierre A. Karrer, *Introduction to International Arbitration Practice – 1001 Questions and Answers* (Kluwer 2014).
2. See Karrer, *supra* n. 1, Questions 946 and 974.
3. See the Preamble of the European Convention on International Commercial Arbitration, done at Geneva on 21 Apr. 1961.
4. See the Preamble of the United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11 Apr. 1980 (CISG).
5. On the CISG see Jeffrey Waincymer, 'The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure', in Camilla B. Andersen and Ulrich G. Schroeter (eds.), *Sharing International Commercial Law Across National Boundaries* (Wildy, Simmonds & Hill 2008) 582–599; Jean Thieffry, 'Arbitration and the New Rules Applicable to International Sales Contracts under the United Nations Convention', *Arbitration International* 4 (1988) 52 et seq.

by creating an international 'level playing field' in the law governing the merit of disputes.

[A] A Duty of Arbitrators to Apply International Conventions?

In practice, uniform law and international arbitration usually coincide without difficulties.[6] Only occasionally, their interaction gives rise to more intricate questions. One of them is: Do arbitrators have a duty to apply international conventions? A significant number of authors indeed believe that such a legal obligation exists and have in particular argued for a duty of arbitrators to apply the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG)[7] and the 1980 Rome Convention on the Law Applicable to Contractual Obligations.[8] The same argument could be made for most other uniform private law conventions.

If the just-mentioned view is correct, it would result in what the title of this contribution refers to as 'mandatory private treaty application'. Under a duty of arbitrators to apply international conventions, treaty law would influence – some may say: disturb – the determination of the law applicable in everyday commercial arbitrations. The consequences could be far-reaching, indicating that the discussion is not merely *l'art pour l'art*: First, international conventions usually define autonomously *when* they are to be applied, and the provisions governing their applicability are often less flexible than arbitration laws that give arbitrators much discretion in determining the law to be applied to the merits. The unclear and disputed role of treaty reservations in arbitrations[9] would result in additional complexity. A generally framed duty to apply conventions could furthermore conflict with the more delicate and

6. See e.g., ICC Award 9887/1998, *ICC International Court of Arbitration Bulletin* 11:2 (2000) 109, 110: 'The 1980 United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) enjoys a strong recognition in the arbitration practice …'; see also Andrea Giardina, 'International Conventions on Conflict of Laws and Substantive Law', in Albert Jan van den Berg (ed.), *Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration* (Kluwer 1996) 459 et seq.
7. Bernard Audit, *La vente internationale de marchandises* (LGDJ 1990) 22; Christoph Benicke, 'Art. 1 CISG', in *Münchener Kommentar zum Handelsgesetzbuch* (3rd ed, Beck 2013) para. 41; Franco Ferrari, 'The CISG's Sphere of Application: Articles 1–3 and 10', in Franco Ferrari, Harry Flechtner and Ronald A. Brand (eds.), *The Draft UNCITRAL Digest and Beyond* (Sellier European Law Publishers 2004) 55 et seq; Sebastian Knetsch, *Das UN-Kaufrecht in der Praxis der Schiedsgerichtsbarkeit* (Peter Lang 2011) 41 et seq.; Ulrich Magnus, 'Art. 1 CISG', in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)* (Sellier – de Gruyter 2013) para. 120.
8. Mary-Rose McGuire, 'Grenzen der Rechtswahlfreiheit im Schiedsverfahrensrecht? Über das Verhältnis zwischen der Rom-I-VO und § 1051 ZPO', *Zeitschrift für Schiedsverfahren* (2011) 257, 262 et seq.; Gerhard Wagner, 'Rechtswahlfreiheit im Schiedsverfahren: Ein Probierstein für die juristische Methodenlehre', in Peter Gottwald and Herbert Roth (eds.), *Festschrift für Ekkehard Schumann zum 70. Geburtstag* (Mohr Siebeck 2001) 535, 554–556.
9. Considering reservations as potentially relevant for arbitrators: Alexis Mourre, 'Application of the Vienna Sales Convention in Arbitration', *ICC International Court of Arbitration Bulletin* 17:1 (2006) 43, 48; Georgios C. Petrochilos, 'Arbitration Conflict-of-Laws Rules and the 1980 International Sales Convention', *Revue Hellénique de Droit International* 52 (1999) 191, 199–200.

much-disputed conditions of the impact of mandatory laws in arbitrations.[10] Second, international conventions often include rules on *how* they are to be applied, Article 7(1) of the CISG and Article 18 of the Rome Convention being prominent examples. As these provisions provide legally binding principles for the conventions' interpretation and application,[11] they would affect an arbitrator's application of law to the merits of the dispute. Third, conflict-of-laws conventions sometimes subject the parties' choice of law to stricter limitations than arbitration laws that e.g., allow a choice of mere 'rules of law'.[12] Fourth, some conventions address issues of fact-finding often regarded as 'procedural' in nature, as e.g., the admissibility of certain means of evidence[13] or the burden of proof[14] – matters also covered by arbitration laws, but in a potentially different way. And fifth, some conventions (notably the CISG) have even been interpreted as governing typical arbitration matters, as e.g., the formation of arbitration agreements or their form.[15] If arbitrators were legally bound to apply these conventions, collisions with stricter or less strict provisions in arbitration laws would be difficult to avoid.

In short, treaty law would affect arbitration practice in every commercial arbitration cases that happen to fall into an international convention's sphere of application. International arbitrators would become private decision-makers with 'treaty-strings' attached.

[B] Treaty Law and Arbitration Practice: Differences in General Approach

The present contribution will try to clarify whether such an arbitrators' duty does exist, and what legal source it could arise from. As these questions reside at the intersection of treaty law and the law of international commercial arbitration, additional complexity is caused by these two areas typically employing different approaches in addressing legal problems: For treaty lawyers, the treaty is the natural starting point from which to evaluate its effect on persons and institutions, or the treaty's relationship to other legal rules and instruments. This 'treaty-centric' approach can be traced to the rule of

10. See e.g., Pierre Mayer, 'Mandatory Rules of Law in International Arbitration', *Arbitration International* 2 (1986) 275.
11. On Art. 7(1) of the CISG Ingeborg Schwenzer and Pascal Hachem, 'Article 7', in *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed., Oxford University Press 2016) para. 7; on Art. 18 of the Rome Convention Bernhard Rudisch, 'Artikel 18', in Dietmar Czernich and Helmut Heiss (eds.), *EVÜ – Das Europäische Schuldvertragsübereinkommen* (Orac 1999) para. 3.
12. On Art. 3 of the Rome Convention Giardina, *supra* n. 6 at 465; McGuire, *supra* n. 8 at 258.
13. See Art. 11 second sentence of the CISG.
14. For the international prevailing view under the CISG see Ingeborg Schwenzer and Pascal Hachem, 'Article 4', in *Schlechtriem & Schwenzer Commentary, supra* n. 11, para. 25. For a more sceptical position see Peter Schlechtriem and Ulrich G. Schroeter, *Internationales UN-Kaufrecht* (6th ed., Mohr Siebeck 2016) para. 211.
15. See the extensive case law and scholarly writings listed by Stefan Kröll, 'Arbitration and the CISG', in Ingeborg Schwenzer, Yesim Atamer and Petra Butler (eds.), *Current Issues in the CISG and Arbitration* (Eleven International Publishing 2013) 59, 71 et seq. and by Ulrich G. Schroeter, 'Intro to Arts 14–24', in *Schlechtriem & Schwenzer Commentary, supra* n. 11, paras 16 et seq.

customary international law[16] expressed in Article 27 of the 1969 Vienna Convention on the Law of Treaties, according to which '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty' – if no provisions of domestic law, arbitration-related or otherwise, can lawfully affect the performance of a treaty, it has to be the treaty itself determining how and by whom it needs to be performed.

In contrast, arbitration law and practice naturally takes as its starting point the arbitration agreement[17] that has been described as the 'foundation stone' of modern international arbitration.[18] Accordingly, the arbitration agreement is the first point of reference in identifying the legal rules that an arbitral tribunal has to apply throughout the arbitration, possibly to be supplemented by the *lex arbitri* (that, in some cases, may also set boundaries for the admissible content of arbitration agreements[19]). The instinctively different starting points of treaty lawyers and arbitration lawyers has been the source of some misunderstandings in the past, and calls for a new approach that combines the two perspectives.

§29.02 DUTY OF ARBITRATORS TO APPLY INTERNATIONAL CONVENTIONS RESULTING FROM THE CONVENTIONS THEMSELVES?

The defining characteristic of the view alleging an arbitrator's duty to apply international conventions[20] is that it, expressly or implicitly, derives this duty from the conventions themselves, independent of the parties' choice or the rules governing the respective arbitration. This approach conforms to the usual, 'treaty-centric' focus in international uniform law, but increases the risk of conflicting with arbitration principles. The central question is therefore whether such a duty follows from international conventions, and why.

[A] Wording of International Conventions

The first point of reference must be the international conventions' wording. Do they explicitly or implicitly name arbitral tribunals as addressees of their provisions, thereby providing a basis for an arbitrator's duty to apply their rules? On rare occasions, explicit provisions of this sort have indeed been proposed during the preparation of uniform law conventions. An early example can be found in Article 3 of the International Law

16. Kirsten Schmalenbach, 'Article 27 VCLT', in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties – A Commentary* (Springer 2012) para. 5.
17. ICC award 1512/1970, V *Yearbook Commercial Arbitration* (1980) 174, 176; Mourre, *supra* n. 9 at 43; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* 52 (Wolters Kluwer 2012); Waincymer, *supra* n. 5 at 589.
18. Nigel Blackaby, Constantine Partasides, Alan Redfern and J. Martin Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015) at para. 1.38.
19. See Karrer, *supra* n. 1, Question 86.
20. See *supra* at §29.01[A].

Association's 1928 Draft of an International Convention for the Unification of certain Rules relating to the Conflict of Laws as regards Contracts of Sale:[21]

> If and insofar as arbitrators have to give decisions according to the law governing the contract, arbitrators shall, subject to Art. 4 [ordre public], apply this Convention.

Unfortunately, and as far as could be ascertained, neither this provision nor any similar draft provision ever became part of actual treaty law.[22] The international conventions currently in force are less clear in specifying their addressees, and provisions referring to arbitrators are few and far between.

[1] Substantive Law or Conflict-of-Laws Conventions

The CISG refers to arbitrators twice, although merely in passing: In its Article 45(3), it stipulates that '[n]o period of grace may be granted to the seller by a court *or arbitral tribunal* when the buyer resorts to a remedy for breach of contract.'[23] Article 61(3) of the CISG contains a mirror-image provision for contract breaches by the buyer. While both provisions indicate that the Sales Convention contemplates its application by arbitral tribunals,[24] they do not address why an arbitral tribunal is applying the Convention, but rather presuppose that it does. By extension, Articles 45(3), 61(3) of the CISG also say nothing about an arbitral tribunal's duty to apply the CISG. This is confirmed by the fact that Article 28 of the CISG only limits the obligation of courts to apply certain provisions of the CISG ('… a court is not bound to enter a judgement for specific performance unless the court would do so under its own law …'), but not of arbitral tribunals. The limited scope of Article 28 of the CISG has sometimes been explained by an oversight of the CISG's drafters,[25] and authors argue that it should apply to arbitral tribunals by analogy.[26] However, its wording could also be due to arbitral tribunals being under no obligation to apply the Sales Convention in the first place. At best, it therefore appears unclear whether the CISG's wording says anything about arbitrators' intended duty to apply this convention.

Other substantive law or conflict-of-laws conventions lack any explicit reference to arbitrators, thus arguably providing no indication that their drafters contemplated an arbitrator's duty to apply them. In contrast, some authors draw exactly the opposite

21. Text reprinted in Anton von Sprecher, *Der internationale Kauf: Abkommen und Abkommensentwürfe zur Vereinheitlichung der Kollisionsnormen des Kaufvertrags* (Polygraphischer Verlag 1956) 133.
22. For express provisions on arbitrators in conventions on the carriage of goods that, however, belong to a different category of rules see *infra* at §29.02[B][2].
23. Emphasis added.
24. Kröll, *supra* n. 15 at 61; Petrochilos, *supra* n. 9 at 192.
25. See Pilar Perales Viscasillas and David Ramos Muñoz, 'CISG & Arbitration', in Andrea Büchler and Markus Müller-Chen (eds.), *Private law: national – global – comparative. Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (Stämpfli 2011) 1355, 1365–1366.
26. Beate Gsell, 'Artikel 28', in Heinrich Honsell (ed.), *Kommentar zum UN-Kaufrecht* (2nd ed., Springer 2010) para. 8; Markus Müller-Chen, 'Article 28', in *Schlechtriem & Schwenzer Commentary, supra* n. 11, para. 8.

conclusion and argue that an international convention's silence about arbitral tribunals should not be read as arbitrators not being among their addressees: They regard uniform private law conventions as primarily directed at private parties, so that a distinction between courts and arbitral tribunals would supposedly not make sense.[27] To the same end, it could be pointed out that arbitral awards have the same *res judicata* effect between parties as final and binding court judgments[28] and that arbitral tribunals accordingly fulfil a task similar to that of state courts; a similarity in function that would militate in favour of a similar treatment in law.

In spite of these arguments, it is submitted that conventions making no mention of arbitrators should not be read as nevertheless (implicitly) imposing an application duty on them,[29] for at least two reasons: First, it is reasonable to assume that their drafters were aware of arbitration as a well established means of private dispute settlement and the significant freedom traditionally granted to arbitrators in determining the law to be applied to the merits – should conventions have aimed at inferring with this freedom, one would expect a sufficiently clear indication of this aim. Second, a number of international conventions on the carriage of goods have long contained explicit provisions in this regard,[30] allowing the *argumentum e contrario* that conventions that remain silent in this matter are most likely not directed at arbitrators.

[2] Arbitration Conventions

As far as international conventions unifying aspects of arbitration law are concerned, their wording is similarly not indicative of an arbitrator's obligation to apply these conventions. This is relatively clear in case of the 1958 New York Convention,[31] which from the outset is only addressed to state courts in Contracting States of that convention.[32] The wording of its Article I(1) ('This Convention shall apply to the recognition and enforcement of arbitral awards …') makes this sufficiently clear, given that both recognition and enforcement require a state's authority, which private

27. McGuire, *supra* n. 8 at 262; also Wagner, *supra* n. 8 at 555 (both on the Rome Convention of 1980).
28. See e.g., § 1055 of the German Civil Code of Procedure.
29. Thomas Pfeiffer, 'Neues Internationales Vertragsrecht – Zur Rom I-Verordnung', *Zeitschrift für Europäisches Wirtschaftsrecht* (2008) 622, 623; Stephan Wilske and Lars Markert, '§ 1051 ZPO', in Vorwerk & Wolf (eds.), *Beck'scher Online-Kommentar ZPO* (21ed., C.H. Beck July 2016) para. 3.
30. See in detail *infra* §29.02[B][2].
31. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 Jun. 1958.
32. ICC award 5730/1988, *Journal du droit international* 117 (1990) 1029, 1033; Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003) para. 6-48; Pierre Mayer, 'L'application par l'arbitre des conventions internationales de droit privé', in *L'internationalisation du droit: Mélanges en l'honneur de Yvon Loussouarn* (Dalloz 1994) 275, 278; Reinmar Wolff, 'Article II', in Reinmar Wolff (ed.), *New York Convention* (Beck Hart Nomos 2012) para. 187. But see Cour d'appel Paris, 20 Jan. 1987 – *Bonmar Oil NV v. Entreprise Tunisienne d'Activités,* XIII *Yearbook Commercial Arbitration* (1988) 466, 469; Albert Jan van den Berg, 'Should an International Arbitrator Apply the New York Arbitration Convention of 1958?', in Jan C. Schultsz (ed.), *The Art of Arbitration: Liber Amicorum Pieter Sanders* (Kluwer 1982) 39 et seq.

arbitral tribunals do not possess. That arbitrators frequently take the New York Convention's rules on form requirements for arbitration agreements (Article II) and on reasons for non-enforcement (Article V) into account is driven by their aim (and, under certain arbitration rules, obligation to make every effort[33]) to render an enforceable award, but is not due to the convention being directly addressed at them.

At first sight, the matter is different in case of the 1961 European Convention[34] that contains a number of provisions explicitly outlining arbitrators' tasks and obligations,[35] as e.g., its Article IV(3) ('… the necessary steps shall be taken by the arbitrator(s) already appointed …').[36] Nevertheless, the European Convention cannot count as support for a duty of arbitrators to apply conventions,[37] because it does not list arbitrators as addressees of its provisions, but as their subject matter. Put differently: Arbitral tribunals are to the 1961 European Convention what sellers and buyers are to the 1980 Vienna Sales Convention. As a result, the convention is not applied *by* them, but *to* them, and therefore provides no help in answering the general question investigated here.

[B] Addressees of the Obligation to Apply International Conventions Under Treaty Law

As the wording of most international conventions provides limited assistance in identifying their addressees, it is appropriate to look next to general treaty law for guidance.

[1] International Uniform Private Law Conventions in General

From the perspective of treaty law, it is quite clear that arbitral tribunals are not legally bound by international conventions, because of a simple formal reason: They are not organs of a state party to a convention.[38] In support, one may look to the fundamental principle of *pacta sunt servanda* as laid down in Article 26 of the 1969 Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' By limiting every treaty's binding

33. Article 42 of the 2017 ICC Rules. See Pierre A. Karrer, 'Must an Arbitral Tribunal Really Ensure that its Award Is Enforceable?', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honor of Robert Briner* (ICC Publishing 2005) 429–435.
34. *Supra* n. 3.
35. Dominique T. Hascher, 'European Convention on International Commercial Arbitration of 1961: Commentary', XXXVI *Yearbook Commercial Arbitration* (2011) 504, 512.
36. Further provisions of this category are Arts V and VII of the European Convention.
37. With a different reasoning also Mayer, *supra* n. 32 at 278–279.
38. Gustav Flecke-Giammarco and Alexander Grimm, 'CISG and Arbitration Agreements: A Janus-Faced Practice and How to Cope with It', *Journal of Arbitration Studies* 25(3) (2015) 33, 46 et seq.; André Janssen and Matthias Spilker, 'The Application of the CISG in the World of International Commercial Arbitration', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 77 (2013) 131, 137; Mayer, *supra* n. 32 at 282, 284; Petrochilos, *supra* n. 9 at 195, 208; Nils Schmidt-Ahrendts, 'CISG and Arbitration', *Belgrade Law Review* LIX (2011) 211, 214; Ingeborg Schwenzer and Pascal Hachem, 'Intro to Arts 1–6', in *Schlechtriem & Schwenzer Commentary, supra* n. 11, para. 11.

force to 'the parties to it' and the obligation to perform the treaty in good faith to 'them' (the parties), Article 26 makes clear that treaties merely create obligations for states and, by association, their organs, namely state courts. As arbitral tribunals in the field of commercial arbitration are private creations, this indicates that international conventions due to their treaty nature are not addressed to them.

[2] In Particular: Conventions on the Carriage of Goods

The position that conventions do generally not intend to create obligations for arbitrators is further supported by the particular wording of conventions in the area of transport law, notably the international carriage of goods. Conventions in this area differ in an important regard from uniform law conventions that respect party autonomy,[39] because they establish mandatory rules for contracts of carriage that cannot be excluded or modified by parties to such contracts.[40] The purpose of this strict regulatory approach is to prevent an unwelcome 'competition through contract conditions' between carriers that would undermine the uniform effect of the conventions in this area.[41] Accordingly, they explicitly declare contractual stipulations that would directly or indirectly derogate from their provisions to be null and void.[42] Among their mandatory provisions are also – somewhat unusually – provisions expressly addressing the admissibility of arbitration agreements.[43] One of them – Article 33 of the CMR – reads:

> The contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention.

The purpose of Article 33 of the CMR is to make sure that arbitral tribunals acting in place of a state court will also apply the Convention.[44] In light of this goal, the provision has been construed strictly, requiring that the arbitration agreement must

39. See *inter alia* Art. 6 of the CISG.
40. Roland Loewe, 'Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)', *European Transport Law* 11 (1976) 311 para. 292; Malcolm A. Clarke, *International Carriage of Goods by Road: CMR* (Informa 2009) para. 92: 'matter of public policy'; Harald de la Motte & Jürgen Temme, 'Vor Art. 1', in Karl-Heinz Thume (ed.), *CMR* (3rd ed., Deutscher Fachverlag 2013) para. 10. See also the critical remarks by Jan Ramberg, 'Freedom of Contract in Maritime Law', in Alexander von Ziegler (ed.), *Internationales Recht auf See und Binnengewässern: Festschrift für Walter Müller* (Schulthess 1993) 171, 179–184.
41. Oberster Gerichtshof, *Transportrecht* (2010) 383; Loewe, *supra* n. 40 at para. 292; Reinhard Th. Schmid, 'Art. 41', in Thume, *supra* n. 40, para. 3.
42. Article 32 first sentence of the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air; Art. 41(1) of the CMR; Art. 22(5) of the 1978 United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules); Art. 34(4) of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.
43. Article 33 of the CMR; Art. 22(4), (5) of the Hamburg Rules; Art. 34(3), (4) of the Montreal Convention. Similar, but less clear Art. 32 second sentence of the 1929 Warsaw Convention: arbitration clauses are allowed 'subject to this Convention'.
44. Roland Loewe, 'Die Bestimmungen der CMR über Reklamationen und Klagen', *Transportrecht* (1988) 309, 319.

specifically oblige the arbitrators to apply the CMR.[45] If this requirement is not met, the arbitral clause is null and void according to Article 41(1) of the CMR,[46] thus rendering an award unenforceable according to Article V(1)(a) of the 1958 New York Convention. For the purposes of the present contribution, it is important that Article 33 of the CMR also clarifies another matter: The assumption implicitly underlying its *raison d'être* is that arbitral tribunals originally are under no obligation to apply the CMR, so that a written contract clause providing that the tribunal shall apply the CMR is needed in order to guarantee its application. Article 33 of the CMR accordingly calls upon the parties to contracts of carriage to create a contractual duty for arbitrators to apply a treaty where no such duty exists under the treaty itself. This indirectly confirms that the general position suggested earlier[47] must be correct, as provisions of this type[48] would otherwise be superfluous.

[3] In particular: European Union Treaties

One could believe that the addressees of the EU Treaties may have to be determined differently, given that the European Court of Justice (ECJ) has traditionally held that the EEC Treaty 'by contrast with ordinary international treaties' has 'created its own legal system which […] binds both [the Member States'] nationals and themselves',[49] and more recently has even spoken of 'the constitutional architecture […] intended by the framers of the Treaties now in force'.[50] Do the EU Treaties therefore differ from traditional uniform law conventions by also addressing arbitral tribunals?

This was one of the questions put to the ECJ in the famous *Eco Swiss* case, when the Dutch Supreme Court asked *inter alia* whether arbitrators are required to apply Article 85 of the (then) EC Treaty.[51] While the ECJ did not answer this question,[52] Advocate General Saggio opined that the argument for extending the obligation to apply EC Treaty provisions to arbitrators 'could not be based purely and simply on Article 5 of the Treaty, which, as we know, is addressed only to the Member States and cannot therefore of itself operate to impose obligations on arbitrators.'[53] It is therefore recognized today that also the EU Treaties are not directly addressed to arbitral tribunals, even if the seat of the respective arbitration is located in an EU State.[54] The

45. Arrondissementrechtbank Rotterdam, *European Transport Law* 6 (1971) 273; Cour d'appel Paris, *Bulletin des Transports* (1979) 440; Clarke, *supra* n. 40 at para. 47; Klaus Demuth, 'Art. 33', in Thume, *supra* n. 40, para. 3; Loewe, *supra* n. 44 at 319.
46. Oberster Gerichtshof, *Transportrecht* (2010) 383; Clarke, *supra* n. 40 at para. 47; Demuth, *supra* n. 45 at para. 4a; Loewe, *supra* n. 40 at para. 271; Schmid, *supra* n. 41, para. 27.
47. *Supra* at §29.02[B][1].
48. See *supra* n. 43.
49. European Court of Justice, Case 6/64 – *Costa v. ENEL*, *European Court Reports* (1964) 585, 593.
50. European Court of Justice, Joined Cases C-402/05 P and C-415/05 P – *Kadi v. Council and Commission*, *European Court Reports* (2008) I-6351 para. 202.
51. Such was the interpretation of the question posed by Advocate General Saggio, Opinion in Case C-126/97 – *Eco Swiss v. Benetton International*, *European Court Reports* (1999) I-3057, I-3064.
52. European Court of Justice, Case C-126/97 – *Eco Swiss v. Benetton International*, *European Court Reports* (1999) I-3079 para. 42.
53. Advocate General Saggio, *supra* n. 51 at I-3068.
54. Lew, Mistelis and Kröll, *supra* n. 32 at paras 18–76.

EU Treaties, in particular their provisions on anti-competitive agreements, may be applicable in arbitrations because of their nature as mandatory provisions,[55] but such an application would not depend on their legal nature as treaty provisions. In any case, arbitral tribunals will have an incentive to take into account EU Treaty provisions in order to render an enforceable award, given that state courts in EU States are under an obligation to consider whether an arbitral award made is contrary to Article 101 of the TFEU – a point that will be further addressed below.[56]

[C] Conclusion and a General Suggestion

For the reasons presented above, international conventions do not create any duty for arbitrators to apply their rules. Although most conventions' wording is at best inconclusive in this respect,[57] treaties are generally addressed to states and their organs (notably courts) only,[58] and not to arbitral tribunals. Most importantly, this conclusion respects the fundamental nature of arbitral tribunals as private institutions[59] that treaty law does not seek to disturb. Indeed, it seems justified to assume a general rule according to which international conventions unifying private or commercial law do not require their application by arbitral tribunals, but rather respect the long-standing particular nature of arbitration as a private means of dispute settlement that has traditionally been governed by principles different from those applicable in state courts.

Nevertheless, this result does not necessarily mean that an arbitrator's duty to apply international conventions cannot flow from other legal sources. These sources will be investigated next.

§29.03 THE *LEX ARBITRI* AS SOURCE OF AN ARBITRATOR'S DUTY TO APPLY INTERNATIONAL CONVENTIONS?

One alternative source of an arbitrator's legal duty to apply conventions is the *lex arbitri*, i.e., the law of the country in whose territory the arbitration takes place.[60] (*Pierre Karrer* prefers a narrower meaning of the term, translating *lex arbitri* as the law at the seat dealing with the relationship between the arbitral tribunal and the state courts at the seat *(Schiedsverfassungsrecht)*.[61]) In modern arbitration laws, the *lex arbitri* – understood in a broader sense – is the law in force at the (juridical) seat of the arbitration.[62]

55. Lew, Mistelis and Kröll, *supra* n. 32 at paras 18–76; Waincymer, *supra* n. 17 at 1037.
56. *Infra* at §29.05[B].
57. *Supra* at §29.02[A].
58. *Supra* at §29.02[B].
59. *Triulziu Cesare SRL v. Xinyi Group (Glass) Co. Ltd.*, [2014] SGHC 220 para. 163: '… arbitral tribunals, private institutions that are not bound by the CISG, … '.
60. On this definition of *lex arbitri*, see Redfern and Hunter, *supra* n. 18 at para. 3.34.
61. Karrer, *supra* n. 1, Questions 666–669 and 989.
62. Redfern and Hunter, *supra* n. 18 at para. 3.51.

Against this background, an obligation of arbitrators to apply an international convention in force at the seat of the arbitration would arise if the *lex arbitri* would require arbitrators to identify and apply the applicable substantive law in the same manner as a judge in a state court of this country. And indeed, such was the position half a century ago, when the Institut de Droit international included the following rule in its Resolution on 'Arbitration in Private International Law' adopted in 1957:

> Les règles de rattachment en vigeur dans l'Etat du siège du tribunal arbitral doivent être suivies pour déterminer la loi applicable au fond du litige.[63]

Ten years later, *F.A. Mann* similarly wrote:

> Just as the judge has to apply the private international law of the forum, so the arbitrator has to apply the private international law of the arbitration tribunal's seat, the *lex arbitri*. Any other solution would involve the conclusion that it is open to the arbitrator to disregard the law.[64]

Under this approach, the *lex arbitri* would require arbitral tribunals to also apply international conventions to which the seat state of the arbitration has acceded. The reason is that conventions' provisions defining a particular convention's applicability – Article 1(1) of the CISG being a prominent example – are unilateral conflict-of-laws rules[65] and would accordingly be subject to the requirement described above. Arbitral tribunals with their seat in a convention's Contracting State would thereby be equated to state courts of that state.[66]

Today, this view has lost most (although not all) of its followers. For some time now, the position has prevailed that an arbitration seat's rules of private international law are not binding for arbitrators,[67] because an arbitrator, unlike a state court, does not have a forum.[68] Due to their private nature, arbitral tribunals are not created by states; states merely provide the legal framework within which arbitral tribunals operate.[69] In theory, the legal framework of the *lex arbitri* could impose the conflict-of-laws rules designed for state courts also on arbitral tribunals, but domestic legislators generally refrain from doing so. One of the clearest indications are the specific conflict-of-laws rules for arbitration proceedings that exist in many domestic laws today, often modelled on Article 28 of UNCITRAL's Model Law on International Commercial Arbitration. Accordingly, there is generally no duty for arbitrators to apply

63. Institut de Droit international, Résolution 'L'arbitrage en droit international privé', Session d'Amsterdam – 1957, in *Tableau des Résolutions Adoptées (1957–1991)* (1992) 237, Art. 11(1).
64. F.A. Mann, 'Lex Facit Arbitrum', in Pieter Sanders (ed.), *International Arbitration: Liber Amicorum for Martin Domke* (Nijhoff 1967) 157, 167.
65. See Schlechtriem and Schroeter, *supra* n. 14 at para. 39.
66. In favour of this approach regarding the CISG Benicke, *supra* n. 7 at para. 41.
67. Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) para. 1541; Emmanuel Gaillard, 'The Role of the Arbitrator in Determining the Applicable Law', in: Lawrence W. Newman and Richard D. Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration* (Juris 2004) 185; Mayer, *supra* n. 32 at 276; Mourre, *supra* n. 9 at 47; Petrochilos, *supra* n. 9 at 198; Redfern and Hunter, *supra* n. 18 at para. 2.80.
68. Kröll, *supra* n. 15 at 64; Mayer, *supra* n. 32 at 282; Mourre, *supra* n. 9 at 43.
69. Kröll, *supra* n. 15 at 64.

international conventions under modern domestic arbitration laws.[70] From a typical *lex arbitri*'s perspective, arbitral tribunals *may* therefore apply conventions, but do not have to. It is accordingly at best imprecise when arbitrators write that they apply e.g., the Vienna Sales Convention 'according to' Article 1(1)(a)[71] or Article 1(1)(b) of the CISG,[72] because Article 1(1) of the CISG in its entirety is only addressed to courts in Contracting States.[73]

§29.04 INTERNATIONAL CONVENTIONS AS PART OF THE *LEX CAUSAE*

The usual basis on which the application of international conventions by arbitrators rests is therefore neither the convention itself nor a convention-specific application requirement by the *lex arbitri*, but rather the parties' choice of law and the general, non-convention-specific rules of the *lex arbitri* about the law to be applied to the merits of a dispute. Arbitral awards that have so applied international conventions are legion[74] and will not be reported here in detail. With regard to the arbitrators' duty to apply a given convention, two situations can be distinguished: Where the parties to the arbitration have chosen the respective *lex causae*, a duty of the arbitral tribunal to apply an international convention arises from this party agreement[75] if the choice therein refers to a convention as applicable 'rules of law', as 'general principles of international law', the *lex mercatoria* or similar, or – probably most often – as an integral part of the domestic law of a state that has ratified the convention. Where the parties have not chosen the law applicable to the merits and the determination of the *lex causae* is left to the arbitrators, arbitrators may well decide to apply an international convention,[76] either through a *voie directe*, by considering a convention to be an expression of trade usages, by a *voie indirecte* or as part of a domestic law. The discretion granted to arbitrators in this context under most arbitration rules and laws makes it difficult to speak of a 'duty' to apply the convention, at least until the tribunal has made its choice. In any of the above cases, the source of such a duty is either the parties' or the arbitral tribunal's choice, but not the convention itself.

70. On the CISG Filip De Ly, 'The Relevance of the Vienna Convention for International Sales Contracts: Should We Stop Contracting it Out?', *Business Law International* 4 (2003) 241, 242; Janssen and Spilker, *supra* n. 38 at 139; Schmidt-Ahrendts, *supra* n. 38 at 214.
71. See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 3 Mar. 1997, CISG-online No. 1298; CIETAC Award, 10 Dec. 2003, CISG-online No. 1546; and many more.
72. See ICC award 7585/1994, *Journal du droit international* 122 (1995) 1015; Schiedsgericht der Handelskammer Hamburg, *Recht der Internationalen Wirtschaft* (1996) 766; and many more.
73. Accord in regard of Art. 1(1)(a) of the CISG Janssen and Spilker, *supra* n. 38 at 137; Petrochilos, *supra* n. 9 at 195; Schwenzer and Hachem, *supra* n. 38 para. 21; but see in regard of Art. 1(1)(b) of the CISG Janssen and Spilker, *supra* n. 38 at 139; Kröll, *supra* n. 15 at 64–65.
74. See on the application of various conventions Giardina, *supra* n. 6 at 467 et seq.; on the application of the 1980 Vienna Sales Convention Kröll, *supra* n. 15 at 61 et seq.; Mourre, *supra* n. 9 at 43 et seq.; Petrochilos, *supra* n. 9 at 196 et seq.
75. Loukas Mistelis, 'CISG and Arbitration', in André Janssen and Olaf Meyer (eds.), *CISG Methodology* (Sellier 2009) 375, 382.
76. According to Mistelis, *supra* n. 75 at 388, in 57% of published arbitral awards applying the CISG the Convention was applied as choice of the arbitral tribunal.

§29.05 DUTY OF STATE COURTS TO APPLY INTERNATIONAL CONVENTIONS WHEN REVIEWING ARBITRAL AWARDS?

A final question concerns setting-aside or enforcement procedures in state courts. In such a context, courts – that, when located in Contracting States of an international convention, are under an obligation to apply its rules – are called upon to decide whether to set aside an arbitral award or to declare it enforceable. Assuming that the arbitral tribunal at hand has failed to apply an applicable convention in making the award, may or must the state court take this factor into account?

[A] Perspective of Arbitration Law

The question is important because under modern laws on arbitration, state courts generally have no authority to vacate an arbitral award or refuse its enforcement because the arbitral tribunal has failed to apply a convention in deciding the merits of the dispute. Such a degree of scrutiny is considered a *révision au fond* that arbitration laws do not allow,[77] irrespective whether the substantive law misapplied were provisions of an international convention. It is a more difficult question whether the non-application of a convention by an arbitral tribunal even escapes the control by state courts where the parties had explicitly chosen the convention as the applicable law: While some read the ground for refusing enforcement in Article V(1)(d) of the 1958 New York Convention – that 'the arbitral procedure was not in accordance with the agreement of the parties' – as not covering violations of party choices about the law to be applied to the merits,[78] others consider it a ground for refusal when the arbitrator has ignored the parties' choice of law by applying a different substantive law than the one chosen.[79] The dispute is interesting because provisions like Article 33 of the CMR,[80] which require the arbitration agreement to explicitly provide that 'the tribunal shall apply this Convention', were apparently so designed in order to ensure that an award may be set aside if the arbitral tribunal fails to apply the CMR.[81] Under current arbitration laws, this goal is not necessarily reached – a result that may be explained by the developments in the law of arbitration since the adoption of the CMR in 1956, when not even the 1958 New York Convention yet existed.

[B] Compatibility with Treaty Law

From the treaty law perspective, it could theoretically be argued that a state court's obligation to apply a convention also extends to setting-aside or enforcement

77. Fouchard Gaillard Goldman, *supra* n. 67 at paras 661 et seq., 688; Waincymer, *supra* n. 17 at 1264.
78. Fouchard Gaillard Goldman, *supra* n. 67 at paras 1701 et seq.
79. Christian Borris and Rudolf Hennecke, 'Article V', in Wolff, *supra* n. 32 para. 337; Kröll, *supra* n. 15 at 65.
80. *Supra* at §29.02[B][2].
81. Loewe, *supra* n. 40 at para. 271: '… probably admitted under all national legislations on arbitral procedure …'; Loewe, *supra* n. 44 at 319; in agreement Clarke, *supra* n. 40 at para. 47.

procedures in that court, as such procedures are nowhere expressly excluded from a Contracting State's application duty. In addition, it could be said that by allowing arbitral tribunals to decide disputes falling into the substantive scope of international conventions, a state merely suspends the performance of its own application duty until the setting-aside or enforcement stage, but cannot completely neglect it.

However, these arguments must fail, because they overextend a state party's obligations arising from uniform law conventions. Given that – according to the reasoning developed earlier[82] – international conventions of this type implicitly respect arbitration's autonomy as a private dispute settlement mechanism, it would be contradictory to measure the results of this mechanism (the awards) against a standard designed for state courts. An exception only applies to European Union law, in respect of which the ECJ has ruled in *Nordsee*[83] and *Eco Swiss*[84] that, where questions of European law arise in an arbitration, ordinary courts may have to examine those questions during review of the arbitration award or upon any other form of action or review available under the relevant national legislation. This stricter standard of review has its roots in the particularities of the EC/EU Treaties that 'by contrast with ordinary international treaties' have created their 'own legal system'.[85] The resulting division of tasks shifts responsibility for the review downstream, namely to the courts in EU Member States, rather than upstream, to arbitral tribunals.[86] It exceptionally requires courts to second-guess arbitrators' application of fundamental provisions of the TFEU,[87] but is not capable of being extended to 'ordinary' uniform law conventions.

§29.06 CONCLUSION

In conclusion, it can be confirmed that arbitrators are indeed under a duty to apply international conventions in deciding the merits of the disputes presented to them. However, this duty does not flow from the respective conventions themselves, because these are addressed merely to state courts as organs of a convention's state parties. International conventions, being treaties under public international law, implicitly tolerate and respect arbitral tribunals and their nature as private institutions. An arbitrator's duty to apply conventions is therefore a duty created and designed by the parties through their arbitration agreement, either directly (by choosing a convention

82. *Supra* at §29.02[C].
83. European Court of Justice, Case 102/81 – *Nordsee v. Reederei Mond*, *European Court Reports* (1982) 1095 para. 14.
84. European Court of Justice, *supra* n. 52 at para. 32.
85. European Court of Justice, *supra* n. 49 at 593.
86. Advocate General Wathelet, Opinion in Case C-567/14 – *Genentech v. Hoechst*, ECLI: EU:C:2016:177 para. 60.
87. See recently European Court of Justice, Case C-567/14 – *Genentech v. Hoechst*, ECLI: EU:C:2016:526, where the interpretation of Art. 101 of the TFEU by the sole arbitrator was confirmed.

as the applicable law) or indirectly (by vesting the arbitral tribunal with determining the rules of law applicable to the merits). For arbitrators, treaty application is accordingly only mandatory if the legal arbitration framework says so, resulting in a peaceful coexistence of treaty law and arbitration practice.