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The Problem of Applicable Law in the Contractual Relations between International Organizations and Private Parties

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11.1 INTRODUCTION

While the aspired goals of international organizations remain as diverse as they have ever been, the way they go about achieving their aims is strikingly more uniform from a legal standpoint. They buy, and occasionally sell, things to help fulfill their missions; they sign rental or loan agreements; they enter into employment contracts with their staff. In short, they generally employ all the familiar legal tools that one would expect a legal person to do. And yet, there is often an impression that interactions between international organizations and private parties take place outside any legal order, in a peculiar legal void of sorts. Solidifying this impression, most international organizations seldom include clauses on applicable law in their contracts. Even when they do, the question remains as to what the legal basis for such a choice would be. Revisiting this old analytical tangle, this chapter's ambition is to chart the legal space in which interactions between organizations and private parties register, a space seemingly in-between the national and the international. To this end, this chapter seeks to unpack the legal issues surrounding the law applicable in contractual relations between international institutions and their counterparties.

Contrary to the many, and valuable in their own regard, studies that examine this problem in the practice of international organizations, the idea here is to approach the topic from first principles.[1] Accordingly, this chapter

[1] For some classic works in that regard, see C. W. Jenks, *The Proper Law of International Organization* (Oceana, 1962); F. A. Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 *British Yearbook of International Law* 34; H. Batiffol,

asks how we can understand the problem by (re-)introducing to the debate first-order concepts of private international law and legal theory, rather than provide new empirical evidence as to how international organizations actually deal with this problem in their usual order of business. Drawing connections with existing puzzles, the aim here is to abstract, wherever necessary, from the presumed idiosyncrasies of international organizations, and to underline them, wherever they matter. Owing to the length of this chapter as well as the complexity at stake, the aim is to lay the issues out in the open rather than to conclusively resolve them, even though ideally a problem well-stated is a problem half-solved.

Where to start then? Part of the ambiguity surrounding the problem turns to lingering impressions that the problem of applicable law in the contractual relations of international organizations and private parties merits special treatment in at least two ways.

The first claim to special treatment draws on the lingering assumption that international organizations are indeed themselves "special" legal subjects, meaning that their "nature" should justify a different set of considerations than those that would normally apply to other legal entities. Typical examples of this are the perceived need for international institutions to be impartial actors above their members, or the idea that they are entities that operate beyond the reach of national jurisdictions. This is sometimes interpreted as suggesting that normal rules of private international law do not apply to them, especially when these lead to the application of some national law. Questioning the analytical import of these considerations, this chapter argues that the problem need not always be handled separately from that of states contracting with private parties.

A second claim to special treatment boils down to the idea that there is something inherent in the legal set up of an international organization that justifies differentiating between the various contractual relations that it partakes in. Various criteria, and resulting classifications, have been produced throughout the years, generally leading back to the idea that international organizations are set apart from other subjects, and most importantly states, by the special mission or function that they are mandated to perform. This has led some to argue that contracts are closely related to the organizations'

Problèmes des contrats privés internationaux (Association des Études Internationales, 1962); N. Valticos, 'Les contrats conclus par les organisations internationales avec des personnes privées. Rapport provisoire' (1977) 57 *Annuaire de l'Institut de droit international* 6; F. Seyersted, *Common Law of International Organizations* (Martinus Nijhoff, 2008).

function or employment contracts are to be treated differently than other types of contracts, such as, for example, the buying of stationary equipment.

Here the question lies primarily with the justification for such potentially different treatment: is it due to the particular relationship between an organization and the functions that it has been entrusted with carrying out? Or can it be explained on the basis of how more general principles and standards of private international law are to be applied in concrete cases? The chapter at hand gravitates toward the second line of approach. While theoretically one can find justifications for different treatment hardwired in an organization's constitution, most of what happens can be explained on the basis of applying, if somewhat creatively, what may otherwise appear as relatively mundane, classic notions of private international law.

Aiming to unpack these two claims to special treatment and work toward an overall clarification of the problem, this chapter proceeds as follows. Section 11.2 provides a general outline of the ideas of applicable law and party autonomy, which are normally at the epicenter of any conflict of laws analysis. This leads to two further questions which are tackled in Sections 11.3 and 11.4. Thus, Section 11.3 discusses whether international organizations and their contractual partners are free to choose the law that is to apply to their contracts. Section 11.4 explores what law should apply when international organizations do not exercise their freedom to choose the applicable law, or when that freedom is exercised beyond its recognized limits.

Before moving forward, a caveat is in order regarding the value of the practice of the organizations themselves in relation to the questions at hand. In certain cases, practice is important for a doctrinal analysis, especially if one considers the role it performs for the formation of customary international law. For example, some authors have suggested that party autonomy now enjoys customary status in public international law.[2] Naturally, this could be relevant to a discussion such as ours.

But things get more complicated when considering the practice of international organizations as such. First, there is the question of whether that practice counts toward the formation of new norms of customary international law. Even if we are inclined to count it as such, and probably rightly so, there is the question regarding the standard against which that practice is to be weighed. If, for example, the conclusion is that international organizations do

[2] For a discussion, see A. Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018). See also A. F. Lowenfeld, 'International Litigation and the Quest for Reasonableness' (1994) 245 *Recueil de Cours* 1, 256; P. E. Nygh, *Autonomy in International Contracts* (Oxford University Press, 1999), 45.

not merit special treatment from states, or even contractual partners in general, then the practice of these institutions, even assuming that it was uniform, would be but a small drop in the ocean of state practice in that regard. Hence, it would seem that the relevance of this kind of practice is a second-order problem. Third, international organizations' practice in this field appears in fact too fragmented and often too obscure to extract general guidance from it. Finally, practice can only be relevant according to its own terms. For example, a well-established practice by certain international organizations to not include provisions on applicable law in their contracts tends to beg the question rather than answer it. All this hardly means that the practice of international organizations is inconsequential for what is examined here; it just goes to show that it needs to be put into the proper perspective.

11.2 OVERVIEW: APPLICABLE LAW AND PARTY AUTONOMY IN CONTEXT

11.2.1 *Applicable Law and Related Concepts*

The idea of applicable law refers to the laws or set of rules that are supposed to govern a legal relation. But how can we conceptualize this link between a particular body of law to a given legal relation? Standard private international law theory provides two possible answers.[3]

The first is that pairing a legal relation, including a contract, to a body of applicable law occurs through an exercise of state authority. Amongst international lawyers this is also known as part of exercising a state's so-called prescriptive jurisdiction. From this angle, the question posed is "which jurisdiction can claim that its laws govern this contract?" Often this inquiry has no single or straightforward answer. Multiple jurisdictions may have competing claims, making it unclear whose would prevail from a (real or imagined) objective point of view.

The second theory is that, at least when it comes to contracts, the source of the link between a given legal relation and a set of rules is, in the first instance, the choice made by the parties themselves. This theory is not to be confused with the idea that national jurisdictions (or, in certain cases, rules of international law) may recognize the validity of party choice. In those cases, one could argue that party choice is effective *because* it is recognized by state power. By contrast, this theory suggests that this relationship is flipped, and

[3] J. Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Martinus Nijhoff, 2015), 115ff.

that party choice is grounded on some perceived natural capacity of individuals to determine the law applicable to them regardless of the confines of any particular legal system.[4]

While resolving this theoretical debate between these two schools of thought is beyond the ambition of this chapter, it is worth noting that they are not necessarily incompatible in terms of legal outcome when viewed from an objective point of view. Just as the claim of a state that its national laws should govern a given legal relation may or may not be recognized and given effect in the courts of another state, so the claim to a natural right of choosing the applicable law may or may not be denied from the perspective of a particular legal order. In both cases, the source of the claim to have a particular law apply remains theoretically intact, and in a way out of reach; it is rather that the effects of that source may or may not be recognized as valid within another legal order.

Thus, the idea of applicable law is inherently related to the concept of power, and the limits thereof, be that the power of a state to have its laws apply to a given situation or that of a party to a contractual relation to choose those rules for itself. This makes the concept of applicable law distinguishable from two related ideas: incorporation of contractual terms by reference and choice of forum.

The former concerns the case where the parties to a contract elect to include into their contract a provision to the effect that certain rules are incorporated by reference as terms of the contract. This is essentially a shorthand for drafting terms into the contract, equivalent to cutting and pasting the incorporated rules into the contract. Incorporation by reference is thus an expression of the capacity of the contractual partners to determine the contents of their contract (also known as contractual autonomy) rather than their decision to anchor it to a specific legal order. As just discussed, the latter is a manifestation of party autonomy, a concept closely related but distinct from contractual autonomy.[5] This is important to note as standard contracts of international organizations with private parties frequently include substantive references to all sorts of laws and regulations, including those of the international organization itself. When this happens, these references do not constitute "applicable law" in the sense of private international law, but rather incorporations by reference.[6]

[4] Ibid., 125.
[5] Mills, *Party Autonomy*, 23ff.
[6] Cf E. Morlino, *Procurement by International Organizations: A Global Administrative Law Perspective* (Cambridge University Press, 2019), 279.

Choice of forum on the other hand is an expression of party autonomy and reflects the parties' choice of a forum for submitting potential disputes arising out of their contract. In practice, choices of forum in international organizations' contracts with private parties are much more common than express provisions on applicable law. It is worth noting in this regard that choice of forum and choice of applicable law are independent and may thus differ;[7] parties' choice of a forum need not necessarily be aligned with their choice of law and vice versa. Moreover, in this case too, the link between dispute and forum can be conceptualized along state-sovereignty or voluntarist lines. In the first case, the link is an expression of adjudicative jurisdiction; in the latter, it is a fundamental prerogative of the parties to choose a forum.

To sum up, party autonomy to choose the law applicable to a contract is a concept distinct from, even if related to, choice of contractual terms and choice of forum. The older theory is that party autonomy in this sense is derivative from national jurisdiction, meaning that it is effective only when a legal order recognizes it as having the power to determine the applicable law.[8] There are, however, those who argue that party autonomy in choosing applicable law is a "natural" prerogative, at least when it comes to contracts.

11.2.2 *Limits of the Classic Debate*

While in practice express choice of law agreements are given effect under the law of most states,[9] it is not hard to notice that the general theoretical outline of applicable law and party autonomy has been constructed with entities other than international organizations in mind. One could argue that, even if only state authority can effectively recognize party autonomy to choose applicable law, this is of little concern to such creatures as international organizations, who are supposed to hover above the national jurisdictions of states, and especially their member states. A similar reaction may be prompted by the idea that a contract must necessarily be anchored to a national, and thus state, law (and jurisdiction), where "state" refers to a territorial legal order.[10] This goes back to a dictum of the Permanent Court of International Justice (PCIJ)

[7] Although inferences about choice of law may be drawn from the choice of a forum. See Seyersted, *Common Law*, 478; Ph Sands and P. Klein, *Bowett's Law of International Institutions*, 6th ed. (Sweet & Maxwell, 2009), 369.

[8] As already noted within this section, there are some who argue that party autonomy is a rule of customary international law. In that sense, however, it would still be derivative or "granted" by the law, even if that law was international in nature.

[9] Mills, *Party Autonomy*, 313.

[10] Ibid., 496.

in the *Serbian Loans* case that "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[11] And yet, the reader may be familiar with other concepts of law that go beyond the state, most notably the idea of *lex mercatoria*. A debate endures in private international law scholarship as to whether non-state law may indeed be the law applicable to a given contract. The subject is potentially of heightened relevance for international organizations, institutions that in practice often choose some form of non-municipal law when they do include choice of law provisions in their contracts. In short, our theories of private international law have not necessarily been crafted with subjects such as international organizations in mind. The question then becomes whether we can bridge that gap by revisiting the fundamental premises that underpin our analyses of contracts concluded between states and private entities, or even between private entities as such.[12]

11.3 INTERNATIONAL ORGANIZATIONS' "RIGHT" TO PARTY AUTONOMY?

11.3.1 *The Idea of a "Right" to Party Autonomy*

In order to make sense of this conceptual landscape in relation to international organizations, we need to disambiguate the very notion of party autonomy in choosing the applicable law. Is party autonomy, as often referred to, really a "right," or is it analytically more accurate to describe it as something else?

The classic Hohfeldian analysis of the concept of "right"[13] into four fundamental legal conceptions and their correlatives can be instructive in that regard. As is well-known, Hohfeld drew a key distinction between privilege, power, right, and immunity. A privilege denotes the freedom or liberty to do something, without anyone having a corresponding duty to accommodate it. For example, I am at liberty to pick up a five-euro bill that I see lying on the pavement, but others do not have a duty to not take it themselves. By contrast,

[11] *Serbian Loans Case* (France v Yugoslavia), [1929] Publ. PCIJ Ser. A, No. 20, 41. Or, as the classic decision of the House of Lords in *Amid Rasheed Shipping Corporation Kuwait Insurance Co.* put it: "contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law ..." [1984] AC, 65 (Lord Diplock).

[12] See also Mann, 'The Proper Law of Contracts', 46.

[13] W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913–14) 23 *Yale Law Journal* 16.

a right refers to an entitlement that corresponds to a duty of another entity. For instance, if it is my money that falls from my pocket, I have a *right* to get it and others have a duty not to take it. The third relevant concept is that of a power, that is the recognized capacity of an entity to change its legal entitlements. Someone's power corresponds to another's liability to have their legal entitlements changed. Think, for example, of the captain of a commercial flight ordering the crew and passengers to wear their seatbelts; the captain's order changes the normative situation for the crew and passengers by imposing a new duty on them, namely, to wear their seatbelts. Finally, immunity is one's freedom from the legal power or "control" of another with respect to a given legal relation. A classic example is the immunity from enforcement that states enjoy from domestic courts of other states.

When thinking about party autonomy of contractual partners, including international organizations, we should be careful to distinguish what is in fact more accurately described as a bundle of privileges, rights, and powers. In one sense, party autonomy could be seen as belonging to a category of "natural" liberties; anyone is theoretically free to write down whatever applicable law they prefer on a piece of paper. The question is whether there is a recognized power to do so, and by whom this might need to be recognized. In the absence of a specific treaty providing so[14] or a recognized rule of customary international law,[15] the answer to that question must be sought in the confines of the jurisdiction within which the problem arises. The takeaway here is that, while international organizations and their contractual partners have a general freedom to choose the law applicable to their contract, this does not necessarily correspond to a recognized, let alone "inherent," power or right to do so. In the absence of rules of international law to that effect, recognition of a

[14] See, e.g. Article 3 Rome I Regulation, that provides that "A contract shall be governed by the law chosen by the parties … [b]y their choice the parties can select the law applicable to the whole or to part only of the contract … [t]he parties may at any time agree to subject the contract to a law other than that which previously governed it"; See also the 1994 Mexico Inter-American Convention on the Law Applicable to International Contracts that provides in Article 7 that "[t]he contract shall be governed by the law chosen by the parties" and in Article 8 that "[t]he parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties." The conceptualization of the rights of the parties to choose the law applicable as a Hohfeldian power, that is as a recognized capacity to change their legal entitlements, does not mean that there might not be limitations imposed on the exercise of that power. For example, Article 3(2) of the Rome I Regulation provides that "[a]ny change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties."

[15] Even in those cases one could question whether these instruments create an individual entitlement as opposed to certain obligations between states.

choice of applicable law will always be relative to the forum that is called upon to decide on this question. Outside of the courts set up by organizations themselves, this forum could theoretically be a national court or an arbitral tribunal.

11.4 PARTY AUTONOMY BEFORE NATIONAL COURTS

The immunities that international organizations enjoy under international law will most often shield them in practice from appearing before national courts, but not as a matter of course from the validly exercised prescriptive jurisdiction by the state in question. The latter does not appear to contain any exception specifically regarding international organizations. This is important as, despite immunities from adjudicative jurisdiction, there are various scenarios where national courts may end up exercising jurisdiction over cases in which one of the litigants is an international organization,[16] including when an international organization itself sues a private party for non-fulfillment of a contractual obligation.[17]

Although rare, these instances pose interesting theoretical questions. National jurisdictions will most often grant a power to determine the applicable law to contractual partners. Yet, they will frequently also pose limitations or exceptions to that power.[18] For example, many legal orders impose subject matter limits to party autonomy relating to consumer, employment, or real estate contracts.[19] Others require that the law chosen by the parties must have an objective connection to their relationship[20] or reserve some safety net of public policy exceptions that apply regardless of choice of law.[21] The question here is whether there is a special reason, by virtue of one party to the contract being an international organization, that would signify a departure from the application of a states' standard rules of private international law, or at least their interpretation.

Assuming that there is no general customary rule on party autonomy as a limit to prescriptive jurisdiction, one such reason could be a member state's

[16] For studies on this, see A. Reinisch, *International Organizations before National Courts* (Cambridge University Press, 2000); A. Reinisch (ed.), *Challenging the Acts of International Organizations before National Courts* (Oxford University Press, 2010).

[17] See, e.g. K. Schmalenbach, 'Challenging Decisions of the European Schools before National Courts', in A. Reinisch (ed.), *Challenging the Acts of International Organizations before National Courts* (Oxford University Press, 2010), 178.

[18] See, e.g. Mills, *Party Autonomy*, 455–520.

[19] See, e.g. Rome I regulation.

[20] See Mills, *Party Autonomy*, 360ff.

[21] Ibid., 486ff.

obligation to recognize the independence of the organization. Several international organizations scholars have brought up similar reservations, especially in earlier studies of this topic. But here the parallel with states may put this problem into a better perspective. Just as the application of local law to a contract between an embassy of a state and a local cleaning contractor is not generally thought of as infringing upon that state's independence or makes it any less sovereign, in the same manner the application of national law does not appear to *ipso facto* render the organization any less independent. In fact, international organizations often choose national law as the applicable law to their contracts.[22] That choice generally seems to be based on the national law of the place where the contract is to be carried out.[23] There may of course be good policy reasons for those organizations to maintain the appearance that no national law is preferred over another, especially in high profile cases. Yet, as a matter of principle, there seems to be no reason to distinguish between states and international organizations in that regard. Again, concerns for operational independence (or the appearance thereof) may affect the choice of applicable law at an internal level, but neither the choice of a particular national law nor its application regardless of a choice to the contrary automatically undoes the institution's formal independence.

The question then becomes one of interpreting the obligations of a state as a member of an organization as these emanate from the latter's constituent instrument. Naturally, here the answer will depend on the constitution involved. It is possible to imagine that certain member state obligations, for example to "give every assistance in any action"[24] that an organization takes, could entail recognizing the latter's party autonomy when it comes to choosing applicable law, especially in relation to contracts that bear an elevated relation to the organization's mission. Nevertheless, this would in reality constitute a separate argument regarding the interpretation of the specific treaty in question, instead of being the default position for all international organizations regardless of circumstances.

There are two more potential complications regarding party autonomy and applicable law that may be seen as peculiar to international organizations. The first is that some provisions of private international law are not easily translatable to these institutions. Take, for example, article 8 of the Rome I Regulation that deals with employment contracts. According to

[22] Valticos, 'Rapport provisoire', 30.
[23] Sands and Klein, *Bowett's Law*, 369.
[24] See ,e.g. article 2(5) of the UN Charter: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter . . ."

paragraph 1 of that article, party choice can be disregarded when it derogates from the protection of the law that would otherwise be applicable to an employment contract. Paragraph 2 provides that employment contracts are "governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract"; paragraph 3 continues that, where the applicable law "cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated"; and paragraph 4 concludes that "[w]here it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply."

Could such wording (and the similar wording that is often found in domestic conflict of laws provisions) accommodate the application of an organization's internal regulations when it comes to employment contracts? One could plausibly maintain that an analogy could be drawn here between "country" and "international organization,"[25] and that, even though international organizations may not enjoy a spatial dimension, in the sense of a distinct territory from where the employee carries out their work, such an employment contract would seem to be "more closely connected" (to borrow Rome I's language) to the international organization than to any country. This end-result may seem only natural to scholars of international organizations, but there indeed have been cases relating to employment contracts with international organizations where national courts have applied national law.[26]

A second reason why party autonomy may stumble in practice before a national court is a choice of non-state law as the applicable law. Traditionally domestic jurisdictions have shied away from recognizing the validity of such choices, the assumption being (at least from their perspective) that any contract has to be governed by the law of a state.[27] Although this received position has not been entirely uncontested over the years,[28] it still holds true for major jurisdictions, such as China, most of the United States, and Europe,

[25] For the conceptual justification of such an analogy, see F. L. Bordin, *The Analogy between States and International Organisations* (Cambridge University Press, 2018).

[26] E.g. Schmalenbach, 'Challenging Decisions of the European Schools', 178.

[27] Mills, *Party Autonomy*, 496. See also *Serbian Loans Case*.

[28] See, e.g. Hague Principles on Choice of Law in International Commercial Contracts 2015, whose article 3 states that: "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 and balanced set of rules, unless the law of the forum provides otherwise" (the Hague Principles were prepared by an expert group rather than government representatives, although they were later approved by the Hague Conference on Private International Law).

including where the Rome I Regulation or the older Rome Convention apply.[29] This is potentially important for international organizations when they choose non-state law to govern their contracts. Such non-state law typically includes "general principles of law,"[30] "general principles of international commercial law,"[31] or models laws such as those of UNCITRAL.[32] It would be hard to imagine a national court applying such non-state law when it would otherwise not, just because one of the contractual partners is an international organization.

11.5 PARTY AUTONOMY BEFORE AN ARBITRAL TRIBUNAL

Such complications regarding party autonomy in choosing applicable law are hardly relevant when the dispute is led before an arbitral tribunal. This is important in practice as, in most cases, contracts between international organizations and private parties will have an international arbitral tribunal as the designated forum for dispute resolution. The difference with national courts at this point is that party choices of applicable law are invariably accepted and honored by arbitral tribunals.[33] The current prevalent theories about arbitration suggest that arbitrators are inherently obligated to apply the law chosen by the parties as their authority is itself contractual.[34] In turn, the contract that gives rise to the authority of the tribunal need not, from the perspective of the

[29] See generally, Mills, *Party Autonomy*, 499–511; the prevalent academic and judicial view is that this limits the scope of the Rome Convention to only national legal systems, excluding international law. For the Rome Convention, see e.g. A. Briggs, *The Conflict of Laws* (Clarendon Press, 2002), 159; for the Rome I Regulation, see O. Lando and P. A. Nielson, 'The Rome I Regulation' (2008) 45 *Common Market Law Review* 1687. See also H. Dang, 'The Applicability of International Law as Governing Law of State Contracts' (2010) 17 *Australian International Law Journal* 133, 137–140.

[30] Valticos, 'Rapport provisoire'. See, e.g., the general terms and conditions of the FAO on applicable law: "[n]otwithstanding any specific provision herein, this Contract and any disputes arising therefrom shall be governed by general principles of law, to the exclusion of any single national system of law."

[31] See, e.g. the general terms and conditions of UNRWA, which provide that "[t]he decisions of the arbitral tribunal shall be based on general principles of international commercial law."

[32] See, e.g. International Fund for Agricultural Development, General Terms and Conditions for the Procurement of Goods, para. 32. Generally, see K.-H. Böckstiegel, 'The Application of the UNIDROIT Principles to Contracts Involving States or Intergovernmental Organizations', in Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration (ICC, 2002), 52–53, who identifies at least five different alternatives (national law with a stabilization clause; general principles of law; public international law; *lex mercatoria* and trade usages; UNIDROIT principles).

[33] B. Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, 2017), 13–14; Mills, *Party Autonomy*, 277.

[34] Mills, *Party Autonomy*, 512.

tribunal, be anchored to any system of *national* law so long as it reflects an exercise of autonomy pursuant to transnational standards.[35] In that sense, it is almost as if arbitration forms a closed system that can exist (in practice, if not in theory) "off the grid" of municipal laws that was envisaged in *Serbian Loans*.[36]

The consequence of this deference is a widespread readiness on behalf of arbitrators to accept any party choice, including non-state law, as the applicable law.[37] This is important for international organizations that, as mentioned, often choose non-national laws to govern their contracts. Whether these alternative sources qualify as "laws" is in a sense beyond the point, so long as arbitrators are prepared to treat them as such for the purposes of resolving particular disputes.

Although most of the arbitral practice involving international organizations remains unpublished due to confidentiality restrictions, there have apparently been instances where, following party agreement, non-state law has been applied. For example, Karl-Heinz Böckstiegel refers to a case of ad hoc arbitration under the UNCITRAL Arbitration Rules where Canadian claimants instituted proceedings against the United Nations (UN) with respect to claims arising out of the transport of its personnel around the globe. During the proceedings the two parties agreed that "generally accepted principles of international commercial law" were to be applied, informed by the UNIDROIT Principles. According to Böckstiegel, this was accepted by the tribunal that relied on the UNIDROIT Principles in order to define the generally accepted principles of commercial law under which it would interpret the contract.[38]

[35] Ibid., 278; E. Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010), 35. Gaillard suggests that this view "is based on the consensus existing among States on this matter rather than on the isolated will of a given sovereign to accept the existence of this private means of dispute resolution."

[36] This is not to say that this development is altogether positive. As Horatia Muir Watt has critically remarked, international commercial arbitration "has now established itself as a largely auto-poetic, parallel, world of private justice, supposedly secreted by a self-regulating transnational merchant community." H. Muir Watt, '"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 6 *European Review of Contract Law* 250, 254. There is, of course, still the view that international commercial arbitration must be grounded in some national jurisdiction, which in practice is that of the seat of the arbitration. See F. A. Mann, 'State Contracts and International Arbitration' (1967) 42 *British Yearbook of International Law* 1.

[37] See, e.g. ICC Arbitration Rules 2017, article 21; UNCITRAL Rules on International Commercial Arbitration, article 33; UNCITRAL Model Law on International Commercial Arbitration, article 28; 1961 European Arbitration Rules, article VII.

[38] Böckstiegel, 'The Application of the UNIDROIT Principles', 54.

11.6 APPLICABLE LAW IN THE ABSENCE OF A CHOICE BY THE PARTIES

While party choice of applicable law poses interesting theoretical questions, in practice many, if not most, contracts concluded by international organizations include no reference to any applicable law whatsoever. This was the chief finding of the empirical study conducted by the Institut de Droit International in the 1970s,[39] and still appears to hold true, especially among the UN family of organizations.[40] As already mentioned, the absence of such choice may reflect the organization's willingness to appear as equidistant from the national jurisdictions of its member states or even a genuine hesitation of predisposing a thorny question. Regardless of the reasoning behind this, the fact remains that, apparently, most contracts concluded by international organizations and private parties contain no provisions on applicable law.

A way out of this silence can be trying to infer the tacit intention of the parties. Yet, this often proves problematic in practice, as have been attempts to come up with objective criteria to that effect, including in relation specifically to contracts concluded by international organizations.[41] The most classic criterion put forward, namely that party selection of the seat of arbitral proceedings also implies party choice of law, has increasingly been recognized as "irrational and inaccurate."[42] It seems in that regard that absent an actual agreement or positive evidence of the concurrent intentions of the parties, this automatic presumption is generally not accepted.[43] This would be especially relevant to international organizations, were most often there is a complete silence regarding the question of applicable law.[44] Indeed, this does not leave much space for inferences of party intentions to be drawn.[45] What is more, in the case of some organizations there seems to be a conscious choice to *not* predetermine the applicable law.

Given that in most cases of contractual disputes between international organizations and private parties there is no provision on applicable law, the question arises as to what law is to be applied. This is a question that is difficult

[39] Valticos, 'Rapport provisoire'.
[40] Morlino, *Procurement by International Organizations*, 278.
[41] Valticos, 'Rapport provisoire', 55–64.
[42] J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003), 412, 415–416.
[43] Gary Born, *International Commercial Arbitration* (Kluwer, 2014), 2636.
[44] Seyersted, *Common Law*, 485; when a reference is made, it is sometimes to general principles of law, but more frequently to domestic law; see also the empirical study carried out by the Institut in 1979. See Valticos, 'Rapport provisoire', 36.
[45] Born, *International Commercial Arbitration*.

to answer in the abstract. National fora will naturally apply domestic conflicts rules to determine the applicable law (provided that they have jurisdiction to hear a case involving an international organization). Arbitration also holds an endless world of possibilities depending on the specific stipulation on applicable law contained in the relevant rules setting up the dispute settlement procedures that have been agreed upon by the parties.

Dispute settlement bodies that have been set up by international organizations, of course, stand apart here. Normally these enjoy jurisdiction in relation to disputes that may arise between the organizations and their employees regarding their contracts of employment and terms of appointment. The UNIDROIT Administrative Tribunal stands out in this regard because it has jurisdiction to also hear claims arising from contractual claims with third parties, provided that they have consented to the tribunal's jurisdiction. According to the organization's statute, the Tribunal shall decide cases "by applying the provisions of the Statute and of the Regulations as well as the general principles of law" (article 7*bis*). This is an interesting provision insofar as it minimizes discretion in identifying the applicable law and excludes on its face national as well as international law. Other administrative tribunals have a much more limited jurisdiction than this, a factor that significantly narrows the rules of law that they are called upon to apply. Institutions such as the ILO Administrative Tribunal or the UN Administrative Tribunal are not tribunals of general competence in relation to potential claims under national labor laws; they only have jurisdiction to hear complaints on the nonobservance of contracts of employment of staff members or of the terms of appointment of such staff members.[46]

In practice, apart from rare cases such as the UNIDROIT's Administrative Tribunal, most instances involving contracts with third parties that include a choice of forum, will designate third-party arbitration for the settlement of potential disputes. Here again, things will invariably turn to the rules of procedure of the relevant body entrusted with setting up the arbitration.[47] The almost countless variations of provisions on applicable law in this respect can be abstracted into two broad categories: the *voie indirecte* and the *voie directe* (the "indirect" and "direct" path).[48] The *voie indirecte* means that the relevant provision entrusts the arbitrator to apply conflicts of laws rules in

[46] See UNAT Statute article 2; ILOAT Statute article II. This cannot exclude theoretically the need for applying supplementary rules, relating for example to the capacity to conclude a contract or its interpretation.

[47] Arbitral tribunals are generally not under an obligation to apply the conflicts rules of the state in which their seat is located.

[48] Generally, see Hayward, *The Closest Connection Test*, 2.22ff.

order to identify the governing law. The *voie directe* means that the arbitrator can directly choose the law that is to apply in a certain case. Both "paths" have a restricted and an unrestricted variant, whereby the choice of the arbitrator is or is not subject to limitations.

The *voie directe* is by far the most prevalent way of dealing with the problem of applicable law in arbitral practice.[49] A popular formulation of this "direct path" is that the arbitrator shall apply "the rules that he or she determines appropriate" or "applicable." Similar formulations exist in the provisions of the UNCITRAL Rules 2010, the AAA International Arbitration Rules 1991, the ICC Rules 2012, the SCC Rules 2010, and many others.[50] Considerably less prevalent are provisions that incorporate some conflict of laws test, perhaps the most notable case here being the Swiss Rules 2012 that stipulate that the arbitrator shall apply "[T]he rules of law with which the dispute has the closest connection."

The standard formulation of the *voie directe* has been criticized for being too wide and too open to arbitral discretion, and potentially to choices made arbitrarily or at least without proper, transparent reasoning.[51] Those valid criticisms notwithstanding, the standard does not seem particularly problematic when applied to international organizations. On the contrary, it might prove more accommodating to arbitrators seeking to go beyond national laws when that would seem necessary. The problem of course is that there is a cloud of mystery as to when exactly that would be "appropriate"; international organizations and their contractual partners defer the question to arbitrators, who in turn are faced with the same problem, even as they are equipped with a wide enough discretion to not have to hammer out a conflicts test of general application. This, coupled with the fact that most arbitral awards (including those involving international organizations) are confidential, means that we can only speculate as to what goes on when a choice of the "appropriate" applicable law is to be made. This result can only be unsatisfactory from a theoretical perspective.

On the flipside, the "closest connection" test, hardwired in the provisions on applicable law of some rules of arbitration as we have seen, seems more geared toward objectivity and predictability. Of course, the two are not incompatible; indeed, one can make the argument that it is "appropriate" to apply the law with the closest connection to a dispute.[52] The closest connection test is established enough in its application to help with standard contractual relations such as the rental of offices or the provision of supplies but

[49] Ibid., 2.49.

[50] For a fuller list, see ibid., 2.39.

[51] Ibid., 3.81-3.104; G. Cordero-Moss, 'International Arbitration and the Quest for the Applicable Law' (2008) 8 *Global Jurist* 42.

[52] Hayward, *The Closest Connection Test*, 5.01ff.

also suitably open ended to accommodate the peculiarities of international organizations, allowing for the possibility that, in certain cases, the rules most closely connected to a dispute are those of the organization. These could include, for example, staff or procurement rules and regulations.[53]

11.7 CONCLUSION

It was once said that the "realm of the conflict of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."[54] International organizations' law is also often described as a field, "richly filled with paradoxes,"[55] where the limits of analytical thought can be shown. Thus, the problem presented in the present chapter lies at the intersection of two challenging, if valuable, spheres of theory and scholarship. Every country has its own rules of private international law; every arbitral tribunal its own rules and provisions on how to decide disputes; and every international organization has its own practice in concluding contracts with third parties. Amongst this plethora of variables, the need to go back to first principles is a much-needed way forward, even as it might also be a demanding one.

Such an analysis, only presented here in its general outline, can help disambiguate the problem, and potentially yield new insights. As this chapter has argued, it can be misleading to simply assert that international organizations have a general and unqualified "right" to choose the law applicable to their contracts. They do, however, appear to have an inherent freedom to do so. The exercise of this freedom produces legal effects in a given legal order depending on the provisions of the latter (including any rules of international law that may apply). In practice, given the immunities that international organizations may enjoy from domestic jurisdiction, the forum will be either commercial arbitration or an international arbitral tribunal, both having their own provisions on applicable law.

[53] This could help rationalize distinctions drawn by authors between the various contracts signed by international organizations in terms of the law that should apply to them. See e.g., Jenks, *The Proper Law*, xxxv; Batiffol, *Problèmes*, 95.

[54] W. Prosser, 'Interstate Publication' (1952–53) 51 *Michigan Law Review* 959, 971.

[55] N. Blokker, 'International Organizations and Their Members' (2004) *International Organizations Law Review* 139, 161.