The Agreement to Arbitrate and the “Applicable Law”
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I. Introduction: The Notion of Party Autonomy

1. I begin with a tiresome chestnut: In any discussion of arbitration, “consent” must be the lodestar;¹ to require---and then to privilege---the presence of “consent,” and exercises of “agreement,”² is to treat contractual autonomy as “the factual, legal, and ideological core of international arbitration,” the “foundation stone of arbitration generally, and of international arbitration in particular.”³ Arbitration then is “the parties’ dream, and they can make it what they want it to be.”⁴
2. So at this point it would hardly be surprising if the very dimensions of the tribunal’s authority---just like any other term of the parties’ agreement---may often by contract be the subject of deliberate and elaborate tinkering. The “jurisdiction” of a tribunal can be carefully tailored to include certain types of future disputes and to exclude others, or potential disputes may be parceled out among different tribunals on the basis of a perceived comparative advantage. Issues otherwise reserved to courts may be “reallocated” through contractual “delegation” to the tribunal itself,⁵ or the tribunal entrusted with work (like the “making” of contracts) that spill far out of the “judicial” mold and that courts

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The present article is an expanded version of one lecture in a series of lectures given at the Hague Academy of International Law in August 2017; the general subject of the series is the “allocation of power between arbitral tribunals and national courts.” I have tried to minimize here any cross-references to any of the other lectures, but as these are intended to form an integrated whole, and as all will eventually be published together, this could not be avoided entirely.

¹ “a point so banal, so commonplace, so formulaic, that readers justifiably wince when they see it repeated,” Alan Scott Rau, “Consent” to *Arbitral Jurisdiction: Disputes with Non-signatories*, in Permanent Court of Arbitration (ed.), *Multiple Party Actions In International Arbitration* ¶¶ 3.03 (2009) [hereinafter Rau, “Consent”].

² For an dauntingly subtle attempt to distinguish between the two, see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* ¶¶ 1.24-1.26 (2008) (suggesting that the distinction may be relevant to the enforceability of a foreign judgment where the defendant has “consented” to adjudication by a foreign judge or where a losing plaintiff has himself asserted a claim in a foreign court; it may also be relevant to whether a contracting party may assert “a cause of action against his opposite number as a party in breach of an undertaking”).

³ Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* 78-79 (2013). (How many metaphors are there?).

⁴ Henry Hart & Albert Sacks, *The Legal Process* 310 (1994).

⁵ See, e.g., Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 *Amer. Rev. of Int’l Arb.* 435, 488 (2011) [hereinafter Rau, “Trilogy”]; Alan Scott Rau, *Arbitrating “Arbitrability,”* 7 *World Arb. & Med. Rev.* 487 (2013) [hereinafter Rau, “Arbitrating ‘Arbitrability’”].

would shrink from performing.⁶ Conversely, parties who wish to retain the benefits of private adjudication but find too many risks in its modal form, may seek to cabin the role of tribunals by limiting the binding force of awards, either in whole⁷ or in part.⁸ Such custom-tailored clauses are naturally more likely to appear where the transaction is substantial and the stakes higher, and are more likely to appear in a common-law context where both attorneys and judges perceive of the law as a living practice, a going institution, rather than “primarily as a text to be read.”⁹

3. Let me note in passing that none of this even remotely amounts

- to a claim that courts must “rigorously enforce” arbitration agreements with “minimal regulation by the state”¹⁰; nor

⁶ See, e.g., Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 Tex. Int’l L.J. 449, 473 (2005)[hereinafter Rau, “Culture”].

⁷ See id. at 467.

⁸ See Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 Amer. Rev. of Int’l Arb. 225 (1999)[hereinafter Rau, “Contracting Out”]; Alan Scott Rau, *Fear of Freedom*, 17 Amer. Rev. of Int’l Arb. 469 (2006)[hereinafter Rau, “Fear of Freedom”].

⁹ A.W.B. Simpson, *Stag-hunter and mole*, Times Literary Supplement, Feb. 11, 2005 (contrasting the civilian and common-law traditions).

¹⁰ And certainly not to a claim that they must be enforced “more stringently than other contracts,” “to a degree unknown in other contracting contexts.” Nevertheless this is how Professor Aragaki characterizes the current state of play of US jurisprudence; see Hiro Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote “Autonomy”?*, 92 Ind. L.J. 1144-46, 1161-62 (2016). Equally flawed for precisely the same reason are Lawrence A. Cunningham, *Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts (and Why Contracts Teachers Need Not Teach the Cases)*, 75 Law. & Contemp. Probs. 129 (2012)(the thesis is in the title); and Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531 (2014)(ditto; “courts have in fact distorted contract law by creating special rules for arbitration clauses that make them enforceable in situations where other contracts are not”).

Such claims hardly improve with age or repetition, and are grounded in some pretty fundamental misconceptions. They fail to bear in mind that:

- “Contract Law”---however static and homogenously abstract it might have seemed to 19th century courts---is in fact largely composed of “default rules” that are contextual, that is, that are designed to reflect *particularized determinations as to where the burden of proof should be placed (either in the interest of replicating hypothetical intentions or of handicapping disfavored contentions)*. That is, it is concrete and intensely context-dependent and context-sensitive.

But cf. nevertheless Cunningham, *supra* at 135, 139, with respect to the presumption of arbitrability (“the common law requires no such clarity” [in order to exclude a dispute from the scope of a contract]; and to the presumption of separability (“the common law of contracts warrants the opposite”); similarly, Professor Frankel seems to believe that the presumption of arbitrability impermissibly contravenes the “long-standing and well-settled contract rule that ambiguities in standard-form contractual terms should be interpreted against the drafting party,” *supra* at 555. But nothing is more exquisitely sensitive to context than what is usually referred to as the canon of *contra proferentem*---a rule of policy which “serves an openly redistributive function” “generally favoring the underdog”; “the one thing that the ‘rule’ is *not*, clearly, is an interpretive guide,” Alan Scott Rau, “*Gap Filling*” by Arbitrators, in *Legitimacy: Myths, Realities, Challenges* (ICCA Congress Ser.No. 18, 2015) at 935, fn. 154.

- Whatever form our ancient dichotomy between “law” and “equity” may have taken over the years, the fact that “specific performance” of arbitration agreements is made presumptively available as a remedy for an aggrieved proponent, reflects absolutely nothing other than a recognition that any

- to a claim that “consent” to arbitrate must be accompanied by some assertion of the individual will, some sort of subjective experience of insight and unfettered empowerment¹¹;
- nor, above all, to a claim that arbitration “really,” by its very nature, inherently, amounts to nothing more than an exercise in Contract: That would be to go far down the path of essentialism---often hard to resist, but like most conceptual inquiries reliably devoid of intellectual interest.¹²

alternative remedy for breach would be simply meaningless; see Alan Scott Rau et al., *Arbitration* (4th ed. 2006)(“While damages could in theory be awarded for breach of this contract, how could they possibly be calculated?”). But cf. Aragaki, *supra* at 1162.

- Nor can I begin to understand why the venerable body of state-generated common-law Contract should somehow be immune from supersession by a *federal common-law*, spun out of a federal statute in the interest of ensuring uniform rules that may affect national and international commerce.

¹¹ Which is the usual premise from which opposition to the use of arbitration in contracts of adhesion seems to proceed, see Alan Scott Rau, *Everything You Really Need to Know about “Separability” in Seventeen Simple Propositions*, 14 *Amer. Rev. of Int’l Arb.* 1, 8 (2003)[hereinafter Rau, “Separability”].

¹² See Adam Samuel, *International Problems in International Commercial Arbitration* 32-74 (1989): Canvassing various “theories of arbitration,” the author here concludes that the “contractual theory” is not “consistent with significant features” of existing law, “some touching on the very definition of the concept of arbitration,” such as “the universal duty of the arbitrator to give the parties an impartial and fair hearing.” Of course no reader would have the slightest difficulty in integrating any such “duty” into even the most banal application of “contract theory,” conceived as a vehicle for giving effect to *ex ante* expectations.

For other examples of essentialist thinking as applied to particular questions regularly posed in the law of arbitration, see Gary B. Born, *International Commercial Arbitration* 3041-42 (2nd ed. 2014)(a *reasoned decision* is “an essential aspect,” “the essence of,” adjudication, essential because arbitration “is [sic] an adjudicative process in which arbitrators apply the law”); Catherine A. Rogers, *Ethics in International Arbitration* 349, 351-52 (2014)(*impartiality* as an “essential marker of adjudication,” “an inherent part of the definition of adjudication,” for without it, the process is just “not an adjudication.”).

But faced with any essentialist claim the proper response, I find, is to ask, “Why?” A central lesson from the very first week of law school is that one can’t answer a question without first establishing *for what purpose it’s being asked*, and that one can’t devise a taxonomy without first establishing what purpose it is intended to serve. Impartiality may be an “essential feature” of public adjudication *precisely because* public adjudication, by definition, involves the imposition of state force on an unwilling party. That after all is the core meaning of “due process.” We usually deem it critical in arbitration *only because it comports with the presumed ex ante preferences of contracting parties*. But where a process has been voluntarily structured in some dramatically different way---although still in accordance with the parties’ will, with what they perceive to be to their joint advantage ---then there is no escaping the need to justify any resulting interference with private autonomy. In other words, one needs an “account.” And some instrumental argument would be nice. (“Just because” will not do.).

So, for example, for a case where a commercial party was happy to abandon any claim to “impartiality”---and presumably wished to retain the premium he had been paid for doing so---see *Westinghouse Electric Corp. v. New York City Transit Authority*, 623 N.E.2d 531 (N.Y. 1993); Alan Scott Rau, *Integrity in Private Judging*, 14 *Arb. Int’l* 115, 131-35 (1998)[hereinafter Rau, “Integrity”](“the arbitration process should never be viewed as separate and apart from the overall process by which substantive contract terms are hammered out”).

4. Now one of the things that in fact makes arbitration such a fascinating subject is its dual nature---viewed from one perspective as an exercise of self-government (infinitely malleable and the result of conscious private choice)---and from another, at one and the same time, as an exercise in “adjudication” (resulting in an award that state power makes obligatory on disputants in much the same way as the judgment of a public tribunal).¹³ So I suspect that a far more interesting way of putting things would be
- to acknowledge the persisting tension between the two models---between the perspectives of private ordering and of adjudication---that *lies at the heart of every interesting issue likely to arise in the course of litigation*, and then,
 - to note that any outcome---the concrete resolution of every issue---will be the product of this conflict, *the resultant vector being a function of the relative forces at play at any given time*.¹⁴

Doubtless it is fair to say that in the United States, as one might expect, the contractual model has by far been dominant. (As I have argued elsewhere, arbitration, “as part of a process of private government and self-determination, . . . should be understood through the lenses of contract rather than of adjudication”).¹⁵ And that by contrast, in other legal cultures---perhaps somewhat more reticent about acknowledging all the implications of arbitration as an expression of private autonomy---the powers of arbitrators may be cabined more

¹³ See William Laurence Craig, *The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration*, in Symposium: Arbitration and National Courts: Conflict and Cooperation, 21 Amer. Rev. Int’l Arb. 243 (2010) (it is now “trite” to point out that arbitration is in this sense a “hybrid institution”); Rogers, *supra* n. 12 at ch. 9 (2014)(canvassing the “adjudicatory model of arbitration” and the “contract vision,” and noting that each is but a partial account, the arbitrator’s status being instead one of “duality”).

That is, as F. Scott Fitzgerald famously remarked, “the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function”). *The Crack-Up* (1936).

¹⁴ That is, one is only interested in the resolution of discrete concrete problems: “To Generalize is to be an Idiot. To Particularize is the Alone Distinction of Merit.” William Blake, Annotations to Sir Joshua Reynolds’ Discourses, in 2 *Works of William Blake* 323 (Edwin John Ellis & William Butler Yeats eds., 1893). Once one loses sight of that elementary insight, one is likely to find oneself writing dazzlingly erudite and rigorously logical scholarship without once pausing to consider the questions, “what possible difference does it all make?” “Just why are we engaging in the enterprise?”

¹⁵ See Rau, “*Integrity*” at 154 (so that the only serious inquiry ought to be one into the understanding and underlying assumptions of the contracting parties”); Rau, “*Culture*” at 451-66 (characterizing the “American culture of arbitration” as “contractual” in that sense).

For a less sanguine---as well as less nuanced---view along the same lines, cf. Sebastian Perry, *Arbitration in the EU a “Nightmare”?*, 5(4) Global Arb. Rev. 32 (July 9, 2010)(comments of Professor Mistelis; “the average educated American lawyer sees arbitration as nothing more than an extension of contract law, without getting into a discussion of the fact that arbitration is [again, *sic*] effectively a jurisdictional agreement”; “the U.S. has no developed concept of international arbitration and I’m afraid it will never acquire it”).

tightly, closely mapped upon the sphere of action permitted to state courts. But of course, to say that any particular outcome will be the resultant of colliding vectors, is to suggest that concrete results may sometimes be different from what would one might a priori expect.¹⁶ We are talking about tensions and tendencies, not templates.

5. The discussion proceeds instead on the classic liberal premise that increased freedom of choice in structuring commercial behavior is likely to maximize joint surplus and thus joint satisfaction; the legal structure serves to facilitate and support mercantile-community transactions.¹⁷ These are areas where contracting parties “are allowed, by and large, to be their own master.”¹⁸ The familiar classical virtues of “efficiency”---often said to underlie private choices of law and forum¹⁹---

¹⁶ So even in a legal culture as relentlessly “contractual” as that of the US, invocation of litigation norms may sometimes lead to results that are counter-intuitive. For example:

- The New York Judiciary Law provides that “a court shall not be opened, or transact any business, on Sunday.” In that state it seems to follow---however absurd the result---that since arbitration is deemed to be a “judicial proceeding and arbitrators perform a judicial function,” then awards are “void” if “a least one hearing was held on a Sunday.” See, e.g., *Bauer v. Bauer*, Sup. Ct. N.Y. (June 16, 2014)(*Jewish Beth Din*); *Terrace View Estate Homeowners Ass’n, Inc. v. Bates Drive Condominium III*, Sup. Ct. N.Y. (June 25, 2013), *aff’d on other grounds*, 10 N.Y.S.3d 142 (A.D. 2015)(same; “the statute expresses the public policy of the State, and cannot be waived”).
- Or consider the question of what civil redress parties might have against arbitrators for their supposed misconduct. In the US, to equate arbitrators to judges has had the apparent consequence that arbitral immunity is absolute---and, what is most telling, is mandatory and unwaivable. See *Rau*, “Culture” at 505-06 & fn. 222 (making it “unnecessary for arbitrators to ‘buy’ immunity from users,” and “impossible for them to compete in terms of their relative willingness to bear the risk of liability”). Other legal systems, by contrast, are paradoxically more likely to envisage that the liability of arbitrators may be the subject of negotiation and contractual adjustment; see, e.g., Julian D.M. Lew (ed.) *The Immunity of Arbitrators* (1990) at 36 (France), 51 (Germany), 77-78 (Spain), 84 (Sweden).

Conversely, particularly where international awards are concerned, a “contractualist” trope is often trotted out in civil-law commentary to justify the enforcement, say, in France of awards annulled at the seat. (This requires a certain amount of chutzpah, as it rigorously sets aside any claims of “autonomy” grounded in the choice of a seat as instrumental behavior); see the discussion at n. 254 *infra*.

¹⁷ See Michael J. Trebilcock, *The Limits of Freedom of Contract* 7 (1993)(the neo-classical “predilection for private ordering over collective decision-making is based [precisely on this] simple (perhaps simple-minded) premise”); cf. Galf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* 76-77, 100-01 (2010)(“processes of self-regulation can be categorized as *private* regimes, combining social norms, alternative dispute resolution, and non-legal sanctions, which can then be understood as natural expressions of the market’s self-regulatory capabilities” [citing the work of Lisa Bernstein on “extralegal contractual relations” in the diamond industry]; they then become “relevant in the state legal system” through “judicial deference,” “incorporation” or “delegation”).

¹⁸ Peter North, *Essays in Private International Law* 172 (1993).

¹⁹ See Gillian K. Hadfield, *Privatizing Commercial Law*, Regulation (Spring 2001) at 40, 44-45 (“It is important to remember that privatization is justifiable only for those areas of law in which efficiency is the only value at stake”---which are, “by and large,” “the areas of law in which we are concerned with the commercial relationship between non-human entities”). Cf. 1 *The New Palgrave Dictionary of Economics and the Law* 389 (1998)(choice of law; “*ex ante* agreements allow the parties to “select more efficient rules to govern their contractual relationship. On this basis, liberal rules for the enforcement of choice of law provisions may be seen as instrumental to

are properly understood in the present context to suggest rules and processes for dispute resolution calculated ex ante to maximize certainty and suitability, and to minimize private transaction costs, decisionmaker error costs, and risk costs. This “normative commitment” to efficiency concerns will rarely be in competition with those interests that underlie autonomy²⁰: It is instead, in the normal run of things, more likely to be nothing but an heuristic for probable intention.²¹

6. Risk-management planning for the resolution of hiccups that might come to plague the construction of a water-treatment facility is (no revelation here) an integral part of planning for the facility itself.²²

reducing the transaction costs of the parties’ bargain”); somewhat more languid and world-weary is Horatia Muir-Watt, “*Law and Economics*”: *quel apport pour le droit international privé?*, in *Le contrat au début du XXI^e siècle: études offertes à Jacques Ghestin* 685, 688 (2001) (“one might well have thought that justification for such a claim could easily have managed to do without such fancy [*sophistiqué*] tools of economic science”).

²⁰ Cf. Aragaki, *supra* n. 10 at 1161, 1180-81, 1188-89.

²¹ See generally Alan Scott Rau, “*Consent*” to *Arbitral Jurisdiction: Disputes with Non-signatories*, in Permanent Court of Arbitration (ed.), *Multiple Party Actions In International Arbitration* ¶¶ 3.45ff. (2009) hereinafter Rau, “*Consent*”] (the usual move “is to presume intent on the basis of what will reduce overall costs, maximizing a joint surplus that the parties can in bargaining divide among themselves”).

When on rare occasions tensions between the two can be identified, they are occasionally palliated by high-handed but well-meaning exercises purporting to be “interpretive.” But see Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of Waiver*, 6 *Amer. Rev. Int’l Arb.* 223 (1996) [hereinafter Rau, “*Waiver*”] (objecting to the attempt by the California Supreme Court in the *Volt* case to accomplish just this through a disingenuous reading of a choice-of-law clause, and to the Supreme Court’s inexplicable acquiescence in the exercise). Where the process of “construction” has ended, external constraints must yield, as it is hard to see why free but “inefficient” choices should not be respected; see Alan Scott Rau & Edward Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 *Tex. Int’l L.J.* 89, 111-12 (1995) (individual states may have taken “the position that if parties want arbitration at all they must have it subject to terms and conditions imposed in the interest of ‘efficient dispute resolution,’” but this must give way “to a contractual preference for arbitration,” despite the inevitable maintenance of separate proceedings in different forums).

²² To suggest that the venerable philosophical distinction between “negative” and “positive” liberty has any purchase here whatever—indeed to claim that it provides the proper “analytical framework through which to understand the autonomy thesis” as applied to the enforcement of agreements to arbitrate—strikes me as somewhat off-the-mark. But see Aragaki, *supra* n. 10 at 1148. The author “seems to have chased a red herring. . . all the way upstream until [he] reached a dry creek bed,” *Williams v. Ormsby*, 966 N.E.2d 255, 266 (Ohio 2012) (Pfeifer, J., concurring in part and dissenting in part). Here’s why:

- In this work the claim is made, first, that to cabin enforceability of such agreements would not really impinge on negative liberty (after all, nothing prevents the parties from “following through with [an agreement to arbitrate] if they so desire”). Indeed, “just the opposite”: It is rather *enforcement* that would be “plainly coercive,” foreclosing as it does “the freedom to change one’s mind” by one for whom performance would “no longer express [his] wishes.” See also Hiro Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 *Y.B. Arb. & Med.* 2, 8 (2016) (“if one party no longer chooses to be bound by it,” “contract law tramples over *that* party’s choice all the time”).

This may be true enough—but only in the sense that a caricature may sometimes be a recognizable likeness. To rely on some distinction between a state’s “lending assistance” and its “interference,” Aragaki, *supra* n. 10 at 1163 [or between its “empowerment” and its imposition of

an “obligation,” Muir-Watt, *supra* n. 19 at 8 fn. 29]---is to elide the simple fact that *it is precisely in being able to tie one’s hands that forward-looking, purposive, instrumental behavior is made possible*. Cf. Stephen A. Smith, *Contract Theory* 258 (2004)(“generally increases our options,” permitting us “to do things we could not do otherwise”): So it may be “empowering” to be able to enter into a binding commitment to make a gift, see Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. Leg. Stud. 411 (1977)(a gratuitous promise “creates utility for the promisor over and above the utility to him of the promised performance” by “increasing the present value of an uncertain future stream of transfer payments,” although the presence of enforcement costs, such as legal error, that may not be fully internalized, may make it not “economical” to recognize enforceability despite the resulting increase in net social welfare.). It may be “empowering” for a company to be able “to sue *and be sued*” so that it can carry on to do business in a given jurisdiction.

- Recognizing all this, of course, Professor Aragaki presses on to the claim that even such “positive liberty” only has value---only constitutes “true or meaningful autonomy”--- if the preferences apparently revealed by a deal are for “good choices,” choices that are not “mistaken,” choices “with some plausible value,” “sensible, informed and reflective dispute resolution choices.” Aragaki, *supra* n. 10 at 1152-53, 1156, 1160, 1177, 1180. This introduction of normative concerns is even more befuddling. The notion of “positive liberty” is after all typically deployed in the literature as a means of addressing concerns about commodification. But our concerns here are alas infinitely more mundane, infinitely less rarefied. Professor Radin herself quite properly recognizes that the rhetoric of commodification is not likely to lead to “wrong answers” when “subjective well-being” is not at stake, that is, “when two firms deal with each other, if we define firms as profit-maximizing black boxes and no difficult externalities exist,” Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849, 1878 (1987).

Consider, for example, a hypothetical choice by contracting parties to provide for the “expanded” judicial review of arbitral awards for “errors of law.” How can one possibly confuse

- the perfectly accurate observation that in the modal case, wisdom would counsel against such a choice---certain to lead to more expensive and time-consuming proceedings, see Alan Scott Rau, “*Contracting Out*” at 261 (seems “certain over time to lessen the potential utility of arbitration to contracting parties,” and so I join in the hope that this “does not catch on generally”), with
- the equally accurate observation that in exceptional high-stakes “bet the company” disputes, commercial parties might nevertheless sensibly wish to tinker with the process, combining all the well-known process values of private adjudication with some means of aligning results with public jurisprudence. See *id.* at 245-46.

The former is simply the admonition that I would expect from any business-oriented attorney. Default presumptions found in institutional rules (consider, for example, “rules” that start with the presumption of a “neutral” party-appointed arbitrator, see Rau, “*Culture*” at 460-61) are obviously in precisely the same vein. I assume that drafting parties alone know best which scenario they are presented with. Nevertheless Professor Aragaki seems concerned only with the former case, suggesting that “positive liberty” would be ill-served should our law sanction such arrangements, see *supra* n. 10 at 1180-1 (relying on Tom Carbonneau for the proposition that expanded-review clauses, as they may be “pathological or oxymoronic,” may not be a “possible object of reasonable choice”); if the parties are thereby “stuck in a less functional and effective process,” they are to that extent “less free.”). But he seems unaware of the possibilities suggested by the *latter* scenario---which are obviously freedom-enhancing in any sensible meaning of the phrase---and so misses the real question, which is, “just who ought to be charged with the decision”?

I pass over in (relative) silence the question how either of these possibilities can possibly be conflated with dispute resolution left in the hands of “a panel of three monkeys.” *Id.* at 1177-78 (“from a positive liberty standpoint it is hard to appreciate how this is freedom at all”). In the latter scenario---as in any commercial case---one starts with

7. If arbitration is part and parcel of the overall process by which substantive contract terms are hammered out, there is an obvious corollary---that it not only benefits from the same *tolerance* we extend to private contractual arrangements, but it is also subject to the same *limitations* we commonly impose on them.²³ But cabinining what Michael Reisman has brilliantly termed the “anarcho-capitalist fantasy”²⁴ (indulged in by so many *arbitrati*) must first be justified---one must first identify the presence and gauge the effect of externalities, whether in the form of third-party effects (which may or may not in turn be reflected in constraints imposed by mandatory rules),²⁵ or in other forms of market failure.²⁶ Anything more, as Johnson pointed out long ago, would seem to be nothing more than “destroying a certain portion of liberty, without a good reason, which was always a bad thing.”²⁷

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- a certain interpretive skepticism to the effect that, “surely, this cannot be what you really intended to accomplish”--- and if that route proves to lead nowhere,
 - and if impermissible burdens on third party or on the judiciary cannot be identified,
 - we are left with what it is conventional to call “hard paternalism”--- understood (but hard to justify) as connoting interference, not with a choice warped by ignorance or distortion of judgment, but “with someone's deliberate and informed choice [merely] in order to prevent harm to that person as defined by the standards of others,” Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 Stan. L. Rev. 875, 878 fn. 19 (1994); cf. Trebilcock, *supra* n. 17 at 163 (the case for legal intervention “on grounds of contingent, adaptive, or bad preferences becomes much more problematic” where “clearly definable individual preferences are being repudiated in the absence of readily identifiable forms of coercion or information failure”).

²³ See Alan Scott Rau, *Arbitration as Contract: One More Word About First Options v. Kaplan*, Mealey's Int'l Arb. Rep., March 1997 (“the dialectic between facilitating and restraining private ordering---the problem of boundaries---is central to any first-year course in Contracts”).

²⁴ W. Michael Reisman & Brian Richardson, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration* 17, in *Arbitration: The Next 50 Years* (ICCA Congress Series no. 16)(2012).

²⁵ See, e.g., Alan Scott Rau, *The Arbitrator and Mandatory Rules*, 18 Amer. Rev. of Int'l Arb. 51 (2007); Muir-Watt, *supra* n. 19 at 15-16, 31-32 (“the very concept of ‘*lois de police*’ or derogatory, overriding provisions ostensibly implies that there remain absolute limits to party autonomy,” although “in reality, jurisdictional mobility through choice of forum means that there is never any guarantee that such policies will be upheld”).

²⁶ See Rau, *Fear of Freedom*” at 510-11 (suggesting that the celebrated *Hall Street* decision [which rendered unenforceable agreements for “expanded judicial review”] might perhaps be justified as a means of insulating drafters “from the weakness of will of a future self” or as a means of enlisting the “regulatory and compulsory process of the state to enforce cooperation in a game like the Stag Hunt”); see also Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 20-22 (rev. ed. 1984)(in the “assurance game”--a blander term for Rousseau's “stag hunt”--if “we assume perfect information for all players, then they will all choose [to cooperate] in the confident expectation that everyone else will do the same, as no one has anything to gain from acting differently”; often these “very stringent information requirements can only be fulfilled if the information is supplied from the outside (e.g. by the government acting as a coordinator”).

²⁷ James Boswell, *The Life of Samuel Johnson* 325 (Percy Fitzgerald ed., 1900). Many years later, see Smith, *supra* n. 22 at 257: “If there are good reasons to enforce contracts in general, then good reasons are required before refusing to enforce particular kinds of contract.” A necessary qualification is that such “good reasons” “need not be the kind of reason” that would in itself justify the suppression of “negative liberty”---that is, that would justify the imposition of tortious or criminal liability for engaging in certain behavior---merely that it be enough to demonstrate that “the activity is not one that the state should assist or promote.” *Id.* Clearly true, although the thrust of my earlier discussion is that any distinction between imposition of sanctions, and a refusal to

II. *Party Autonomy and the Applicable Law*

8. Now if consensual submission to arbitral jurisdiction is the lodestar, an inevitable corollary is that whether there is a duty for the parties to arbitrate any dispute---whether the parties have consented to a final arbitral judgment on the issues---whether the arbitrators have “jurisdiction” to decide---is necessarily a matter for judicial determination. What purports to be an agreement to arbitrate cannot be entirely self-validating, the product perhaps of some curious process of autogenesis. This in turn requires that a court first establish the analytical framework within which the presence of “consent” can be assessed. Here too attentiveness to the expectations of the parties is critical: If the parties have purported to plan for dispute resolution by custom-tailoring a scheme of arbitral justice to suit their particular needs---to conform to their own “dream”---to what extent does this exercise of autonomy extend to the very legal foundation of the arbitration agreement itself?

That in a few sentences is what all the following discussion is about.

A. *The “Separable” Governing Law*

9. Where a contract is the subject of litigation, it is necessarily subjected to a governing law---whatever the origin of that law may be. No *contrat sans loi* can sensibly be envisaged, no contract can be imagined in abstraction from the work of a state court in applying its own law (or at least its own conflict-of-law rules) to bring the agreement into the legal order, to breathe life into it, and (in however perfunctory a manner) to regulate its operation and effects throughout the life of the parties’ relationship.²⁸
10. The same thing of course is true with respect to the “agreement to arbitrate” as well. It has become a familiar proposition that the body of law that governs the validity, or the enforceability, or the interpretation of this agreement need not be the same as the law governing the overall contract that “contains” it. And it is equally a commonplace to observe that in the effort to discover the law governing

assist, resolves itself at best into a difference in degree which in commercial cases is likely to be evanescent.

²⁸ “Each and every contract is governed by a certain law.” Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 Amer. J. Comp. L. 209 (2006) (as “the right of each party ultimately to coerce the other party” depends on the power of coercion which “remains the monopoly of the State”), Professor Symeonides notes, with perfectly appropriate indifference, that “some critics attempt to denigrate this position with adjectives like ‘positivistic,’ ‘Austinian,’ and, at the same time, ‘ahistoric.’”

It is of course obvious that the parties’ ability to contract around, or out of, a state’s otherwise applicable default rules is likely to be a feature of the contract law of most developed states, and is nothing more than that. See *id.* (even when a contract purports to incorporate “non-state norms,” what makes these binding “is not the parties’ volition alone, but rather a state’s willingness to enforce a contract that incorporates these norms”).

this agreement, the “starting point” for the inquiry must be the canonical presumption of “separability.”²⁹

11. We are here concerned only with the law that governs this “separable” agreement to arbitrate. But it should be obvious that the notion of a “separate choice of law” supporting a process of private justice can be a subversive one, and one that can have an explosive effect on the entire system: An arbitral tribunal may render an award that determines the parties’ primary rights and obligations on the basis of Jewish law or the New Testament,³⁰ or on the basis of the customs of the Hanseatic League, the Code of Hammurabi, the rules of “Monopoly,” the UNIDROIT Principles, or on the tribunal’s ad hoc sense of intuitive fairness---and it will draw its legal effect solely from
 - the willingness of the parties to submit to such an arbitral determination, and
 - the currency given by any legal system to the arbitration agreement alone.
12. Recall that the notion of “separability” reflects,
 - first, a recognition on the part of contracting parties that inevitable disputes arising between them in the future are likely to call into question
 - not only their respective primary obligations, but also
 - the (often closely-related) question of the legal currency *of the very agreement that creates those obligations*,
 - and second, a presumed preference on the part of contracting parties that this whole set of disputes be entrusted to arbitral tribunals.

So when a court invokes “separability” it is necessarily asking arbitral tribunals, first, to identify the proper law of the “container contract” and then, to assess that contract in accordance with the proper law. But none of this taken alone says anything in particular about the higher-level question of the tribunal’s own mandate: The parties’ ability to structure their affairs by entrusting contract validity to an arbitral tribunal would obviously be ill-served were we assume that whatever legal grounds underlie predictable challenges to the “deal” must at the same time, in all circumstances and by their very nature, implicate their choice of a dispute resolution mechanism.³¹

²⁹ Born, *supra* n. 12 at 475.

³⁰ Cf. *In re Tuck’s Settlement Trusts*, [1978] 1 All E.R. 1047 (C.A. 1977)(Lord Denning; “who better to decide these questions of ‘Jewish blood’ and ‘Jewish faith’ than a chief rabbi?”); *Prescott v. Northlake Christian School*, 244 F.Supp.2d 659 (E.D. La. 2002), *vacated on other grounds*, 369 F.3d 491187 (5th Cir. 2004) (in “biblically-based arbitration,” tribunal determined that school had breached its contract by terminating the principal without following Matthew:18”).

³¹ To take an obvious example, the “rules of law” that govern interpretation of the overall contract may be quite distinct from a default rule of the legal system regulating the agreement to arbitrate, and which may incorporate a “presumption of arbitrability”---that is, a rule that privileges “arbitrability” by presumptively directing doubtful claims to private adjudication.

13. It is thanks to the presumption of “separability” that the tribunal’s mandate may escape the fate of the overall transaction, deemed “unenforceable” under the contract law that governs it. And once this becomes second nature to us, it is easy to conclude that the need to carry on a separate choice-of-law inquiry into the arbitration agreement itself is then simply “a result” of that presumption³²---the hypothesis of a different law to govern the arbitration agreement being merely its “logical corollary.”³³
14. This is a view that is routinely expressed, although I suppose it is always possible to approach the matter from the opposite direction entirely: Perhaps the first move, the true “starting point,” should instead be the baseline characterization, under private international law, of the arbitration clause as a “procedural agreement”;³⁴ such an agreement---being in this respect “something different from the rest of the contract”---does not by definition address the rules governing the parties’ primary conduct, their substantive rights and obligations. Conversely, then, the very premise of “separability” would emerge as a simple by-product of a prior assumption of a different governing law, the arbitration agreement being relegated by traditional conflict-of-law analysis to the law of the forum.³⁵

³² See Stephen Bond, *What Were They Thinking? The Law Governing the Arbitration Agreement*, in Liber Amicorum William Laurence Craig 29, 30 (2016)(or at the very least the application of the separability principle “pushed to its extreme”).

³³ See Jeffrey Waincymer, *Pathologies, Presumptions and Proof---Adjudicating the Effectiveness of Arbitration Agreements*, 26 Amer. Rev. Int’l Arb. 407, 416 (2015).

Of course the life of the law, as Holmes famously reminded us, has not been logic but experience---or more pejoratively, perhaps, “expediency.” George Curzon in the House of Commons, March 22, 1895: “Since he had been in the House he had heard almost every new proposal stated to be the logical corollary of something that preceded it at some time or other,” although this was at best “a synonym for the lowest political expediency.” *Parliamentary Debates* (4th) at p. 1775.

³⁴ See Adam Samuel, *Separability and the US Supreme Court Decision in Buckeye v. Cardogna*, 22 Arb. Int’l 477, 489 (2006)(akin in this respect to the “exclusive jurisdiction clause”); Frédéric-Edouard Klein, *Du caractère autonome de la clause compromissoire, notamment en matière d’arbitrage international*, 50 RCDIP 499, 503, 507 (1961)(“courts and commentators have been led all the more easily to recognize the independent existence of the arbitration clause to the extent that it seems, by contrast with the principal contract, to come within the scope of civil procedure [*comme relevant de la procédure civile*]”); Peter Nygh, *Autonomy in International Contracts* 83 (1999)(“a procedural classification of the jurisdiction clause, needless to say, leads to the application of the internal law of the forum”). Cf. *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261 (1921)(Cardozo, J.)(statute making arbitration agreements enforceable applies to contracts entered into before its enactment, for “it is not a definition of the rights and wrongs out of which differences grow” but is merely “a form of procedure,” “part of the law of remedies,” and “the rule to be applied is the rule of the forum”).

³⁵ On the “reflexive” application by US courts of the *lex fori* to determine the existence, validity and scope of a forum selection clause---treated as a “procedural question”---and this even despite the presence of an explicit choice-of-law clause selecting the law of another jurisdiction to govern the contract as a whole---see Symeon Symeonides, *Choice of Law* 445, 448, 454 (2016). A choice-of-law clause will of course capture the parties’ substantive obligations, but it will not “normally [be] interpret[ed]” “to cover procedural matters,” and the enforceability of a forum-selection clause, “sensibly and practically considered, appears procedural for this purpose,” Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 Hastings L.J. 643, 655 (2015).

It may be somewhat ironic then that in recent years---and even without the comforting

However interesting as a theoretical matter, any choice between these alternative explanations hardly seems to matter for our purposes. In any event the argument with respect to the distinct and “higher level” nature of the inquiry into arbitral jurisdiction far transcends of course any facile dichotomy between “substance” and “procedure.” For example, the same line of argument would suggest that a *choice-of-law clause* too need not suffer the same fate as an invalid contract in which it happens to be contained---precisely because the whole point of such a clause (as a surrogate for the conflict-of-law inquiry that would take place in its absence) is to lay down *the constituent rules that the judge or arbitrator is expected to apply in the very process of going about making the determination* of validity or invalidity.³⁶ Note that in this respect arbitration clauses, choice-of-forum clauses, and choice-of-law clauses have an identical function and “sphere of operation,” designed to address identical concerns that are prior to and apart from any determination of the merits.³⁷ As their job is to demarcate at the outset “who” is to be entrusted with making the decision---and “where” and “how” he is to go about doing so---they all serve to provide the

armature of the FAA---the jurisprudence with respect to the “separability” of choice-of-forum clauses has seemed to increasingly invoke, and to be responsive to, the arbitration cases themselves; e.g., *Megrath v. Nationwide Mutual Ins. Co.*, 2016 WL 1237350 (W.D. Pa.) (“plaintiff’s contention that the forum selection clause is invalid and unenforceable due to fraud . . . is unavailing”; citing the canonical “separability” case of *Prima Paint*, “plaintiff cannot show that there was fraud in the inducement of the forum selection clause itself”). See also *Marra v. Papandreou*, 216 F.3d 1119 (D.C.Cir.2000). Here the plaintiff’s license agreement with the Greek government called for any disputes to be settled “by the Greek courts,” but the Greek government had purported to revoke the license “from the time it came into effect”---allowing the plaintiff to argue that the government should be estopped from invoking the forum selection clause which had become a provision of a “nonexistent” license. The court, relying on *Prima Paint* in what it called “the closely analogous context of a challenge to the enforcement of an arbitration clause,” held that the plaintiff was required to file suit in Greece: The government’s action “does not work a repudiation of the forum-selection clause unless it is specifically directed at the clause itself.”

³⁶ On this point, Pierre Mayer, *Les limites de la séparabilité de la clause compromissoire*, [1998] *Rev. de l’arb.* 359, 362. See also Nygh, *supra* n. 34 at 1 (this is “the *causa causans*, the autonomy to select the law which will provide the determinative rules which define the rules by which the parties are bound”). See also Maria Hook, *The Choice of Law Contract* 76 (2016) (a “meta contract” that is thus “logically anterior in application to the main contract”). Cf. Briggs, *supra* n. 2 at 394 (“in the same way as the parties’ choice of court or tribunal sets out some of the ground rules for the resolution of disputes, the expression of a choice of law is part of the same structure by which the parties agree that if there is going to be a dispute, and litigation resulting from it, it will be to this law that the court looks to resolve questions of substance”).

³⁷ See Briggs, *supra* n. 2 at 395, 428 (agreement on choice of law “treads in the footsteps of the analysis made of jurisdiction agreements and agreements to arbitrate”); Nygh, *supra* n. 63 at 15, 24 (“choice of law and choice of forum are closely related issues” since “the very power to choose raises the same issues as to the autonomy of the parties”; “arbitration in principle presents much the same issues as choice of court”). See also Jason Webb Yackee, *Choice of Law Considerations in the Validity and Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 *UCLA J. Int’l & For. Aff.* 43, 45 (2004) (“forum-selection agreements “differ from arbitration agreements only by designating public fora,” although they “remain something of a poor cousin”).

“structure,” the “ground rules,” the “framework,” the “apparatus” for the decisionmaking process.³⁸

15. An agreement to arbitrate can thus readily be analogized to a contractual choice of forum,³⁹ and plausibly also (although this may be harder to see) to a contractual choice of law.⁴⁰ An assertion of the interests of private autonomy underlies them all: In a sense the agreement to arbitrate is both, although at the same time of course, strictly speaking, it is neither. To see this we need to descend once more to the concrete.

B. The Problem of Fredonia

16. Let us assume that a contract purports to bind a New York individual to a contract subject to Fredonian law and which calls for arbitration with a seat in Fredonia: He claims, however that he has really never agreed to anything at all---perhaps he claims that the signature on the agreement was forged, or was the signature of someone without authority to bind him, or that the arbitration agreement merely appears in a “counter-offer” sent in the course of a “battle of the forms.” Or assume that he is not even mentioned in the document---that he is perhaps the owner of an undoubted signatory, but that his parenthood is his only connection with the dispute or the proceeding.⁴¹ Yet the arbitration goes forward in his absence, and it is held that the existence of his consent to arbitrate---and thus whether he is bound to the award---is to be determined by the principles of Fredonian law. But on what basis can the corpus of Fredonian law possibly bind a New Yorker to a contract to which he claims never to have assented?; how can it validate a proceeding to which he claims to be a complete stranger?⁴² To assert smugly

³⁸ All the necessary metaphors are in Briggs, *supra* n. 16 at 143, 394-95, 427-28.

³⁹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 519 (1974)(“a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,” and “an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute”).

⁴⁰ See *id.* at 519 fn. 13 (“under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction,” although in this case the laws of Illinois “were explicitly made applicable by the arbitration agreement”).

With respect to the choice of a place of arbitration as “the best evidence of an implied choice of law” to govern the overall contract, see Robert Merkin, *Arbitration Law* ¶¶ 7.32ff (2004); cf. Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts, Commentary* at ¶ 4.12 (2015)(“an arbitration agreement that refers disputes to a clearly specified seat may be one of the factors in determining the existence of a tacit choice of law”). With respect to the choice of a place of arbitration as the principal determinant of the law to govern the validity and interpretation of *the arbitration agreement itself*, see the extended discussion *infra*.

⁴¹ Other “irresistible” examples are posited in D.F. Libling, *Formation of International Contracts*, 42 *Modern L. Rev.* 169, 170-71 (1979)(silence and *non est factum*).

⁴² Note that in the cases given---whether we are talking about an arbitration clause, or a contractual choice-of-forum, or choice of law----the challenge is at the very least one that goes to

that the contract is validated by Fredonian law because “the validity of the contract conforms to the parties’ legitimate expectations”⁴³ is, needless to say, nothing more than to assume the conclusion; this is the very issue in contention and as yet unresolved. On the facts given there is no *a priori* reason to suspect that Fredonian law (whether as the *lex contractus* or the *lex arbitri*) is indeed, in the canonical words of the Convention, the law “to which the parties have subjected” their supposed “agreement” “to submit to arbitration.”⁴⁴

17. It must seem high-handed to assume that whether the parties have chosen the forum can be determined by the law of the putative forum---and equally high-handed to assume that whether they have chosen the substantive law to govern them can be determined by the putative substantive law.⁴⁵ In both cases such a “choice” becomes self-validating. Attempts to bind our New Yorker to an application of Fredonian law thus put us flatly in the presence of a migraine-inducing “vicious circle”⁴⁶--- “bootstrapping,”⁴⁷ a “puzzle,”⁴⁸ a “conundrum,”⁴⁹ an “infinite regress,”⁵⁰ a “circular”⁵¹ “chicken and egg” exercise.⁵² Various high-level attempts have been made to struggle with this dilemma, with varying degrees of sophistication and success.

C. The Restatement and the Rome Regulation

the “clause itself” [whether it is also an attack on the underlying contract being a matter of indifference]---so that the usual learning that surrounds “separability” falls away.

⁴³ Cf. Markus A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 Mich. St. J. Int’l L. 453, 484 (2010).

⁴⁴ New York Convention, arts. V(1)(a), II(1).

⁴⁵ Cf. Pierre, Mayer, *L’autonomie de l’arbitre international dans l’appréciation de sa propre compétence*, 217 Rec. des Cours 436 (1990)(contract by correspondence; neither the law of the seat nor the law governing the overall contract has an “irresistible claim” to be applied---the former, for “even if the seller has made a proposal regarding the seat, the live issue is precisely whether that proposal was ever validly accepted”---the latter, “due to the separability of the arbitration clause.”).

⁴⁶ See Yackee, *supra* n. 37 at 94-95 (yet the problem of the “vicious circle” “afflicts other areas of conflicts law as well. For example, courts make similar assumptions when applying the designated law to evaluate the validity of the contract as a whole. Yet this practice has been widely sanctioned due to the lack of a better solution”).

⁴⁷ Briggs, *supra* n. 2 at 396; Symeonides, *supra* n. 35 at 380-82.

⁴⁸ Briggs, *supra* n. 2 at 94 (“problems of contractual formation are notorious for throwing up puzzles which test logic to destruction”).

⁴⁹ *Id.* at 478 (“A court cannot assume that there is a contract and apply the law that would govern that contract, putatively. . . ; why should it not equally accept the invitation from the other party to the dispute to take the first steps in the resolution of the dispute as through there was no contract?”).

⁵⁰ Antoine Kassis, *Le nouveau droit européen des contrats internationaux* ¶ 205 (1993).

⁵¹ See William W. Park, *Challenging Arbitral Jurisdiction: The Role of Institutional Rules in Liber Amicorum William Laurence Craig* 231, 257 (2016).

⁵² See Clermont, *supra* n. 35 at 644; Briggs, *supra* n. 2 at 38 (“if the alleged contract is not valid, it would in principle be just as objectionable to look to the law which would have governed if it had been valid and effective to determine issues which put that very validity in question”).

18. The current draft of the ALI’s Restatement of International Commercial Arbitration could hardly afford to ignore the problem. The test it proposes is (appropriately) identical whether the context happens to be

- an attempt to enforce an agreement to arbitrate (say, by a motion to compel),⁵³ or
- an attempt under art. V to recognize or enforce an arbitral award,⁵⁴ and it is this:

a. Whether an international arbitration agreement “exists” is to be determined by “appl[ying] the law governing that issue under the choice-of-law rules of the forum”---rules that will “most likely point to the contract law of one jurisdiction or another”⁵⁵---and thus is to be a determination made without regard to any supposed party choice.⁵⁶

⁵³ Restatement of the Law, *The U.S. Law of International Commercial Arbitration*, §§ 2-12, 2-13 (Tent. Draft No. 4, April 17, 2015)[hereinafter “*Restatement*”].

⁵⁴ *Id.* at § 4-12 (Tent. Draft No. 2, April 16, 2012).

That the test is “appropriately identical” in either context, see *infra* at ¶ 39.

⁵⁵ § 2-12, *cmt. e.* See, e.g., *Duplan Corp. v. W.B. Davis Hosiery Mills, Inc.*, 442 F.Supp. 86 (S.D.N.Y. 1977)(in a “battle of the forms,” did the arbitration clause become part of the contract?; under the law of the forum state [whose conflicts rules are applicable in federal court], the law of the state having the most significant relationship to the matter in controversy governs contract disputes in the absence of an effective choice by the parties,” and “the facts of the instant case make it clear that the law of North Carolina controls the question of materiality presented here”); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997)(“because Indiana was the situs of all relevant events in this dispute, we look to the contract law of that state”).

⁵⁶ That is, it is made without assuming the legitimacy of such a choice and thus without regard to what has incomparably been termed “putativity.” Hook, *supra* n. 36 at 77. “Fairness would . . . suggest that the question whether the choice of law clause has been agreed on ought to be determined by the law that would apply to the putative contract in the absence of the alleged choice; this would be a more neutral approach and would not unduly favour the party that alleges that a different choice has been made.” Richard Plender & Michael Wilderspin, *The European Private International Law of Obligations* 173 (4th ed. 2015).

Challenges founded on a party’s lack of “capacity” apparently also fall into this category and are assimilated to the rule of § 2-12, at least for the purposes of determining the law applicable to the agreement---since if well-grounded they would “prevent a contract from coming into existence,” § 2-12 *cmt. b.*, § 4-12(b). Under the rule summarized in the text they “must therefore be resolved by means of the conflict of laws rules of the law of the court before which the enforcement of the arbitral award is sought,” Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 276 (1981). (At the *pre-award* stage, the proper reference should be to the court before which enforcement of the arbitration agreement is sought; see also *id.* at 156 (arbitration agreement; “under his personal law or another law which a court may hold applicable to this issue according to its conflict rules”). In the US this would tend to be determined not by recourse to the notion of a party’s “personal law” but instead as an ordinary matter of contract formation. Nevertheless, despite the familiar rules that it lays down to govern the law applicable to contracts in the “absence of effective choice by the parties,” the Restatement of Conflicts warns that a party’s capacity to contract “will usually be upheld if he has such capacity under the local law of the state of his domicile”; the result is otherwise, however, if the person involved is a resident of a state with a rule of incapacity and which has a “greater interest” in him, perhaps because “his relationship to the state of his domicile is relatively slight.” *Restatement, Second, Conflicts of Laws* §§ 188, 198(2) & *cmt. b.* (1971).

- b.** By contrast, the law contractually chosen by the parties becomes determinative where it is instead the “validity” of the arbitration agreement that is in issue---that is, where the question is posed whether this agreement is “null and void.”⁵⁷ More on this very shortly---but for the moment it is obvious that this choice-of-law rule will in turn send us presumptively either to the law the parties have chosen to govern the underlying contract, or to the law of the jurisdiction they have chosen as the seat of the arbitration.

The supposed “distinction” is apparently this: Questions of “*existence*” raise “basic questions of contract formation”---more properly, they directly challenge the parties’ “assent to arbitration” in the first place⁵⁸---while “*validity*” depends

Along the same lines see, e.g., Ore. Rev. Stat. § 15.330(2) (“A party that lacks capacity to enter into a contract under the law of the state in which the party resides may assert that incapacity against a party that knew or should have known of the incapacity”; “the consequences of the party’s incapacity are governed by the law of the state in which the incapable party resides”).

For the sake of completeness I should note, reluctantly, that in its discussion of the pre-award enforcement of *agreements*, the Restatement allows that some cases of “incapacity” may not in fact render an agreement entirely “non-existent”: If characterized instead simply as examples of “partial disability,” they may render the agreement merely “voidable”---thus escaping rule entirely the rule of § 2-12; see Restatement, supra n. 82, § 2-12, *Reporters’ Notes*, n. b. I see not the slightest value in taking even a step down this murky path. [Cf. Rau, “*Separability*” at 38 (“Void/Schmoid”)]. It is critical to note that this cavil is in fact completely absent from the Restatement’s discussion of the enforcement of *awards*---apparently out of the felt necessity to track art. V(1)(a); but see § 2-12 *Reporters’ Notes*, n.e(ii)(given the “value in promoting consistency in choice of law at the two stages,” “the law applicable to the capacity of a party to enter into an agreement at the time of enforcing the arbitration agreement is in principle, the same as the law applicable to the capacity of a party to enter into an agreement at the time of recognition or enforcement of the resulting award”). So an agreement entered into even by a mature minor of 17 may perhaps just be “voidable,” but for all that, “separability” will not salvage the arbitration agreement itself---and the currency of that agreement will be determined not by the law of the seat, nor by the putative chosen law, but by the law of minority generally applicable “to him” under the forum’s conflict-of-law principles; see also Symeonides, supra n. 35 at 480 (“the Convention drafters understood and avoided the bootstrapping problem. Unless the parties have capacity to enter into an agreement in the first place, they may not validly choose a law to govern that agreement”).

⁵⁷ § 4-12 (c) (recognition or enforcement of award; “whether the arbitration agreement . . . is invalid”); § 2-13 (enforcement of agreement; “whether the arbitration agreement is null and void”). The two formulations are equivalent, but they are apparently intended to track the language of the New York Convention respectively at arts. V(1)(a) and II(3).

⁵⁸ § 4-12 *cmt. b.* Cf. Ronald A. Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, in Liber Amicorum Hubert Bockern 541, 544, 551 (I. Boone et al. eds., 2009)(the “existence of the agreement” for a choice of forum---“i.e., whether the parties have consented” to it---“deals with whether there is a meeting of the minds such that an agreement has been formed”; international instruments understandably do not deal with such questions since including them “would reach into the domain of substantive contract law rules dealing with contract formation”); with particular reference to the Hague Convention on Choice of Court Agreements, see Ronald A. Brand & Paul M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* 79 (2008)(whether there is a “meeting of the minds” “is a separate and distinct inquiry from whether an agreement can or cannot be given legal effect” due to invalidity; with respect to the former question, “presumably, the law of the forum---including its choice of law rules---will apply”).

instead on whether the agreement once assented to “is rendered unenforceable by standard defenses to contract enforcement, such as duress, mistake [and] fraud.”⁵⁹

19. Some commentators have dismissed the Restatement’s solution reactively and out of hand as simply “mistaken.”⁶⁰ Others are not quite so dogmatic,⁶¹ and somewhat to my surprise I find myself in their camp.⁶² There is perhaps no formulation that is entirely free from the inevitable qualms and question-begging and semantic quibbles. But I find it striking that despite attempts to deprecate the Restatement solution by taxing it with “inconsistency with general choice-of law principles in both national and international instruments,”⁶³ other attempts in precisely the same instruments to address the dilemma posed by ¶ 22 are not radically dissimilar: The formulations may differ but they respond to the same concerns; marginally more nuanced in their treatment of the fraught question of “existence,” however, they are thus marginally freer from a compromised conceptual framework.
20. Arbitration and choice-of-forum agreements are of course “excluded” from the EU’s Rome I Regulation, but its provisions are nevertheless readily available for application by analogy.⁶⁴ Article 10(1) of the Regulation stipulates that *both “the existence and validity”* of any term of a contract -- and this includes *a term by which the parties have chosen the applicable law*⁶⁵--- will be determined “by the law which would govern it” if the term “were valid”: This in turn, sends us to the “law chosen by the parties” under Article 3, the “putative law”---in other words, it

⁵⁹ § 4-12 cmt. b.

⁶⁰ E.g., Born, *supra* n. 12 at 566; see also *id.* at 594-95 (with no apparent explanation other than that it is not “consistent with general choice-of-law principles in both national and international instruments”).

⁶¹ See, e.g., Symeonides, *supra* n. 35 at 480-81 (expressly approving the Restatement; the distinction between on the one hand the “formation” (“and thus the very existence”) or the arbitration agreement, and on the other hand “issues affecting its validity or enforceability,” is “appropriate, if not necessary, in the context of choice of law”). Cf. Nygh, *supra* n. 34 at 83, 93 (the choice-of-law rule of the forum may allow the parties to agree on the applicable law, but “until they agree, there is no choice: hence the existence of any agreement as to choice of law (or jurisdiction) is a preliminary issue to be determined before any choice of law rule can operate”; “support for the application of the law of the forum to the question of whether agreement exists is also found in other legal systems”).

⁶² While I have indulged in some criticisms during the course of these lectures, nothing I have said anywhere in this piece detracts from my great admiration of the current state of the Restatement product. Treading carefully among all the various interests and attempting to establish some sort of balance between American positive law and what is considered “international best practice” is an impossible task, and it is one that the drafters have undertaken with immense learning and cheerfulness and good sense. I know that the curate, in the celebrated *Punch* cartoon gamely tasting his egg at the bishop’s tea, was too eager to assure his host that “parts of it are excellent;” but here, this is really the case. In other cases perhaps (as the curate was understandably more reticent to acknowledge), somewhat less so.

⁶³ See n. 60 *supra*.

⁶⁴ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (J. E.U. 4.7.2008); <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32008R0593>; see art. 2 (e).

⁶⁵ *Id.* art. 3(5).

deems the challenge to be irrelevant with respect to the choice of law. So the Regulation, unlike the Restatement, seems simply to “ignore the logical problem behind” the notion of “bootstrapping”⁶⁶---or perhaps, can be said simply to embrace it.⁶⁷

21. However, the self-referential effect of the chosen law is nevertheless qualified where a party wishes “*to establish that he did not consent*” to this choice at all: Here he may have an “out,” regardless of how the challenge is characterized, if he seeks the protection of the law of the state of his “habitual residence”; the non-consenting party “may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct” in accordance with the putatively chosen law.⁶⁸
22. Such a notion of true “consent” to a choice of law, posited as critical, is extremely attractive--- and in accord with the basic theme that has run through these lectures. In the interest of preserving a sort of negative “freedom from contract,” the Regulation aims at winnowing out, at the very outset, those cases where there is lacking any manifestation of mutual assent, any consensus ad idem, any mutual understanding, any “meeting of the minds such that an agreement has been

⁶⁶ Gralf-Peter Calliess, *Rome Regulations: Commentary* 269 (2nd ed. 2015).

⁶⁷ Plender & Wilderspin, *supra* n. 56 at 439.

⁶⁸ Art. 10(2).

Despite the inartful drafting, this hardly means that where art. 10(2) is successfully invoked, the applicable law necessarily becomes the law of the non-consenting party’s “habitual residence.” On the contrary:

- This provision in fact “does not expressly provide for a choice of the applicable law where paragraph (2) is successfully relied on,” Pender & Wilderspin, *supra* n. 56 at 174.
- But it is clear that the “escape hatch” of art. 10(2) may be invoked by a party only “to establish that *he did not consent*” to what purports to be the “chosen law”; the clear implication is rather that the parties have now failed to make any effective choice of law at all---their putative choice of law simply being “deemed non-existent,” Calliess, *supra* n. 66 at 271. This sends us back in turn to the general choice-of-law provisions of art. 4.
- Turning then to art. 4: Under the Regulation, in sharp contrast to US law, “habitual residence” is generally and in any event a rigid uniform connecting factor -- a strong choice-of-law presumption determining the law applicable in the absence of any agreement at all. [Inquiry into the country with which the contract may be “most closely connected” is at most a subsidiary factor only to be brought into play *in extremis*, see art. 4(3),(4)]. But this general choice-of-law rule obviously will not always point to the habitual residence of the party *seeking to avoid the contract*; see arts. 4(1)(a)(sale of goods; “where the seller has his habitual residence”), 4(1)(b)(provision of services, “where the service provider has his habitual residence”).

formed,”⁶⁹ any “fundamental lack of willpower.”⁷⁰ In many cases a simple factual inquiry into this question may be thought sufficient to obviate any explicit choice of law inquiry at all.⁷¹ Where this cannot be avoided, the structure of the

⁶⁹ See n. 58 *supra*.

For alternative formulations with respect to choice-of-law clauses, see Hook, *supra* n. 36 at 83, 111 (with reference to the putative proper law of the underlying agreement, the need for “a base level of mutuality” “consisting of consensus ad idem and an intention to create legal relations”); *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi v. VSC Steel Co. Ltd.*, [2013] EWHC 4071 (Comm.) at ¶¶ 88-97 (before reaching the question of the law applicable to the arbitration agreement, “in considering whether there was a consensus in fact the English law objective approach was to be followed”); Libling, *supra* n. 41 at 175 (“if at some point of time *the parties were of the same mind that some set of proposals should be adopted* and that it should be legally effective, English law will classify the transaction as a contract” and it will then “be referred for its validity to the legal systems indicated by the connecting principles of the English conflict of laws”).

Similarly, in the analogous context of choice-of-forum agreements, see Briggs, *supra* n. 2 at ¶¶ 7.06, 7.08 (to say that under the Brussels I Regulation “jurisdiction is prorogated when the parties have ‘agreed’ that [some other given] court will have jurisdiction” does not require *contractual agreement*”(emphasis in original), and “there may be other ways to show that the parties reached a *common understanding* about which courts would have jurisdiction”)(emphasis added); Trevor Hartley & Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* ¶ 95 (2005) (Hague Convention on Choice of Court Agreements; to say that the Convention has “come into operation” assumes first of all that “*by any normal standards*” “*the basic factual requirements of consent exist*,” failing which a court would be entitled to assume that the Convention is not applicable, “without having to consider foreign law”).

Something of the same sort seems to be going on in Mindy Chen-Wishart, *The Nature of Vitiating Factors in Contract Law*, in Gregory Klass et al. (eds.), *Philosophical Foundations of Contract Law* 294, 312-13 (2014)(with respect to contracts generally, “the validity of a transaction is a *two-stage* inquiry,” so that “a contract is presumptively valid if it satisfies the requirements of formation at stage one (including consent), *unless*, at stage two, the vitiating factors (invoking other values) operate to defeat it”; this structure takes into account “the omnipresence of the unforeseen in human activity” and “the accidents thrown up by life and litigation”).

⁷⁰ Calliess, *supra* n. 66 at 266.

The dominant concern of the drafters was apparently to deal with the disparate treatment across different legal systems of an offeree’s “silence”: Can silence be deemed to constitute “acceptance” of an offer? However, art. 10(2) can potentially sweep far more broadly; cf. P.R. Beaumont & P.E. McEleavy, *A.E. Anton, Private International Law* ¶ 10.233 (3d ed. 2011), which poses the question whether the provisions of art. 10(2) would also “allow of pleas based upon economic duress”? The proper answer of course is “no,” see *infra* and Lecture II, *supra* at ¶ 64; but see Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* at Ill. 6-2 (2015)(different result where “economic duress” would be thought to “vitate consent” under the standards of the law of the “establishment” of the purportedly non-consenting party).

⁷¹ In trying to make some sense of the architecture of the Regulation it is often difficult to disentangle

- the proper ambit of art. 3(1)---which seems to require the forum court first to be satisfied at the threshold, even before any “bootstrapping” begins, that there has been *some exercise of party “choice”*---and
- that of arts. 3(5), 10(1), and 10(2), which subjects even “*the existence and validity of [the parties’] consent as to the choice*” of law to the putative law itself, requiring application of that law---but nevertheless permitting a defendant to assume the burden of demonstrating his lack of “consent” to it.

One might well think that this is just saying the same thing in different ways several times over.

One route to proper construction is this: It has been suggested that at the “threshold” stage a court is expected to gauge directly whether an inference of actual “consensus” is justified---i.e., to ask whether some “choice” has been made (assessing, for example, a claim of *non est factum*)---whereas it becomes necessary to apply the proper law (assessing, for example, the legal implications of “silence,” of contracts formed by correspondence, of the “battle of the forms,” or of a *Peerless*-type fatal misunderstanding) only at a later stage. In theory then a case might end at the preliminary stage before any burden is shifted to the defendant. See Pender & Wilderspin, *supra* n. 56 at ¶¶ 6.073-6.079, 14.062 (the former may pose a question “with little or no scope for the application of black letter rules,” while the latter alone ‘treats the issue of consensus as a legal question’); Nygh, *supra* n. 34 at 87, 92-93 (“in most cases of uncertainty the issue may simply be one of interpreting the intention of the parties without reference to any particular national approach”). With reference to the analogous problem of choice of forum agreements, cf. *id.* at 83: “The first step . . . is to consider whether the parties *factually agreed* to the jurisdiction clause,” “in most cases “ “a purely factual question not involving any issue of law. But if it does raise an issue of the law, the forum will determine this *according to its own standards*. The second step is to consider whether the factual agreement is binding in law or affected by mistake, duress or fraud and the like,” and this by contrast is an issue to be “determined by the law governing the jurisdiction clause”).

This appears to be precisely the way the court proceeded in *Oldendorff v. Libera Corp.*, [1996] C.L.C. 482 (Q.B.D. (Comm.)), although the methodology is not immune from criticism. Here the court performed a Convention analysis to determine whether an arbitration clause calling for arbitration in London “should be treated as validly incorporated in any contract, if any contract was validly made.” (This was done despite the fact that arbitration is excluded from Rome I [and from its predecessor Convention]; see Beaumont & McEleavy, *supra* n. 70 at 497 fn. 299, 499 fn. 305).

- The court’s first step was to find that the clause, “specifically provid[ing] for arbitration in London by persons conversant with shipping law,” amounted in fact to a “real,” if “tacit,” choice of English law under art. 3.
- The next move---taking a “dispassionate, internationally minded approach”---was to find that it was not “unreasonable” to hold the defendant to this implied choice of English law, even though his “habitual residence” was in Japan.

So here the defendant’s “consent” to the arbitration clause---and thus his consent to the choice of English law---had first been verified as a simple, straightforward, factual---indeed admitted---matter; the court concluded that the clause was “uncontroversial” and the defendants “must on the face of it have observed the clause and found it acceptable”; “everything suggests that the defendants must actually have considered and accepted the clause,” see [1996] C.L.C. at 487, 490. (Note that this undoubted assent *to the arbitration clause alone* was taken---without the quixotic attempt at further inquiry---to independently confirm assent *to the choice of law supposedly embedded in it.*) Turning next to the attempt to invoke art. 10(2), the court set aside Japanese law, which was allegedly to the effect that “an arbitration clause must be specifically [or “expressly”] agreed”---“a mere reference to a form containing” it being insufficient: The unspoken premise here seems to be that such a potential legal obstacle would at most affect the agreement’s “validity,” but not the core conclusion reached under arts. 3 and 10. But cf. Nygh, *supra* n. 34 at 96 (“an argument . . . as to whether a clause was incorporated [by reference] in a contract falls within [the] scope” of art. 10(2)).

There are variant ways of explaining art. 3---but by deferring any definitive determination at all with respect to the reality of “consent” to the “application” stage of art. 10, they would deprive it of much of its substantive import. To the extent that art. 3(1) appears to require a finding at the outset of some exercise of party “choice,” its significance can be cabined if it is read in such a restrictive fashion as to limit a court’s role---that is, deeming that it asks a court merely to make a preliminary “prima facie” determination to the effect that the parties “reasonably can be held to have behaved in a way *which at least created the appearance of a choice*.” For such a reading, see Cailless, *supra* n. 66 at 90-91; to the same effect apparently is Briggs, *supra* n. 2 at ¶ 10.32 (“the Rome Convention advises that so long as there is *an expression of what may be a choice of law*, that law must be taken to be validly chosen”).

Regulation obviously entails a shifting of the burden, to the detriment of the party seeking to invoke the private international law of the forum---a burden that, as applied, may often prove to be steep. And the drafters of the Regulation felt able (at least on the surface) to dispense with the conceptual construct of “existence,” a creaky and unreliable relic of two centuries past.⁷²

23. But in other respects the common thread running through both Regulation and Restatement is bright enough. Both share the recognition that some minimal level of assent is necessary (and may in fact be sufficient) to trigger a supposed choice of applicable law. Autonomy is set aside where it should have no purchase. At this stage “assent” can often be tested without diverging radically from “common sense notions of contract,” widely shared and intuitively understood.⁷³ Where it is

But for our purposes, we need not go any further: It seems sufficient to note that in *any* event---however it is thought arts. 3 and 10 are to be rationalized---the thrust of both sections seems equally to invoke and implicate the core notion of “consent.” And at some level this is precisely the prior inquiry required by the Restatement.

⁷² Yet at the same time one notes bemusedly that all courts and commentators apparently take it for granted that the “escape hatch” of art. 10(2) serves as a surrogate for the very same idea---ancient taxonomy functioning perhaps as a sort of security blanket: In close parallel with the Restatement, it is said that the defendant’s ability to rely on the law of his “habitual residence” is closely confined to those consensual defenses which can be swept up into the notion of an agreement’s “existence” (as opposed to its “validity”!) Cf. Cailless, *supra* n. 66 at 265-71 (“the formation of a contract from an external point of view,” but art. 10(2) “cannot be extended by analogy to matters of validity”) ; Pender & Wilderspin, *supra* n. 56 at ¶ 14-069 (and so it can have no bearing, for example, on the right of a party to “withdraw” from a contract originally entered into, granted to consumers by the law of the country of their habitual residence); Lupofresh Ltd. v. Sapporo Breweries Ltd., [2013] EWCA Civ. 948 (art. 10(2) “relates only to” the existence of consent, as opposed to the question of whether consent, admittedly given, was invalidated by mistake, misrepresentation, duress, undue influence or non-disclosure”; therefore “the effect of duress, if made out,” is “a matter for the putative proper law of the contract”).

The Hague “Principles on Choice of law in International Commercial Contracts” “follow” closely on Rome I (adding however a new “sub-rule” addressing the “battle of the forms,” under which “there is no choice of law” art all where the parties have each used “standard terms” that designate two different laws leading to different outcomes). They too consciously eschew the fraught terminology of “existence” and “validity,” preferring instead to use the “non-technical” terms of “agreement” [in the equivalent to art. 10(1) of Rome I] and “consent” [in the equivalent to art. 10(2).]. See Hague Conference on Private International Law, *Principles on Choice of Law* at ¶¶ 6.2, 6.6.

⁷³ William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in *Multiple Party Actions in International Arbitration*, *supra* note 30 at ¶¶ 139, 142; see also *Rau, “Jurisdiction”* at 166 (this will often permit “a fruitful conceptual muddiness, making it largely unnecessary to nail down just what law is being applied”).

In addition, the more “demanding” the *formal* requirements imposed on arbitration agreements, the more any inquiry into the actual presence of “consent” properly becomes marginalized---as formalities already provide abundant reassurances with respect to the presence of “assent” that thus tend to “absorb” the need for independent judicial inquiry. See van den Berg, *supra* n. 56 at 287-88 (with reference to art. II(2) of the Convention); Briggs, *supra* n. 2 at 480 (“if the agreement is or appears to be in writing, it is likely to reflect a deliberate act by the parties, and so raises a defensible presumption in favour of binding validity”). The unfortunate corollary is that as time and impatience cause formal requirements to be relaxed [see ¶¶ 75 ff. *infra*; “Formal Validity”], the inevitable response must be the reinvigoration of judicial gate-keeping. The classic discussion is by Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 800-03 (1941)(the

present it may not prove necessary to dwell *de novo* on “the more precise question of what the parties did and do actually agree to.”⁷⁴

24. I have in past lectures mocked the lingering obsession in soft-law instruments like the Restatement with the ancient dichotomy between the “existence” and the “validity” of contracts.⁷⁵

a. The trope of “existence” is indeed *essentially incoherent where the allocation of power between alternative tribunals is in issue*. Arbitration being a *jurisdiction d’exception*, the ultimate question whether there is an enforceable arbitration agreement must always remain with the court for plenary review---but such an agreement is not necessarily or even presumptively “tainted” by any failure of formation of the main contract. So the attempt to build arguments on the quicksand of “non-existence” leads nowhere in particular: Our usual “mimicking” default rule sensibly permits an inference that the parties may have wished to have the currency of the main contract determined by private tribunals, as part of the adjudication of their underlying primary rights and obligations.⁷⁶ Enforcing the arbitration agreement here still leaves us quite immune to any accusation of “bootstrapping.”

b. But this trope, if properly understood, causes far less harm here---given that the solution to the choice-of-law problem (in the forms advanced by both the Restatement and Rome I) aims at very different things, responds to very different questions, and serves very different functions. Where the parties (by hypothesis) may never have expressed their consent to any arbitration agreement at all, any notion that this “non-existent” “agreement” can somehow be disaggregated and disassembled---in the process attributing to the parties a desire to submit this very issue of their consent to a particular chosen law--is a counter-intuitive non-starter.

“cautionary or deterrent” function of formality as “inducing the circumspective frame of mind appropriate in one pledging his future”; but “if language sometimes loses valuable distinctions by being too tolerant, the law has lost valuable institutions, like the seal, by being too liberal in interpreting them”).

⁷⁴ Briggs, *supra* n. 2 at ¶ 10.33.

⁷⁵ The trope of “existence” runs through the Restatement, and indeed we find advanced *in the very same section of the Restatement* the propositions

- that since *challenges to the “existence” of the overall container contract* necessarily call into question the very existence of the arbitration agreement itself, such challenges *must be decided by a court* [this is the proposition that in an earlier lecture I held up there to some scorn], and
- that *challenges to the “existence” of the arbitration agreement itself* necessarily fall to be determined *on the basis of some body of law other than the law designated by the parties* [this is the subject of the present discussion].

See §§ 2-12(a)(1), (2).

⁷⁶ Cf. Rau, “*Separability*” at 18-26 (e.g., mutual mistake; “if they have agreed on nothing else they have agreed to arbitrate”).

25. In any event, in all cases---and this is true of both “a.” and “b.” in the paragraph above---such a tendency to take metaphor for reality, such an anthropomorphic view of legal concepts, must be resisted as being exceptionally unlikely to lead anywhere useful. Although in “b.” the Restatement formulation may charitably be viewed as an heuristic serving to winnow out cases where core “consent” or “consensus” is lacking, it is always best to address such a concern directly rather than to indulge in metaphysical detours. So assume, then, that a direct challenge is made to the constituent ground rules (choice of law or forum) laid down by the parties for the resolution of future disputes: Binding a party in these circumstances to Fredonian arbitration, absent even a minimal indication of mutual assent, may be problematical; on the other hand, once such a showing is made, this may precisely mark the appropriate point at which party autonomy should properly come into play. It may, in other words, be deemed sufficient *for the limited purpose of sending us to the body of law on which the parties assumed the validity of their choice would turn*. This is the law that will assess the effect of external constraints that may condition the legitimacy of their choice.

26. However it is framed, such a distinction may be a necessary tool to deal with what are often imponderable choice-of-law issues (but not, I repeat, with respect to the allocation of decisionmaking authority). This suggestion is reinforced by a glance at the structure of the Vienna Convention on the International Sale of Goods. The CISG, we remember, imposes a transnational and uniform regime with respect to any issues that implicate the “objective agreement”---the “formation of the contract of sale.”⁷⁷ And yet by its express terms it is “not concerned with the *validity* of the contract” --- because it is precisely with respect to the issues characterized under the Convention as going to “validity” (dealing, for example, with “unfair contracts” or “unconscionability,” or statutory prohibitions) that national laws, and thus party expectations, are likely to vary substantially in response to long-standing and strongly-held customs and traditions.⁷⁸ Line-drawing, then, is a central feature of the Convention scheme.

D. The Sarhank Case

27. The simple premise of the Restatement is that deference to party “choice”---whether a choice of a Fredonian seat or a choice of Fredonian substantive law---can only follow upon some true expression of assent; it cannot rest alone on the putative “choice” of either without courting circularity, exposing a party to

⁷⁷ See CISG arts. 4, 14-24; see also Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods* 87 (4th ed. 2016)(“the objective agreement. . . is a core area of the CISG”).

Cf. Brand, *supra* n. 58 at 544 (“While different rules on the formal or substantive validity of choice of forum agreements and contracts in general may be justified, it is much more difficult to justify different rules on the element of consent necessary to result in a legally binding obligation”).

⁷⁸ See, e.g., Helen Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 Yale J. Int’l L. 1, 47 (1993)(while the term “validity” “at most refers to common, or at least comparable, effects in different legal systems,” “as far as its content is concerned . . . it is an elastic term that permits some national differences”).

arbitration proceedings without some assurance that agreement is present. This is the principle that seems to drive many cases, including the Second Circuit's inexplicably controversial decision in *Sarhank*.⁷⁹

28. Here an agreement was entered into between Sarhank (an Egyptian company), and Systems (a Cypriot company); the agreement was to be performed within Egypt and provided for arbitration under Egyptian law. Sarhank later initiated an arbitration against Systems---and also against Oracle, its Delaware parent; although Oracle protested that it had not signed the agreement and “had never assented to arbitration” in any way, the arbitrators found both defendants liable and the award was upheld in Cairo. The district court enforced the award against Oracle. It was clear---and this was conceded by the claimant---that “the arbitrators’ conclusion that Oracle is bound to arbitrate as a non-signatory was based solely upon Egyptian law.”⁸⁰ Nevertheless the fact that a US court might not have held Oracle to be bound under these circumstances was found to be nothing but a “misplaced” “quibble”; the arbitral determination obligating Oracle on the ground that it was “a consolidated partner with Systems” was simple a non-reviewable “construction of the parties’ agreement.”⁸¹
29. Nevertheless the Second Circuit reversed: For the court of appeals, the approach of the district court was flawed for the simple reason that it had “failed to determine independently whether Oracle had consented to arbitration”: “Whether a party has consented to arbitrate is an issue to be decided by the Court in which enforcement of an award is sought,” and “an American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or agency law.”
30. *Sarhank* has been subject to vehement criticism, much of it baffling.⁸² It is certainly a straightforward enough proposition that a court should be able to

⁷⁹ *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 662-63 (2d Cir. 2005).

⁸⁰ *Id.* at 662.

⁸¹ *Sarhank Group v. Oracle Corp.*, 2002 WL 31268635 (S.D.N.Y.) at *5, *7.

⁸² E.g., Bernard Hanotiau, *Multiple Parties and Multiple Contracts in International Arbitration*, in Permanent Court of Arbitration (ed.), *Multiple Party Actions In International Arbitration* 35, 60-62 (2009); Bernard Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law*, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, vol. 13) 341 (2007). For Professor Hanotiau “the decision is wrong, being based on a totally erroneous interpretation---which we have denounced several times---of the term ‘arbitrability’ referred to in art. V(2) of the New York Convention” (which “has nothing to do with the theory of arbitrability prevailing in the United States”). See also Barry H. Garfinkel & David Iherlihy, *Looking for Law in All the Wrong Places*, 20(6) Int’l Arb. Rep. 12 (2005) (“a mistaken application of Article V(2)(a)”; “the Court took the wrong route to get to its ultimate outcome”); *Aloe Vera of America, Inc. v. Asianic Food Pte. Ltd.*, [2006] SGHC 78 ¶ 37 (High Ct. Sing. 2006)(the court in *Sarhank* “incorrectly grafted [the American] concept of ‘arbitrability’ into art. V(2)(a) of the Convention,” even though art. V(2) was intended instead to cover awards in which the subject matter of the dispute is not capable of settlement by arbitration because “a law in the enforcing state prohibits that class of disputes from being resolved by arbitrators”). For the admittedly eccentric use of the term “arbitrability” in US arbitration law, see Jan Paulsson, *The Idea of Arbitration* 72-77 (2013).

intervene if is not satisfied at some point that there was indeed “an assent to arbitration” -- that is, either

- that the arbitrators did in fact have “jurisdiction,” or alternatively,
- as a higher-level matter, that the parties had entrusted the arbitrators themselves with the power to make a binding determination with respect to their own jurisdiction.

But perhaps a marginally cogent ground for objection to *Sarhank* is nonetheless available---one that might proceed along these lines: As the court presumably

Now it does appear that the court's refusal to confirm the Egyptian award was based on art. V(2). Nevertheless the court *did not distinguish at any point* between art. V(2)(a) (“not capable of settlement by arbitration”) and art. V(2)(b) (“contrary to public policy”). And note this: In any event the court never said anything *even remotely suggesting that the dispute was not “arbitrable.”* (Its occasional references to “arbitrability” were nothing more than clumsy attempts to capture the supposed teaching of Supreme Court jurisprudence that governs a very different question, the contractual allocation of decision-making responsibility between courts and arbitrators).

Perhaps it might have been preferable to rely directly on art. V(1)(a) (“agreement is not valid”). Cf. *IMC Aviation Solutions Pty. Ltd. v. Altain Khuder LLC*, 2011 WL 3659937 (Ct. App. Sup. Ct. Victoria): Here the Victoria court took it as a given that IMC Solutions' defense---“I was not a party”---came within the local legislation implementing Article V(1)(a) of the Convention, *see* ¶¶ 166, 172 (“the ordinary and natural meaning of the expression ‘the arbitration agreement is not valid’ is that the arbitration agreement is ... of no legal effect as against him or her”; “there is no doubt that [Article V(1)(a)] also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement”). Or even art. (1)(c) (“matters beyond the scope of the submission to arbitration”). In the case of a U.S. arbitration, it would have been easy enough to speak the language of FAA § 10(a)(4) (“the arbitrators exceeded their powers”).

The most obviously-applicable provision of the Convention, although fraught and fearful to amateurs, was art. V(2)(b): See Born, *supra* n. 12 at 3468 & fn. 394 (*Sarhank* might “arguably” be reconcilable with the Convention if were regarded as an application of the “public policy” ground for refusal of recognition, although a court relying on that that ground “should be required to articulate that choice”). This was suggested in a particularly articulate fashion in the later case of *Changzhou AMEC Eastern Tools & Equipment Co., Ltd. v. Eastern Tools & Equipment, Inc.*, 2012 WL 3106620 (C.D. Cal.), *aff’d sub nom.* *Dai v. Eastern Tools & Equipment, Inc.*, 571 Fed. Appx. 609 (9th Cir. 2014). Here the court refused to enforce a Chinese award where the respondent’s President testified that he had been arrested by Chinese police and told that he would not be released until he signed an agreement promising to pay \$2.5 million to the claimant, and submitting to the arbitration in China of any future disputes. The holding rested not on art. V(1)(a)---since the arbitral tribunal had applied Chinese law in a way that did not seem to rise to the level of “manifest disregard” of the law---nor did it rest on art. V(2)(a)---since the underlying contract dispute over the sale of goods was perfectly capable of settlement by arbitration---but instead on art. V(2)(b). Here, without regard to any choice-of-law clause, the proper inquiry---phrased as “whether the parties intended to contract for arbitration”---had to be decided using “the analytical framework of the FAA”; “as federal arbitration law applies state law to rule on the merits of the defense of duress,” the court then proceeded to apply “California state contract law” to ultimately find that the respondent’s President had been “deprived . . . of his free will” so that he “did not consent to the agreement.” 2012 WL 3106620 at *12-*13. An analogy to defenses based on incapacity---“which also vitiates consent”---was made explicitly, *id.* at *11 n. 22; *see* n. 55 *supra*.

But as long as we know what's really going on---as long as the ultimate result is defensible---correct terminology pales next to the essential point that “consent” must be re-examined *de novo*.

understood, any talk of “lack of agreement” inevitably poses the question of *what law* should govern such a determination: The court’s refusal to enforce the award does appear to have been rooted in art. V(2) of the Convention---a route that conveniently allowed it to restrict itself to US law. For that reason, as John Townsend shrewdly notes, the most plausible problem with *Sarhank* may simply be that the decision is “an example of overreaching extraterritoriality.”⁸³

31. This line of criticism obviously proceeds from the premise that on a motion to enforce a foreign award, art. V(1) imposes a universal and mandatory conflict rule that requires deference to the parties’ contractual choice---a route that here, as the district court held in *Sarhank*, would test the substantive validity of the arbitration agreement against the principles of *Egyptian law*.⁸⁴ But this seems misguided: It hardly seems “parochial” or “insular”⁸⁵ to bridle at the prospect that such a “choice” must be treated as somehow self-validating---that it may not be set aside as lacking legitimacy even in the absence of manifested party assent. Does a piece of paper with a scribbled “signature” thereby constitute a chosen law under art. V over a vigorous protest from respondent that it was a mere forgery, or was signed without authority, or without any understanding that it was a contractual instrument of any sort?⁸⁶

⁸³ See John M. Townsend, *Non-Signatories in International Arbitration: An American Perspective*, in *International Arbitration 2006: Back to Basics?*, *supra* note 82, at 359, 364 n.28.

To the same effect, and with a rich display of rhetoric, see also Born, *supra* n. 12 at 541, 3467 (“contrary to the requirements” of art. V(1)(a), this “reflects a parochial insistence on applying local law,” “notwithstanding a foreign arbitral seat, a choice-of-law clause selecting foreign law and the absence of any connection of the relevant contract to the United States”; “it is very difficult to see what could justify this application of US law”); *Aloe Vera of America, Inc.*, *supra* n. 82 at ¶ 38 (*Sarhank* demonstrates “an insular attitude” since it pays insufficient “regard to the fact [sic] that the American parties had chosen to do business in a foreign jurisdiction and to make their agreements subject to foreign law and foreign arbitration”); S.I. Strong, *Navigating the Borders between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. Disp. Resol. 119, 196 (to apply “federal common law to the question of validity and incapacity simply because the motion to enforce the arbitral award is before a U.S. court” is to “ignore the express language of art. V(1)(a)”). Similarly, an early draft of the Restatement agreed that by applying Article V(2) the court in *Sarhank* “improperly circumvents the choice-of-law rules of art. V(1)(a),” Restatement of the Law Third, *The U.S. Law of International Commercial Arbitration*, § 5-8 *Reporters’ Notes* note b (Tentative Draft No. 1, March 29, 2010); on reflection wiser counsel appears to have prevailed. See n. 91 *infra*.

⁸⁴ To the same effect see *Aloe Vera of America*, *supra* n. 82 (in Arizona arbitration, manager was held personally liable as the alter ego of a Singapore company which was itself a signatory to the agreement; held, under the Convention “the arbitration agreement was subject to the law of Arizona and therefore Mr. Chiew bore the burden of establishing that it was not valid under the law of Arizona”; “in order to establish whether there was a valid arbitration agreement binding Mr. Chiew” “it would not be correct . . . for me to construe . . . the Agreement in the same way as I would be able to if it were subject to Singapore law”).

⁸⁵ See n. 83 *supra*.

⁸⁶ See *Changzhou AMEC Eastern Tools & Equipment Co., Ltd.*, *supra* n. 82; see also *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274 (3rd Cir. 2003)(US respondent alleged that the contracts containing the supposed arbitration clause has been forged; on a motion to enforce a Chinese award, the district court had the “obligation to determine independently the existence of agreement to arbitrate,” a determination to be based “on straightforward notions of contract law rather than on any technical interpretation of the language

32. This is precisely the situation posed in *Sarhank*. As I have written earlier, there is a critical difference we must bear in mind between:

- a. attempts to bind a non-signatory to an arbitration agreement, and
- b. attempts to impose, on a *signatory* to an agreement, the obligation to arbitrate with other, unnamed parties.⁸⁷

Given the critical nature of consent, it will rarely be possible in the former scenario to force a *non-signatory* to an agreement into an arbitration proceeding in the absence of some threshold finding of assent. And thus the court in *Sarhank* quite properly insisted on a prior judicial finding of consent without regard to the putative chosen law or the law of the putative seat.⁸⁸

33. One mustn’t exaggerate the scope of the holding. All that transpired in *Sarhank*, after all, was that the cause was remanded.⁸⁹ The precise (and in light of the above, quite unobjectionable) holding was that the district court had committed error by thinking that the “construction of the Agreement” or the “conclusions of law”---*rendered pursuant to Egyptian law by arbitrators in Egypt*---were sufficient in and

of the treaty”).

Even more explicit if possible is *Exceed Int’l Ltd. v. DSL Corp.*, 2014 WL 1761264 (S.D. Tex.). Here, before signing contracts on behalf of the Texas respondent, its President “struck through the English versions of the arbitration provision” but left the Chinese version untouched; he testified that he “would never have agreed to arbitration, especially not in China---a country with which DSL has no affiliation and whose language I do not speak or understand.” The court applied “ordinary principles of contract formation” as found in Texas law in order to hold that a Chinese award should not be enforced under the Convention; the contracts “are unambiguous in that they do not contain valid arbitration provisions.” Cf. *Chateau des Charmes Wine Ltd. v. Sabaté USA Inc.*, 328 F.3d 528 (9th Cir. 2003)(valid oral agreement did not include any forum-selection provision; the seller’s later attempt to materially alter the terms of the agreement, through a clause in its invoices calling for disputes to be settled in French courts, did not satisfy the requirements for contract modification under the CISG, applicable as the contract law of the forum; although the district court had dismissed the action in favor of adjudication in France, “there was nothing for the district court to enforce”).

⁸⁷ See *Rau*, “Consent” at ¶¶ 3.61ff.

⁸⁸ By contrast most of the cases that choose to assess the validity of an arbitration agreement (“b.”) by relying instead on the parties’ “chosen law” will be found to fit neatly into the latter category: Rather than suggesting a lack of core consent, these cases suggest instead “a strong analogy to the problem of determining the *scope, the coverage*, of an undoubted agreement to arbitrate”; the proper inquiry is, “what are we to make of your undoubted, broad, generic, sweeping commitment to arbitrate disputes?” See *Rau*, “Consent” at 122 (“it is more foreseeable, and thus more reasonable, that a party who has actually agreed in writing to arbitrate claims with *someone* might be compelled to *broaden the scope* of his agreement to include others”). See *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F.Supp.2d 334, 354-55 (S.D.N.Y. 2005)(in this second category of cases “the party *seeking arbitration* must implicitly accept that the contract under which arbitration is sought is valid and binding on it, and the party *opposing arbitration* has signed the contract, so *both parties* can reasonably be bound by the choice-of-law clause”).

⁸⁹ Thus in light of ¶ 33 above it seems inaccurate and a substantial overstatement to claim that in *Sarhank* the Second Circuit “decid[ed]” that the parent company “would not answer for the obligations of its subsidiary [Systems] pursuant to an arbitration clause signed only by the latter.” William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 *Hastings L.J.* 251, 292 (2006).

of themselves to bind Oracle; the trial court was instructed instead to go about the logically prior inquiry *de novo*---to “find as a fact whether Oracle [had] agreed to arbitrate” at all, by “its actions or inaction” or by reason of having cloaked its subsidiary “with apparent or actual authority to consent” to arbitration “on its behalf.”⁹⁰ In the absence of any deference to the putative choice of Egyptian law,

⁹⁰ *Sarhank*, supra n. 79, 404 F.3d at 662-63.

Thus, in the more recent case of *Int’l Chartering Services, Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp.3d 629 (S.D.N.Y. 2015), the district court carried out precisely the inquiry envisaged by the Second Circuit in *Sarhank*: Here a charter party was to be governed by English law and disputes between “Charterers” and “Owners” were to be resolved by arbitration in London. A ship broker had served as “deal broker” and participated in the negotiations; when it brought suit against the Owners for commissions, the defendants moved to compel arbitration. Whether the broker was required to arbitrate apparently depended on the applicable law, which was “outcome determinative”---for if the agreement were interpreted under English law, plaintiffs would be included in the contractual reference to “Owners and Charterers” as assignees from the original parties, “folding them into the arbitration clause”; under federal common law, on the other hand, plaintiffs would be characterized as neither, and so would not be covered. The court held that

- Just as a party may be “estopped” *from denying its obligation to arbitrate* whenever it elects to receive a “direct benefit” from a contract containing an arbitration clause, so too, by extension,
- the plaintiffs were “estopped” *from denying the contract’s choice-of-law provisions*, “insofar as their claims arise under the contract” and they were seeking a “direct benefit” under it; nor did they “seriously dispute that they are third-party beneficiaries.” For either reason the choice-of-law rule, as a ground rule intended to regulate and structure their substantive claim, was swept in by the plaintiff’s conduct---making it reasonable for the court to treat the case “*as if the plaintiffs had formally consented to the choice-of-law clauses in those contracts.*” Cf. Pierre Mayer, *La “circulation” des conventions d’arbitrage*, in Lic Cadiet et al. (eds.), *Mdiation et arbitrage: Alternative Dispute Resolution* 209-10 (2005) (assignment; there is no room whatever for “separability” here, as the arbitration clause has “configured” the cause of action arising out of the transaction; the substantive and procedural aspects of the parties’ legal relations are “usually inseparable, the parties having envisaged them as a matched set”; Pierre Mayer, *Note [to Compagnie tunisienne de navigation (Cotunav) v. socit Comptoir commercial Andr]*, [1990] *Rev. de l’arb.* 681, 689 (ratification; the arbitration clause is “towed behind” [* la remorque*] the substantive obligations of the parties, whose fate it shares because it merely constitutes one of its elements or “modalities”).

Estoppel, as I have earlier argued at length, is really little more than “an alternative way of phrasing the central core inquiry into agreement”; see Lecture I at ¶¶ 54-63 (“estoppel” as “word balloons,” “the last refuge of a desperate advocate,” an “unnecessary excrescence,” a “surrogate for consent,” the functional equivalent of consent”).

Since the plaintiffs in *Int’l Chartering Services* were not themselves signatories to the original agreement, the court---in holding nevertheless that they were bound to the “chosen law”---felt that it had to deprecate the significance of the signatory/non-signatory distinction as a framework for decisionmaking. But quite unnecessarily: No claim would be tenable---no claim is ever made---to the effect that signatory status is *necessary* in order to capture the “chosen law”; at most the claim is that it is likely to prove *sufficient*; other canonical ways of establishing consent---as here---remain open. Another illustration is FR 8 Singapore Pte. Ltd. v. Albacore Maritime Inc., 754 F.Supp.2d 628 (S.D.N.Y. 2010): What law governs the plaintiff’s attempt to compel a parent/non-signatory to arbitrate on “alter ego” grounds: The law of the Marshall Islands, where the subsidiary/signatory was incorporated? Federal common law? Or the law of England---which was the governing law of the contract and the seat of the arbitration---under which veil piercing would be “virtually impossible”? The court opted for the last of these: For here it is the non-signatory who resists being compelled to arbitrate who nevertheless---far from being held hostage to some alien body of law---in fact “seeks the protection of the choice-of-law clause”; on the other

the court followed in fact a route quite similar to that which would be laid out several years later by the Restatement:

- Enforcement of the Egyptian award must be denied unless the court is convinced “that the totality of the evidence supports an objective intention to agree to arbitrate.”⁹¹
- And whether there is “an objective intention to agree to arbitrate” falls to be determined “by the law designated by the general choice-of-law rules of the forum, which will most likely point to the contract law of one jurisdiction or another.”⁹² (Bear in mind that under this scenario, there is as yet no assurance that there has been any expression of will whatever). Here, that the forum’s choice-of-law rules would point directly to the law of the US seems not controversial, but overdetermined:
 - Recall that the court in *Sarhank* summarized its holding by saying that “an American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or agency law.”

A number of the cases that have followed might equally be thought to have attributed significance to the American identity of the resisting party, suggesting both a protective impulse⁹³ and a characterization of the party’s “proper law,” based on domicile and “establishment,” as a strong connecting choice-of-law factor.⁹⁴

hand it is the signatory who inconsistently “seeks to avoid the choice-of-law clause in the very agreement it seeks to enforce.”

⁹¹ *Sarhank*, 404 F.3d at 662.

The most recent draft of the Restatement seems to perceive that in this respect the decision in *Sarhank* is in perfect accord with the overall structure of the project (as it is indeed with the argument here.) The draft first repeats its earlier assertion that to apply art. V(2) to a defense of “lack of assent” “improperly circumvents the choice-of-law rules of art. V(1)(a).” See n. 83 *supra*. But it then abruptly switches direction: “That said [sic], given that the issue in the *Sarhank* case itself was whether an arbitration agreement could be enforced against a non-signatory,” the appropriate applicable law would nevertheless “be determined by the choice-of-law rules of the forum”---after all, in cases like *Sarhank*, there had been *a challenge to the very “existence” of any agreement to which the non-signatory was bound.*” § 4-12, *Reporters’ Notes*, n. b. (Tent. Draft No. 2, April 16, 2012)

⁹² *Restatement*, § 2-12, *cmt. e.*, & *Reporters’ Notes*, n. e.

⁹³ Cf. *Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V.*, 245 F.3d 505 (2nd Cir. 1998)(parties exchanged draft contracts providing for Dutch governing law and dispute resolution in Dutch courts, but did not enter into a final written agreement; “if no contract exists, the language of the forum-selection clause cannot logically deprive Evolution of its significant right of access to the courts of the United States”). See also the cases at n. 86 *supra*.

⁹⁴ Concern for “domicile” is here of course in complete abstraction from any purpose or policy that the underlying substantive law may be seeking to advance. Cf. Clyde Spillinger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. Rev. 1240 (2015)(noting the increasing tendency to consider that “domiciliary interests” are “presumptively a legitimate consideration in the choice-of-law analysis” and are “among those that will establish the connections with the forum that are

But while this is canonical learning in cases, say, where “incapacity” is claimed,⁹⁵ it is less likely to be appropriate across the board where there is a mandate for enforcement from the Convention.⁹⁶ It is after all only to be expected (and so as a contingent factor not deserving to be weighed separately) that any respondent in an enforcement proceeding will be a local domiciliary.

- A more plausible and familiar pointer would direct us to US law considered *as the law of the forum*: Certainly when the currency of a forum selection clause is at issue, this has tended to be the starting point from which courts have proceeded.⁹⁷ After all, when the task posed is to decide as an initial matter whether there was any “agreement to be contractually bound,” it is hard to see how a court can approach the matter “by reference to anything other than its own conception of what amounts to an agreement.”⁹⁸

34. When cases like *Sarhank* direct lower courts to identify the presence of “consent” by deploying the “general principles of contract formation” of the forum,⁹⁹ this is

requisite for the application of forum law” ---this is something that corresponds to yet “another shift in the centuries-long dialectic between a conception of law as essentially personal in nature (in which a person ‘carries her law’ with her wherever she may go) and one that regards its scope as territorial”).

⁹⁵ See n. 56 supra; see also n. 68 supra (Rome I; applicable law in the absence of party choice).

⁹⁶ See *Republic of Ecuador*, supra n. 80 at 355 (to make “the choice of governing law in a Convention case depend on the nationality of the party sought to be forced into arbitration” would not be “consistent with” the principle that “parochialism in international arbitration should be avoided”).

The Convention itself of course distinguishes between the question of the general validity of an arbitration agreement and the more precise question whether a party was “under some incapacity” “under the law applicable to [him]”; this is art. V(1)(a), but the result should be the same with respect to the pre-award enforcement of agreements, see *Restatement*, § 2-12, *Reporters’ Notes*, n. e(ii); see more generally infra at ¶ 39.

⁹⁷ See *Symeonides*, supra n. 35 at 447-48 (contracts with both forum-selection clauses and choice-of-law clauses; “there is no question that the vast majority of cases apply the *lex fori*”); see also n. 35 supra (“reflexive” application by US courts of the *lex fori* to determine the existence, validity and scope of a forum selection clause).

⁹⁸ *Briggs*, supra n. 2 at 396. See also *Kassis*, supra n. 50 at ¶ 207 (formation of a contract for the choice of law; the “natural vocation” of the law of the forum is to act as the law of “last resort”---unless of course the conflict rules of that same forum court mandate the application of some other more appropriate body of national law); *Partenreederei M/S “Heidelberg” v. Grosvenor Grain & Feed Co., Ltd. (The “Heidelberg”)*, [1994] 2 Lloyd’s L. Rep. 287, 306 (Q.B.D. (Comm.) 1993)(“there is no system other than the municipal law to which reference can be made for the purposes of answering the preliminary question whether” “the parties reached a consensus ad idem”).

⁹⁹ See *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 147-48 (2d Cir. 2001)(“the district court correctly evaluated the written communications under general principles of the law of contract formation,” and permissibly found that “the negotiations never resulted in a ‘meeting of the minds’ sufficient to form a binding ‘ad hoc’ agreement to arbitrate”); cf. *Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 WL 3476430 (S.D.N.Y.)(“the general principles of domestic contract law”).

often thought to send them to the contract law of the individual state in which a state or federal court is sitting.¹⁰⁰ But as I have written earlier, that’s far too uncritical a view of the matter: When federal courts purport to channel state contract law in arbitration cases, the engine driving the machine is principally that of administrative convenience---allowing courts to avoid the burden of fashioning a newly-minted federal common law of private agreement. Despite the superficial impression that one might casually glean from commentary and cases,¹⁰¹ state and federal law are hardly in some sort of unseemly competition: For the former should in no event apply *ex proprio vigore*---as it has no regulatory force of its own: It is chosen, in Justice Holmes’ typically quotable phrase, only as a “benevolent gratuity.”¹⁰² “Federal common law” is merely a phrase that serves as a signal to the effect that international arbitration remains a matter of national concern---it is this precisely because Congress has dealt with it---so that to the extent local rules are not congruent with this concern, they fall away.

35. Even if it nominally begins with “federal common law,” an American court should hardly be expected to refrain from deploying its usual choice-of-law analysis in circumstances where foreign law may claim a more significant relationship to the dispute: One obvious example is the use of foreign law as data, swept in

- not in the slightest by virtue of the fact that it happens to be the law of the state selected as the seat or the law chosen to govern the overall contract;¹⁰³

¹⁰⁰ See *Exceed Int’l Ltd.*, supra n. 86 (“ordinary state-law principles that govern the formation of contracts”); *Changzhou AMEC Eastern Tools & Equipment Co., Ltd.*, supra n. 82 (applying “California state contract law in ruling on defendants’ duress defense”; *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004) (“in determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement,” and “this means Mississippi state law applies here”).

¹⁰¹ Cf. *Republic of Ecuador*, supra n. 88 at 352-53 (while “several recent Second Circuit cases support the application of state law to the question of whether a party is bound by a purported agreement to arbitrate,” “there is also, however, a line of Second Circuit authority supporting the application of federal common law”); *Restatement*, § 2-12, *Reporters’ Notes*, n. e(i) (while “in many cases, particularly domestic cases, the forum’s choice-of-law rules will point to the law of a U.S. jurisdiction, very often the law of a U.S. state,” “other courts have held, in the international context, that the law applicable to the existence of an arbitration agreement is federal common law”); cf. *Graves v. BP America, Inc.*, 568 F.3d 221 (5th Cir. 2009) (while questions of “contract validity” call for the application of “ordinary state-law principles that govern the formation of contracts,” whether a dispute falls within the *scope* of the arbitration agreement is answered “by applying the ‘federal substantive law of arbitrability’”; there is however “less certainty” over what law governs whether a non-signatory should be compelled to arbitrate---something that seems to fall between the two---“and in fact, we have cases applying state law and others applying federal law to this question”).

¹⁰² *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 220 (1917). See Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 *Amer. Rev. Int’l Arb.* 435, 528-30 (2011) [hereinafter Rau, “*Trilogy*”].

The court in *Sarhank* itself held that where the question is posed of a non-signatory’s ability to avail himself of an art. V(2) defense, it is “federal arbitration law [that] controls,” 404 F.3d at 661.

¹⁰³ Cf. *Chloe Z Fishing Co., Inc. v. OdysseyRe (London) Ltd.*, 109 F. Supp.2d 1236 (S.D. Cal.

- but as a way of giving effect directly to the expectation of the parties, which is properly the forum’s Prime Directive: For example, a reference to foreign law may make meaningful---may fill with content---a fact-intensive application of a commonplace principle such as estoppel.¹⁰⁴

E. The Applicable Law

36. Now perhaps it is time to move away from *Sarhank* itself. Once the hurdle identified by the Second Circuit has been cleared---once we are satisfied that the decision to submit future disputes to arbitration has become “in fact the subject of consensus between the parties”¹⁰⁵---the interests that underlie party autonomy

2000). The question here was that of compliance with the form requirements of the Convention: Did the parties’ conduct affirmatively manifest their consent to the arbitral clauses within the meaning of the “exchange of letters or telegrams” requirement of art. II? Was a party’s letterhead treated as his “signature”? The court held that the “import of the parties’ conduct must be construed in accordance with English law”:

- “not because of an English choice-of-law provision to govern the P & I policies or a London arbitration clause,”
- “but because the . . . the conduct which must either constitute a ‘signature’ or an ‘exchange of letters or telegrams’ under the Convention *occurred* in London.”

This would “adequately take into consideration the parties’ expectation,” *id.* at 1246.

In addition, when it came to the further question whether the arbitration clause “encompassed the subject of the dispute,” the court noted that there was equally “a colorable argument” that either the choice-of-law provision or the choice of a London seat would also “subject the scope of the arbitration clause to English law.” But in a far more doubtful step, the court nevertheless held that it was federal law that must instead govern this question----so much for the “expectations of the parties.”

¹⁰⁴ See, e.g., *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F.Supp.2d 452, 458, 465, 469 (S.D.N.Y. 2007).. Here a state-owned oil company sought to stay a New York arbitration proceeding brought against it by Chevron. Chevron argued that the non-signatory/respondent was estopped from denying that it had an obligation to arbitrate. But this estoppel argument turned on whether the claimant had “reasonably relied” on a joint-venture agreement still being in effect after the respondent took over the interest of the claimant’s original partner in the venture. And this, in turn, depended on Ecuadorian law: “It is impossible to properly analyze an estoppel claim in American law without reference to the underlying Ecuadorian law because estoppel, particularly when sought against a governmental entity or the government itself, can only lie where there is reasonable reliance”; it would be “unreasonable for Chevron to assume” the continued existence of the agreement, and impossible for it to estop the respondent from denying an obligation to arbitrate, if, for example, “the laws of Ecuador precluded contracting with the state without certain formalities.” Since it appeared that “an Ecuadorian court would find no reasonable expectation on Chevron’s part” that the joint-venture agreement would continue to bind the respondent, the federal court enjoined the arbitration.

See also *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs*, [2008] EWHC 1901 (QBD (Comm.)) ¶ 79, *aff’d*, [2009] C.L.C. 84 (CA) (the inquiry into “whether a party is bound by an arbitration clause” “can extend to the consideration of issues of foreign law in specific circumstances”; for example, where the question is “whether a state entity is bound,” “a state’s activities and its intentions in doing various things must be viewed against the background of the legislation of that state and any other applicable laws”).

¹⁰⁵ *Mainschiffahrts-Genossenschaft e.G (MSG) v. Les Gravières Rhénanes S.a.r.l.*, [1997] Q.B.D. 731 (Ct. Justice European Communities Feb. 20, 1997) ¶¶ 15-23 (“by making the validity of a jurisdiction clause subject to the existence of an ‘agreement’ between the parties,” the Brussels Convention imposes on the court the duty of examining “whether the clause conferring

come more prominently into play; the implications of their choice, the legal consequences of their actions, might fairly be left to their chosen law. Of course the legal currency of their agreement, its conformity with external legal constraints, may still have to be adjudicated: But for this purpose, the course most congruent with the parties’ justified expectations---as well as with their need for predictable transactional planning---is likely to lead directly to the law to which they have already subjected themselves.¹⁰⁶

37. Now I would hardly be so foolish as to claim that the line that for choice-of-law purposes demarcates issues of “consent” or “contract formation” from those of “validity,” is a self-evident one. On the contrary, it is malleable and tendentious and fraught and contested across different legal systems.¹⁰⁷ Nor, despite the need for categorization, is this in reality much more than a difference in degree.¹⁰⁸ But

jurisdiction on it was in fact the subject of consensus between the parties”; “consensus . . . is presumed to exist where commercial practices in the relevant branch of international trade or commerce” exist “of which the parties are or ought to have been aware,” and this is a matter that “must not be determined by reference to the law of one of the contracting parties”). See also Libling, *supra* n. 41 at 175; Calliess, *supra* n. 66 at 265 (choice of law; “the intent to enter into a binding legal relationship and the reaching of a sufficient agreement”).

¹⁰⁶ See ¶ 25 *supra*; cf. also Yackee, *supra* n. 37 at 94 (choice of forum clauses; “in the absence of an explicit choice of law,” “the law of the designated forum should govern,” for “that law has the highest probability of corresponding to the parties” bargained-for jurisdictional expectations”); Briggs, *supra* n. 2 at 396-98 (choice of law; “where it is denied that there was agreement on the choice of law,” application of the expressed choice “is much less easy to justify”; but by contrast, “if on balance there appears to have been an agreement on choice of law, the least objectionable course is to use that law as though it had been chosen to decide the issues of whether the parties are contractually bound and if so to what effect”).

¹⁰⁷ See Stefan Kröll et al. (eds.), *UN Convention on Contracts for the International Sale of Goods: Commentary* 68 (2011)(“there can be as many definitions of validity as the number of Contracting States to the CISG”); Larry A. DiMatteo et al. (eds.), *International Sales Law: Contract, Principles & Practice* 294 (2016)(validity “is a polysemous concept”---yes, I had to look that up too); Calliess *supra* n. 66 at 267 (“duress”; “in the German doctrine it is disputed whether these threats to consent go to the existence or the validity of a contract”).

¹⁰⁸ Nor would I suggest for a minute that all the elaborate learning spun out in attempts to mark off the boundaries of the Vienna Convention is readily transposable to choice-of-law questions posed by the *New York Convention*: As the need to dichotomize responds to different concerns, it would be only natural after all that the inquiry in particular cases would tend to generate different answers:

- With respect to the Vienna Convention, the point of the exercise is to discriminate between the respective claims of transnational and domestic law---recognizing that in the face of the tensions between civil and common-law models of private obligation, uniformity is achievable only to a limited extent---and not more.
- Arbitration cases do not by contrast call on us to engage in the same strenuous and obsessive work of categorization---the choice-of-law concerns are more muted, and party autonomy is central: So at whatever stage the inquiry proceeds, the judicial task is merely to screen for and sift out claimed exercises of private ordering that seem unacceptable---recognizing that the greater the play allowed to consensual choice, the fewer the obstacles placed in the path of the growing consensus that privileges arbitral justice.

So these are analogies, merely serving to reassure us that we are at least asking coherent questions.

polar cases readily suggest themselves;¹⁰⁹ in most circumstances, in any event, intuition does a reasonably satisfactory job of sorting out

- cases in which the true challenge asserts the absence, as a factual matter, of any actual agreement,¹¹⁰ and
- cases in which the true challenge asserts the invalidating force of external legal controls imposed on manifested intention.¹¹¹

¹⁰⁹ Cf. Steven D. Walt, *CISG’s Principle of rule-Displacement: Validity and Three-Party Cases*, University of Virginia School of Law, Public Law and Legal Theory Research Paper No. 02-17 (Dec. 2002), http://ssrn.com/abstract_id=353700 (the “reach [of the CISG’s exclusion of “validity” in art. 4] is uncontroversial over a range of central cases”).

¹¹⁰ See the examples adumbrated in ¶ 16 *supra*; see also generally the discussion at nn. 71, 105 *supra*.

¹¹¹ Examples might include the unenforceability of “penalty” clauses; the unenforceability of one-sided or “potestative” contracts [see Adrian Briggs, *One-Sided Jurisdiction Clauses: French Folly and Russian Menace*, [2013] LMCKQ 137, 141 (in the Brussels I regime there is room for the argument that some purported “agreements,” even though they may seem to give jurisdiction to a designated court, may not even rise to the level of being considered “agreements” in the first place—but nevertheless “potestative” or one-sided agreements should be “accepted at face value,” and “not rendered ineffective by doctrines which only establish unenforceability in terms of contractual obligation”)]; and the right of a non-professional to “withdraw” from a contract within a certain period of time [see Ulrich Schroeter, *The Validity of International Sales Contracts*, <http://cisgw3.law.pace.edu/cisg/biblio/schroeter5.pdf> at ¶ 6.4.2].

Or the effect of a regulatory prohibition. [See Schwenzer, *supra* n. 77 at 89-90; cf. *Stawski Distributing Co., Inc v. Zywiec Brewries PLC*, 2003 WL 22290412 (N.D. Ill.). In *Stawski* a state statute prohibited a brewery from terminating a franchise agreement without “good cause,” regardless of the stated terms of the arrangement. On a motion for a preliminary injunction, the court reframed the choice-of-law question: It asked whether the state statute was “preempted” by federal law found in the Convention, and held that it was not—but *not* on the ground that it was within the safe harbor of art. 4 [“If this were a typical case, there could be little dispute that the CISG would apply and be considered the authoritative law on this subject”], but on the far more dubious ground that the local law “implicates issues related to core concerns reserved to states under the 21st Amendment [relating to the sale of alcohol.]”

Of course whether a regulatory statute is found *in fact* to affect contractual “validity” will ultimately turn on whether it has pretensions to apply—that is, whether it should be read in the first place as intended to address transnational rather than purely local concerns; see Horacio A. Grigera Naón, *Choice of Law Problems in International Commercial Arbitration* in 289 Rec. des Cours 76 (2001) (arbitration clause was challenged on the ground that that it did not comply with a requirement in the Egyptian Code of Civil Procedure to the effect that the names of the arbitrators be expressly designated, but the Swiss tribunal rejected the challenge since the Egyptian provision “only applied domestically” and “did not have an “international scope” and was in any event not congruent with “the needs of international trade”); see also Alan Scott Rau, *The Arbitrator and “Mandatory Rules of Law,”* 18 Am. Rev. Int’l Arb. 51, 56-57 & fn. 22 (no “ambition” to “govern conduct outside [the] perimeter” of “its intended reach”).

I would also include in this category challenges based on the absence of “consideration,” a common-law requisite for the enforcement of contractual obligations. Like “fraud” and “duress,” lack of “consideration” as a defense is orthogonal to the mutual intentions expressed by the parties towards each other in their “deal.” See *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 201 F.Supp.2d 236 282-83 (2002) (without discussion, finding it self-evident that “validity” under the CISG includes challenges such as lack of consideration that would render the contract “unenforceable”). Most discussion of this issue under the CISG, however, does not raise the question of characterization at all—making it considerably less pertinent to our concerns here: It seems to proceed instead *without regard* to how the requirement

38. The next step, obviously, is this: Once the presence of “assent” has in some sense been *constaté*, how is a court to go about assessing its legal currency? Assuming some deference is due at this point to party preference, what should they be taken to have done? Once again an appropriate starting point might be the current draft of the Restatement project: Whether on a motion to compel arbitration or stay

of consideration should otherwise be pigeonholed; the live issue seems to be whether---however it is characterized---the domestic-law rule has been *displaced* by an express provision of the CISG, see art. 4 (“validity” is excluded “*except as otherwise expressly provided in his Convention*”). Displacement may be particularly plausible given that the Convention permits a contract to be “modified” “by the mere agreement of the parties,” art. 29(1); see *Text of Secretariat Commentary on art. 27 of the 1978 Draft*, ¶ 3 (“agreements” of modification “are effective, thereby overcoming the common law rule that ‘consideration’ is required”). And if the presence of “mere agreement” is alone deemed to eliminate any consideration requirement for modifications, why should the same principle not be extended by analogy to the entire “formation” process under arts. 14-24 generally? All the commentary on this question is bemusingly unhelpful; see, e.g., Schwenzer, *supra* at 225 (the common-law’s rule of consideration “constitutes a validity rule on a matter of form and is therefore pre-empted by art. 11”). [What can this be about? I know that Holmes famously wrote that “consideration is a form as much as a seal,” O.W. Holmes Jr., *The Common Law* 247 (Harvard 2009)---but really, this was metaphor intended to give us greater insight into the true functions served by the doctrine--- not a guide to textual construction.]

In efforts at characterization under the CISG, the most ink has undoubtedly been spilled over the defense of “mistake.” The word encompasses a multitude of fact patterns: Certain kinds of “mistake” (more precisely, perhaps, “misunderstanding”) go directly to the heart of the process of contract formation and thus are a primary concern of the Convention (e.g., the canonical *Peerless* case; cf. also CISG art. 27 [errors of transmission]). Other kinds may instead implicate “validity,” but the domestic law defense will nevertheless be preempted as being “expressly” displaced by or in conflict with particular provisions of the Convention (e.g., mistakes with respect to the non-conforming nature of the goods, or their initial destruction; see Franco Ferrari, *The Interaction between the United Nations Convention on Contracts for the International Sale of Goods and Domestic Remedies*, 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 67, 71 (2007); Christoph Heiz, *Validity of Contracts under the United Nations Convention on Contracts for the International Sale of Goods and Swiss Contract Law*, 20 *Vanderbilt J.L. Transnat’l L.* 639 (1987)). Still other forms of mistake should remain comfortably within domestic law (e.g., *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887)(contract unenforceable where the parties agreed to buy and sell a cow which they both assumed to be barren but which was in fact with calf); *Mackender v. Feldia A.G.*, [1967] 2 W.L.R. 119 (C.A.)(insurer rejected claims under jewelers’ policy, alleging that it was unaware that the insureds had made a practice of smuggling diamonds into Italy, where the loss had occurred; held, clause providing for the settlement of disputes in Belgian courts and under Belgian law should be enforced; there had been no plea of “*non est factum*” but on the contrary “there was a contract,” and a dispute as to non-disclosure is a dispute “arising under the policy”).

With specific reference to an arbitration agreement, the set of colorable challenges to “validity” is considerably attenuated; see, e.g., *Rau*, “*Separability*” at 30, 67-70; *Rau*, “*Consent*” at ¶ 3.15 (challenges to ‘the arbitration clause itself’); *Restatement*, § 2-13, *Reporters’ Notes*, n. a (providing the usual list of “generally applicable contract defenses that may render agreements to arbitrate invalid”); *A. v. B.*, [2007] 1 Lloyd’s L. Rep. 237 (Q.B.D. (Comm.))(agreement to arbitrate allegedly “illegal and unconscionable” because the named arbitrator was “not independent from the parties and thus could not validly act as arbitrator”); *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202 (H.L.)(Scottish law rendered invalid arbitration agreements in which the “arbiters are not named”). On the question whether the Convention bars states from deploying anything other than “neutral” contract grounds in challenges to arbitration agreements---eliminating idiosyncratic and discriminatory grounds of invalidity---see n. 162 *infra*.

litigation, or on a motion to recognize and confirm the resulting award, the Restatement directs a court to assess the validity of the arbitration agreement

- “pursuant to the law to which the parties have subjected” it, or
- “in the absence of such a choice of law, [pursuant to] the law of the seat.”¹¹²

39. A preliminary point that the reader will have immediately noticed is that this formulation tracks with great precision the choice-of-law rule contained in art. V(1)(a) of the Convention: So the underlying premise must be that this choice-of-law rule is “equally applicable” at whatever stage the question is presented to a court---the enforceability of agreements under art. II and the enforceability of awards under art. V constituting “a single and cohesive regime.”¹¹³ This seems eminently sane: As I have written earlier, it only “seems sensible that the obligations of the Convention should be read as congruent for both agreements and awards”---that is, it seems sensible to read the Convention as requiring the enforcement *only of agreements that would in turn lead to awards that themselves come within the protection of the treaty*.¹¹⁴ In order to read art. II and art. V

¹¹² Restatement, § 2-13(b) (court “declines to enforce the agreement” if it finds it to be “null and void”), § 4-12 (c) (court denies recognition or enforcement of a Convention award if it finds the arbitration agreement to be “invalid”). As a final catchall default rule, in the absence of both a choice of law or a designated seat, the applicable law is “indicated by the choice-of-law rules of the forum.” § 2-13(b)(3).

¹¹³ See Born, *supra* n. 12 at 496-502, 565-66, 3199-3200 (“highly undesirable” that an arbitration agreement could be found valid at one stage of a dispute, and then treated in the opposite manner at a later stage).

While the Restatement’s comments acknowledge the “value of maintaining substantial congruence” between the law governing invalidity at the time of enforcement of the *agreement* and at the stage of recognition or enforcement of the *award*, it nevertheless claims to find the formula of art. V too ‘rigid’ to apply across the board at the pre-arbitration stage---and so in laying down a choice-of-law rule for the enforcement of agreements, suggests that it has opted instead to “preserve the general thrust of art. V(1)(a) without literally reproducing the exact formula found in that provision.” § 2-13, *Reporters’ Notes, n. d.* This reads like unnecessary waffling and is in any event rather opaque, since the text of § 2-13 (relating to the enforcement of agreements) is in fact identical to art. V of the Convention. Virtually identical in consequence is the tenor of the Restatement’s treatment of pre-award and post-award challenges, see n. 117 *infra*.

¹¹⁴ See Alan Scott Rau, *The New York Convention in American Courts*, 7 *Amer. Rev. of Int’l Arb.* 213, 233-34 (1996); see also van den Berg, *supra* n. 56 at 126-27 (“application by analogy of the conflict rules of art. V(1)(a) to the enforcement of the agreement”; art. II “can be deemed to incorporate” art. V(1)(a)); Symeonides, *supra* n. 35 at 479 (“analogical reasoning” particularly appropriate given that art. II was drafted hastily and added to the text at the last minute; “to remain within the spirit of the Convention, the same or substantially similar rule must be followed in the pre-arbitration phase”); Giorgio Gaja, *Introduction, in International Commercial Arbitration: New York Convention I.A.4* (1978) (“there would not have been any valid reason for creating an obligation to give effect to arbitration agreements which cannot lead to an award that may be recognized under the Convention”).

But woodenly to the contrary, and buttressed by no policy that is even remotely discernible, are Leonardo Graffi, *The law applicable to the validity of the arbitration agreement: A practitioner’s view*, in Franco Ferrari & Stefan Kröll (eds.), *Conflict of Law in International Arbitration* 29, 53 (2011) (to invoke the conflicts rule of art. V at the pre-award stage “does not take account that the black letter rule” [sic] of that article “applies only at the stage of enforcement of the award, and not at the stage of referral to arbitration”); Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, in *Improving*

together, a minor emendation of the latter perhaps becomes necessary; with respect to pre-award challenges, we are obviously called upon to look to the law of the state “where the award *will be made*.¹¹⁵

the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 197, 200 (ICCA Cong. series n. 9)(1999)(the law to be applied by a court that is initially seized of an action “has nothing to do with the law to be applied by a court in case of a request for enforcement”); Dongdoo Choi, *The Tension between Validation and Implied Intent Approaches in Finding the Law for the Agreement to Arbitrate*, [2016] Int’l Arb. L. Rev. 121, 128 (given that the “silence” of art. II with respect to the applicable choice-of-law rule “is so conspicuous,” the Convention “permit[s] forum courts to resort to their own rules of law” in determining the validity of an arbitration agreement). Similarly, see Bernard Hanotiau, *What Law Governs the Issue of Arbitrability?*, 12 Arb. Int’l 391(1996), asserting that the “concern for concordance between Article II(3) and Article V is rather illusory” and “not the right approach”: But his discussion seems inexplicably to conflate “invalidity” *at the seat*---the sole concern of the enforcement court under art. V(1)---and invalidity *in a third jurisdiction*: See Alan Scott Rau, *The Arbitrator and “Mandatory Rules of Law,”* 18 Amer. Rev. Int’l Arb. 51, 84 fn. 102 (2007).

The discussion here naturally assumes that any pre-award determination with respect to the “validity” of the arbitration agreement is intended to be final and conclusive rather than merely “preliminary” or “prima facie” or “arguable” (i.e., that it is framed in this way by the decisionmaker, whether or not it will ultimately benefit from a preclusive effect in other jurisdictions). [Any application of the fraught “gateway” metaphor has to be most careful in making this distinction, see Alan Scott Rau, *Arbitrating “Arbitrability,”* 7 World Arb. & Med. Rev. 487, 488-511 (2013).] A court that would otherwise have jurisdiction to adjudicate a dispute has of course the power to decide *with such finality* whether its jurisdiction is divested by an enforceable arbitration clause, see FAA § 4 (a court “which, save for such agreement [to arbitrate], would have jurisdiction . . . in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties,” may compel arbitration). In an extreme form, for example, a US court convinced that no enforceable arbitration agreement has been formed may choose simply to enjoin the parties from proceeding elsewhere; see Rau, “*Jurisdiction*” at 131. Where by contrast the court’s jurisdiction *in the first place* depends on the existence of an agreement to arbitrate—and where this very premise is challenged---some sort of a preliminary showing will be required in order to minimize circularity. See, e.g., *Pathak v. Molopo Energy Ltd.*, 2013 WL 5477594 (S.D.N.Y.)(federal courts have subject-matter jurisdiction over actions “falling under the [New York] Convention,” but “the alleged lack of an arbitration agreement between the parties to this action [does not] deprive this Court of jurisdiction” as long as the proponent’s “allegations are not immaterial, frivolous, or made solely to obtain jurisdiction”); cf. *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205 (D.C. Cir. 2015)(arbitration exception to foreign-state sovereign immunity; claimant has made a “prima facie showing that there was an arbitration agreement” and the respondent has failed to “demonstrate by a preponderance of the evidence” that there was not; whether the BIT “encompassed” or “covered” the claim, however, can only be considered on review of the award).

¹¹⁵ See van den Berg, *supra* at 56; cf. European Convention on International Commercial Arbitration, art. VI(2)(1961)(where a challenge to the jurisdiction of a court is made in favor of an arbitration agreement, a court, failing any other indication of party intention, shall “examine the validity of such agreement. . . under the law of the country *in which the award is to be made*”).

Party autonomy will of course equally support the choice of a seat made not directly in the contract itself, but instead by an arbitral institution or the tribunal to whom the question seems to have been delegated; see *United States Lines, Inc. v. Liverpool & London Steamship Protection & Indemnity Ass’n, Ltd.*, 833 F. Supp. 350 (S.D.N.Y. 1993): Here a contract of insurance was to be governed by English law; arbitration was required under the “Rules of the Liverpool & London Steamship Protection and Indemnity Association” and “the provisions of the [English] Arbitration Acts . . . shall apply to any such arbitration”; in case of disagreement the arbitrator was to be named by the President of the Law Society of England, whose practice was uniformly to name an English solicitor. The court held that the “issue of venue is itself a proper issue for resolution” by

40. The delicate and demanding question, however, is to be found elsewhere. It is this: What body of law do the mandates of the Convention and the Restatement point to? Where are we to find the parties’ “chosen law”?
41. We can probably put to one side the hypothesis of a contractual provision that clearly and explicitly and expressly chooses a body of national law in such a way that it purports to govern the arbitration agreement itself---something that we will never come across.¹¹⁶ In its inevitable absence, what is left?
42. Here the Restatement joins much modern authority in preferring to believe that

the arbitrator ultimately designated. The probable “venue” here seems clear enough, but note that since English arbitration law had already been agreed upon by the parties as the *lex arbitri*, it was overdetermined that this was the state “in which the award is to be made.” Cf. *Zenol, Inc. v. Carblox, Ltd.*, 334 F. Supp. 866 (W.D. Pa. 1971), *aff’d per curiam*, 474 F.2d 1338 (3rd Cir. 1973) (arbitration clause provided that it “shall be deemed to be a submission to arbitration within the Arbitration Act 1950,” understood to be a reference to the English statute; the court stayed the action “pending arbitration under the British [sic] Act of 1950”; where the proceedings should actually be held “is a matter for the British Courts,” but “if it is required to arbitrate in England, plaintiff cannot complain, having agreed to such a result by incorporating the British Arbitration Act in the contract”).

Extremely significant---both for the purposes of this note and for the connections it draws between the procedural law of the arbitration and the law that governs the agreement---is *FirstLink Investments Corp. Ltd. v. GT Payment Pte. Ltd.*, [2014] SGHCR 12 (High Ct. Sing.) (“any claim will be adjudicated by Arbitration Institute of the Stockholm Chamber of Commerce,” and parties “agree to submit to the jurisdiction” of that institution; held, this “evinces an objective intention to elect the *lex arbitri* of Sweden as the curial law”---and as well, in order “to ensure *consistency* between *the law and the procedure* of determining the validity of the arbitration agreement,” an “implied” intention to “select” the law of Sweden as the proper law applicable” to that agreement).

On the occasional difficulties of identifying a “seat,” see *Rau*, “*Jurisdiction*,” at 52-54; Georgios Petrochilos, *Procedural Law in International Arbitration* 70-80 (2004); *The Bay Hotel & Resort Ltd. v. Cavalier Construction Co. Ltd.*, 2001 WL 825663 (Privy Council) (when “the need for arbitration arose” the parties “requested the hearing to be in Miami *for convenience*,” but “an agreed term that disputes shall be resolved according to the laws of Turks & Caicos Islands . . . amounts to an express choice of the same curial law”). Certainly, in the rare circumstances where there is no basis for a forecast, and where the arbitral procedure has not even been set in motion, the link between arts. II and V dissolves. See Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* 63 fn. 15 (2nd ed. 1989) (it may not even be possible to determine where the award is to be made without first determining the proper law of the arbitration agreement; “the problem is circular”).

¹¹⁶ Well, as Captain Corcoran grudgingly conceded, “hardly ever.”

There may of course be a freestanding agreement to arbitrate (containing a choice-of-law clause) that is entered into apart from, independently of or subsequent to, any other instrument. Other examples: Under art. 16.4 of the new LCIA Arbitration Rules (effective October 1, 2014), “the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration”; where an agreement provides for arbitration under the rules of the LCIA “the parties thereto shall be taken to have agreed in writing . . . that such LCIA Rules form part of their agreement” (*Preamble*). See also *AVR Communications, Ltd. v. American Hearing Systems, Inc.*, 2014 WL 348248 (D. Minn.) (“*Arbitration*. This Agreement shall be construed and enforced in accordance with the laws of the State of Israel . . .”).

- even in such circumstances, the parties have nevertheless “subjected” their arbitration agreement to a particular body of national law within the meaning of art. V---and that,
- lacking anything more explicit, this is presumed to be the law made applicable by whatever choice-of-law provision appears in the overall agreement.¹¹⁷

¹¹⁷ To be immoderately precise:

- § 4-12 of the Restatement (dealing with the enforcement of *awards*) provides an elaborate hierarchy for the assessment of “validity” of the agreement---sending courts
- first to the law to which the parties may “have subjected the arbitration agreement”---failing which---that is, if “the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly)” [sic]--- then
 - to the law “identified in the general choice-of-law clause in the underlying contract,” and only then, in the absence of any of this,
 - to the law of the seat.
- § 4-12 (c) and *cmt. c.*
- § 2-13 (dealing with the enforcement of *agreements*) omits any mention of step “b.” This seems to have only minimal or marginal significance:
- Despite the reporters’ protest that “literally reproducing the exact formula found” in art. V(1)(a) would be too “rigid” at the pre-arbitration stage, see n. 113 *supra*, § 2-13 is in fact *more* faithful to art. V(1)(a)---art. V(1)(a) also makes no actual mention whatever of the general contract’s choice-of-law clause---and it in fact reproduces art. V(1)(a) *verbatim* [although changing “the law of the country where the award was made” to “the law of the seat of arbitration”; the latter usage is a shorthand with which arbitration mavens are abundantly familiar, but the former is more conventional in international instruments, where the common use of the term “seat” for other purposes may give rise to confusion; cf. European Convention, *supra* n. 146 at art. I(c)(in defining the scope of the Convention, “seat” [*siege*] “shall mean the place of the situation of the establishment that has made the arbitration agreement”)].
 - Nevertheless---and this is critical--- § 2-13 (via the Reporters’ comments) manages to replicate precisely the result reached in § 4-12, *in equally giving priority to the container contract’s general choice- of-law clause*. See *Reporters’ Notes, n. d.*: While the parties may “subject” their arbitration agreement to a particular law in a “direct” way--- by including a choice of law “in [presumably, physically in] the arbitration clause”---the suggestion is thought “persuasive” that in the alternative they may *also* have done so by designating “in the main contract’s general choice of law clause” a body of law that is equally intended to be applicable to the validity of the agreement to arbitrate. And that they have done precisely this is indeed “assumed” “to be the case.” See also § 2-18, *cmt. d.* (“condition precedent”; “the most probable body of contract law to be consulted in this respect is the law to which the parties subjected their arbitration agreement, whether designated in the arbitration clause itself or in the main contract more generally”). So both “a.” and “b.” above are folded together; In either case, subject always of course to more explicit draftsmanship, there is an attribution of intention, a default rule, that privileges any generic choice of law over the choice of the seat.

Gary Born harshly deprecates the Restatement formulation as “ill-considered”; he asserts that it is not only a “violation of” and “contradicts” the Convention, but that it is also analytically incoherent for the Restatement to accept the premise “that the parties have *not* chosen the law governing their arbitration agreement,” even “impliedly,” and yet at the same time to go on to ignore the Convention’s default rule mandating recourse in such cases to the law of the seat, Born, *supra* n. 12 at 500, 3468-69 (italics in original). But while I too part company with the Restatement here, I find Born’s criticism rather unfair. The obvious thrust of the Restatement---or at least a tolerant and indulgent reading---is that, whether at the pre- or post-award stage, “a.” and “b.” should each (taken in the alternative) be deemed to constitute the law to which the parties have “subjected” the agreement. If necessary the move to “b.” is preferred because it, too, is thought “best to reflect the parties’ intent,” *Reporters’ Notes, n. c.*

- Only where any choice-of-law provision at all is missing are we authorized, as a fallback, to find the governing law in the law of the seat.

43. None of this is in any sense mandated by the Convention,¹¹⁸ and in fact it all seems rather doubtful. Now while

- the law chosen to govern “the merits”---the law governing the overall contract by virtue of a choice-of-law clause, and
- the law of the state chosen as the seat of the arbitration,

¹¹⁸ The Restatement’s hierarchy of sources of law is perhaps not *excluded* by the Convention: Certainly in particular circumstances we might justifiably conclude that the law chosen in the container contract constitutes a (tacit or mutually understood) “indication” under art. V(1) of the law to which the arbitration agreement, too, was to be “subjected.” (The burden of proof imposed by the term “indication” is hardly insuperable).

But it is certainly *not a necessary implication of the Convention, nor even the inevitable default, nor even a particularly desirable default*: As noted, art. V(1)(a) says nothing at all about the possible relevance of an overall choice-of-law in the container contract---this possibility is a pure interpolation by the drafters of the Restatement. Indeed on the contrary, much commentary on the Convention seems to suggest that absent the case (*rarissime*) of a choice of law that directly addresses the agreement to arbitrate, we are usually expected to proceed directly to the law of the chosen seat: See, e.g., van den Berg, *supra* n. 56 at 127 (as the “first and primary” conflict rule of art. V(1)(a) [the law to which the parties have “subjected” the arbitration agreement] will “rarely happen in practice,” the “subsidiarily applicable conflict rule” will inevitably send us to the law of the state where the award is rendered). Van den Berg makes the point more sweepingly and dogmatically---more perhaps than seems strictly necessary---in *id.* at 293 (the “distinction between substance and procedure” dictates that “directives” to the arbitrator as to the law he is expected to apply to the merits of a case, could not at the same time constitute an “indication of a choice of law governing the arbitration”---something that can only be achieved by a “distinct express agreement” and that therefore remains little more than a “theoretical nicety”).

A certain odd asymmetry results from the Restatement hierarchy, which necessarily imposes a different analytical construct for post-dispute submissions as well as for freestanding agreements to arbitrate---since with respect to these, there *is* no “overall contract,” see Klaus Peter Berger, *Re-examining the Arbitration Agreement: Applicable Law---Consensus or Confusion*, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 301, 308, 319 (ICCA Congress Series No. 13) (2007); *BCY v. BCZ*, [2016] SGHC 249 (High Ct. Sing.) ¶¶ 66-67 (“in these circumstances “no question of any express choice of governing law of a main contract to govern the arbitration agreement”).

will frequently point in the same direction,¹¹⁹ very often they will not:¹²⁰

- The former---as a surrogate for the conflicts analysis that will proceed in its absence---calls on counsel as part of the process of transaction planning to choose a well-developed and/or familiar body of substantive rules that seems most suited to the contours of “their deal,”¹²¹ while by contrast

¹¹⁹ See, e.g., *BCY v. BCZ*, supra n. 118 at ¶¶ 51-53 (discussing Singapore cases in which “there was no divergence between the law of the main contract and the law of the seat of the arbitration” so that “there was no competition between the two possible governing laws” and thus “no reason” to “specifically address the competing approaches”).

More interestingly, see *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004) (agreement between the plaintiff and Turkish corporations provided that it would be governed by the “internal laws of Switzerland,” and that arbitration would take place in Zurich; the district court denied a motion by the defendants/nonsignatories to compel arbitration, and also enjoined them from pursuing Swiss arbitration; *held*, affirmed, “Swiss law strictly enforces privity of contract and generally prohibits nonparties from seeking to invoke contractual terms”); *Felman Production Inc. v. Bannai*, 476 F. Supp. 2d 585 (S.D. W. Va. 2007) (agreement for the sale of ore provided that it was to be governed by English law and called for arbitration in London; the court denied a motion by the defendant -- a principal for the seller but a nonsignatory -- to compel arbitration; “English law would not allow a non-signatory to compel arbitration” and under the Arbitration Act 1996 “it is a general principle of arbitration law that the agreement only binds the parties to the agreement to arbitration”).

The alert reader will immediately have noticed two things about *Uzan* and *Felman*:

- In both cases the choice of the “seat” and a general choice-of-law clause pointed to precisely the same body of law: The applicable law question was thus overdetermined, although it was not satisfactorily clear which ought to be dispositive. See also Emmanuel Gaillard & John Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 223 (1999) (“where the parties have not only subjected their main contract to the law of a particular country, but have also chosen that country as the seat of the arbitration,” “it would be possible to subject the arbitration agreement to the law of that country, either by giving effect to the parties’ presumed intentions, or by making an objective assessment that the connecting factors provided by the law governing the main contract and the seat of the arbitration are the same”).
- In both cases the question was whether an undoubted *signatory* to an arbitration agreement could be obligated to arbitrate with other, unnamed parties; see the discussion at ¶ 32 & n. 90 supra. A similar result is occasionally reached in actions to compel arbitration against a *non-signatory*, but only persuasively where “estoppel” can fairly be treated as just an alternative means of characterizing consent; see, e.g., *FR8 Singapore Pte. Ltd.*, discussed at supra n. 90.

¹²⁰ In discussing choice-of-forum clauses Symeonides, supra n. 35 at 447, writes that “in the vast majority of cases, the law chosen in the choice-of-law clause is the law of the same state as the one chosen in the forum selection clause.” But this point is not readily transposable here; while it is often awkward to expect the courts of the forum adequately and efficiently to apply a foreign law, by contrast, as the saying goes, arbitration has “no forum” at all and no law is “foreign” to it.

“Bermuda Form” liability insurance policies typically stipulate that they are governed by New York law but call for arbitration in London; “no doubt this represents a balancing of the conflicting interests” of liability insurers and insureds, the impetus for London arbitration arising “from a certain disenchantment with the expansionist scope of American jury and judicial decision-making,” and the selection of New York law revealing “a certain disenchantment with the substantive law of insurance in England,” *C. v. D.*, [2007] EWCA Civ. 1282.

¹²¹ Cf. Clermont, supra n. 35 at 655 (choice of forum clauses; if in the *absence* of any choice-of-law clause no court would “select the law governing the contract under choice-of-law principles,” it might “appear inconsistent to embrace the law governing the contract simply because the parties selected the law”).

- the latter---given the centrality of the notion of the “seat” in the architecture of the Convention---is properly chosen with an eye to the legal framework within which an arbitral proceeding will be conducted and supervised.¹²²

44. When these two bodies of law diverge, it is hard to find a principled basis for a choice between them; each, taken alone, may constitute a perfectly plausible “connecting factor” linking it to the purported agreement to arbitrate, with the result that any “rule” privileging a single national law will inevitably seem arbitrary.¹²³

- Either can be justified in the abstract by an appeal to the notion of “party autonomy,” as a means of giving effect to the parties’ probable expectations;¹²⁴

¹²² A 2006 Queen Mary/PricewaterhouseCoopers research study concluded that for in-house counsel, “legal considerations” were “the single most important factor” in the choice of a place of arbitration. Nevertheless for these respondents, “convenience came a close second.” For the authors of the study, this seemed to “suggest that some do not fully appreciate the significance of choosing the right seat.” [Still, even such a modest relevance attributed to considerations of “convenience” was undoubtedly exaggerated by the fact that the study instrument referred merely to “arbitration venues” rather than using a brightly flashing neon term of art like “seat.” Furthermore, the apparent indifference of many respondents towards “legal considerations” can be explained simply on the grounds that such considerations were taken “for granted”; this can hardly be surprising given that the most favored “venues” were in any event overwhelmingly countries like Switzerland, France, and the United States, as well as England.] See *International Arbitration: Corporate Attitudes and Practices* (2006), at ¶6.2; see also Loukas Mistelis, *International Arbitration: Corporate Attitudes and Practices*, 15 Am. Rev. Int’l Arb. 525, 567-71 (2004).

A more recent study conducted by Queen Mary together with White & Case seems to have comfortably eliminated any need for such qualifications: It confirms that the preferences of users for certain seats are predominantly driven by “their appraisal of the seat’s established ‘formal legal infrastructure’; the neutrality and impartiality of the legal system; the national arbitration law, and its track record for enforcing agreements to arbitrate and arbitral awards” (as well, to a lesser extent, by the “availability of quality arbitrators who are familiar with the seat”). *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* at 14.

¹²³ A point well made inter alia in Born, supra n. 12 at 542-43.

¹²⁴ See, e.g., Berger, supra n. 118 at 315-16 (the significance of the seat “for choice of law issues related to . . . the arbitration agreement cannot be emphasized enough,” since “the choice of the seat by the parties . . . functions as an indirect choice of law . . . for the law applicable to the substantive validity of the arbitration agreement”); *FirstLink Investments Corp.*, supra n. 115 at ¶ 13 (there can be “no natural inference that commercial parties would want the same system of law to govern [the] distinct relationships” [of performing the substantive obligations under the contract, and of resolving disputes when problems arise]. “The natural inference would instead be to the contrary”). See also (in the apparent absence of any alternative choice-of-law provision), *Hague Principles on Choice of Law in International Commercial Contracts* at ¶¶ 4.11-4.12 (a choice of court agreement “may be one of the factors to be taken into account in determining whether the parties intended the contract to be governed by the law of that forum,” and by the same token “an arbitration agreement that refers disputes to a clearly specified seat may be one of the factors in determining the existence of a tacit choice of law”); Yackee, supra n. 37 at 90-92 (“even if it is unrealistic to assume that the parties, by designating a particular forum, intended that forum’s law to govern the contract as a whole, it is reasonable to assume that the parties anticipated that the validity and enforceability of the [forum selection agreement] would, more likely than not, be determined by the law of the designated forum”; after all, “courts have assumed

- Each, as a default rule, is regularly the subject of blithe question-begging conclusory assertions, ex cathedra pronouncements with respect to what the parties “clearly” or “surely” must have “had in mind” or indeed have “taken for granted,”¹²⁵ and

that parties make implicit choices of law by designating a particular physical location for an international arbitration”).

Redfern and Hunter write that:

To say that the parties [by choosing a place of arbitration in a particular country] have “chosen” that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has “chosen” French traffic law ... [I]t would be an odd use of language to say that this national motorist has opted for “French traffic law.”

Nigel Blackaby et al. (eds.), *Redfern & Hunter on International Arbitration* ¶ 3.63 (6th ed. 2015).

This is engaging but essentially meaningless. One carefully weighs all the various considerations, and then one “decides.” In fact, however charming the Devon countryside, my “choice” of Provence as a place to vacation instead will be largely determined by my unwillingness to drive on the left. Should I find myself paralyzed in a London roundabout, “well, you asked for it” would be an appropriate reproach. And as is often true of the “seat,” neither Devon nor Provence may have the slightest connection with my business or professional life -- but it is where I know from the outset that I will be behind the wheel.

On the other hand, looking in the other direction, see Bond, *supra* n. 32 at 48 (the law of the contract “is the most accurate reflection of the intentions and expectations of the parties”; “it would be an exceptional commercial party that would imagine that the law they chose the govern the contract would not govern the entirety of the contract, including the contract’s arbitration provisions”); Redfern & Hunter, *supra* at 125 (“if the parties expressly choose a particular law to govern their agreement, why should some other law---which the parties have not chosen---be applied to one of the clauses in the agreement, simply because it happens to be the arbitration clause?”); Christophe Seraglini & Jérôme Ortscheidt, *Droit de l’arbitrage interne et international* ¶¶ 591, 593 (2013) (the “intention of the parties” as “expressed in their choice of law” should “as a general matter be presumed” to encompass “the totality of the contractual stipulations, including the agreement to arbitrate”); Grigera Naón, *supra* n. 111 at 55-56 (discussing unpublished award in which the arbitrators found that the arbitration agreement was governed by English law, “the proper law chosen by the parties to govern the underlying contract”; “it would be rare for the parties to envisage that it will be governed by a law which is not the one governing the rest of the contract”: Note, however, at the same time that in this case, the seat of the arbitration was London). In the same sense see Graffi, *supra* n. 114 at 28, 59 (“the law governing the main contract is typically the law which rational commercial parties expect an international arbitration agreement to be governed by”; “frequently a de facto understanding (and sometimes even a strong belief) leads the parties” to form this impression). *Quaere*: what, pray tell, is a “de facto understanding,” and just how does it differ from a “strong belief”?).

¹²⁵ So,

- compare Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* ¶ 297 (2nd ed. 2007) (“by choosing a law, the parties clearly have in mind the terms of the contract and not the arbitration agreement”),
- with Ilias Bantekas, *The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy*, 27 J. of Int’l Arb. 1 (2010) (“where the parties have selected the law of a single legal system as the proper law of their contract, it is generally assumed that this law applies to the entire contract and not simply parts of it. In fact, there is no rational or legal basis by which to assume otherwise”), and Choi, *supra* n. 114 at 123 (“the more sensible inference” is that “the parties took it for granted that the law for the contract [would] also apply to the arbitration clause”---at least unless “the parties were aware of the separable nature of the arbitration clause or the art. V default rule”).

With respect to Choi: The notion of having to litigate the question of the parties’ “awareness” of a legal rule, making their rights vary with the extent of their ignorance, is supremely silly. With

- Either can be justified by an appeal to the virtues of congruence with other elements of the overall regime established by the parties—
 - in the former case, consistency with the rules chosen to govern their underlying transaction,
 - and in the latter, consistency with the rules chosen to govern their procedure designed for the resolution of disputes.¹²⁶

45. We are still left with the task of fashioning an appropriate default rule, but here the elements that operate on the choice will begin to seem marginal and unexciting---focusing largely perhaps on “fit,” on what seems within the contours of the system most calculated to facilitate the work of a court charged with diagnosis and decision.

46. Here is a starting point: It is commonplace, particularly in English jurisprudence, to distinguish among

- “the law” that governs the primary rights and obligations of the parties,
- “the law” that governs the separable agreement to arbitrate, and, separately,
- “the curial law,” or the *lex arbitri*, or “the law” that governs the conduct of the arbitration itself.¹²⁷

This last is invariably found “by identifying the seat of the arbitration.”¹²⁸ And if the choice of a seat is properly treated as an implicit choice of a body of law to govern the

respect to Bantekas, the author goes on further to support his “assumption” by claiming that “if the parties [had] a contrary intention . . . they [were always] free to declare so”: But the form of this common question-begging argument is equally foolish---for after all it works just as well when turned on its head, and framed to defend the precisely opposite default rule.

¹²⁶ In addition, one might add---looking in the same direction---the possible virtue of congruence with *analogous choice-of-law solutions*: One might note, for example, a marked tendency to determine the validity of choice-of-forum agreements by recourse to the law of the chosen forum itself. See Hague Convention on Choice of Court Agreements, arts. 5(1), 6(a)(court that has not been chosen shall dismiss proceedings “unless the agreement is null and void under the law of the State of the chosen court”). See also art. 9(a): In a marked parallel to the New York Convention, other contracting states may refuse recognition and enforcement of a judgment if “the agreement was null and void under the law of the State of the chosen court”---and in a marked departure, the Hague Convention adds an explicit rule of preclusion---“unless the chosen court has [itself] determined that the agreement is valid.”

¹²⁷ See *Furness Withy (Australia) Pty. Ltd. v. Metal Distributors (UK) Ltd.*, 1990 WL 754806 (Q.B.D. (Comm.)) (“it is even possible for three systems of law to be relevant---law X for the substantive rights of the parties, law Y to govern the validity of the arbitration agreement, and law Z for procedure. But I doubt if many commercial men would welcome so complex an arrangement”).

¹²⁸ *Sulamérica Cia. Nacional de Seguros S.A. v. Enesa Engenharia S.A.*, [2012] EWCA Civ. 638 ¶ 15. See generally *Rau*, “Jurisdiction” at 49, 72-73 (the “‘seat’ of the arbitration has been the fulcrum around which the entire arbitral enterprise pivots”; “the choice of a ‘seat’ as the notional legal ‘home’ of the arbitration is critical precisely because this will *presumptively determine the body of law that will govern the arbitral procedure*”); Petrochilos, *supra* n. 115 at 64-65 (“modern arbitration law” is “premised” on the “fundamental proposition” that “party autonomy in the

choice of the law of the arbitration is to be expressed in a choice of a seat,” which “operates as a choice of a legal system to regulate an arbitration” and is therefore “entirely without prejudice to the actual locale where various procedural acts take place”); *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] I.L.Pr. 607 ¶ 62 (H.L.) (contract provided that the “seat” shall be Brussels, and so “the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration ... must I believe be the law of Belgium”; “the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible”) (Lord Mustill); *Karaha Bodas Co., L.L.C v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 fn. 32 (5th Cir. 2004)(“arbitration clauses designating the site of the arbitration presumptively designate that site as the source of the applicable procedural law” and thus the state whose law is the *lex arbitri*, the state of “primary jurisdiction” under the Convention).

Gary Born has distinguished between the “external” and the “internal” issues regulated in this way by a state's arbitration legislation:

- (a) the former encompassing the relationship between the arbitral proceeding and national courts, including the “resolution of disputes concerning jurisdictional objections,” judicial assistance to the proceedings, and judicial review of awards;
- (b) the latter encompassing “various procedural issues that arise ‘internally’ in the arbitral proceedings,” such as “standards of procedural fairness,” “disclosure and discovery” “confidentiality,” “the choice of law rules applicable to the parties’ underlying dispute,” and the tribunal’s “remedial powers.”

Born, *supra* n. 12 at 1576-1583. While “(a)” tells us *what the courts of the enacting state may do* in relation to the arbitral process, “(b)” calls for an inquiry into *the requisites of a legitimate arbitral proceeding* -- what, for example, are the respective roles of arbitrators and contracting parties? This is an inquiry that can be carried out by any national court in any state -- once, of course, it has sorted out the *lex arbitri*, that is, the applicable governing law that it is bound to respect. Both “(a)” and “(b)” properly sweep in not only the mandatory rules at the “seat” governing the arbitral process, but its default rules as well. Cf. *The Bay Hotel & Resort Ltd.*, *supra* n. 115 (issues concerning joinder and the need for a reasoned award; “the law of the Turks and Caicos Islands entitled the parties to select” AAA rules, which governed “procedural and jurisdictional issues”; national law will nevertheless “be in the background” and “may have an invalidating effect or an auxiliary role”).

Now the *lex arbitri* may well develop distinctive rules of “agreement” concerning arbitration---rules that may depart from the usual understandings of “substantive” contract law, in that they perhaps treat arbitral clauses more leniently [as with the conventional “presumption of arbitrability”], or more restrictively [with respect, perhaps, to contracts of adhesion, or the problem of incorporation by reference]; see also Alan Scott Rau, “*Punitive, Exemplary, ‘Vindictive,’ or Edifying Damages of Whatever Nature,*” *Liber Amicorum William Laurence Craig* (2016)(punitive damages)[hereinafter Rau, “*Punitive Damages*”]]. *Where it does so, that is after all only to be expected*---as the work of “contract” takes place exclusively in the concrete. See Rau, “*Trilogy*” at 466 fn. 114 & 501 fn. 227 (“‘Contract Law’ does not float untethered in the sky”; “‘Contract’” is responsive to social policy; above all ‘Contract’ is concrete and intensely context-dependent and context-sensitive”). *Where it does not*, it will simply incorporate the general law of private agreement, the “general principles of contract,” which then become a residual category *applicable to arbitration agreements within its scope*, and with all the usual deference paid to private ordering, see *Bay Hotel & Resort Ltd.*, *supra*. But cf. Waincymer, *supra* n. 33 at 420 (when courts look to the law of the seat, “it is often not clear “whether they simply mean to consider the express and implied terms of the *lex arbitri*, or whether they are in addition willing to look to the substantive contract law in that country”---it would be far “more contentious if one uses a procedural logic to then get to the substantive contractual law of that place”). But to invoke the law of the seat does not properly depend on anything like “procedural logic,” two unfortunately yoked terms constituting a superfluity of question begging.

arbitral procedure, then any conceptual attempt to disassociate the two---any attempt to posit that the parties may have chosen to arbitrate “in” one jurisdiction but to submit to the “arbitration law” of another---seems highly unrealistic---doubtless a theoretical possibility, but a *hypothèse d'école*.¹²⁹

47. English courts then (largely it appears on the basis of intuition) have for many years been attempting to map out the complex relationship between all three, almost to the point of doing so in the form of mathematical equations.¹³⁰ (Lord

¹²⁹ See generally the discussion in *Rau*, “Jurisdiction,” at 74-81 (“in which, or under the law of which . . .”).

We may indeed come across arbitration clauses that seem to have such an effect, although they are fortunately quite rare--- in fact “a purely academic invention, almost never used in practice, a possibility more theoretical than real, a once-in-a-blue moon set of circumstances,” *id.*---and, I suspect, when found they are far more likely to be the result of inadvertence or ineptitude than of deliberate choice. See, e.g., Decision of July 5, 1955 (Cour d'Appel de Paris), 1956 Rev. Crit. Droit Int'l Privé 79. Here a contract between two French parties provided for “arbitration in Paris to be held pursuant to English jurisdiction exclusively [*suivant la juridiction anglaise seule admise*].” The court concluded, sensibly enough, that the parties had wanted (a) a “French arbitration,” but had also wanted (b) to waive any right of appeal that they would otherwise have under French law -- appeal not being possible under English law unless the arbitrators' error was “manifest,” and a *waiver* of appeal being something which is both “frequent in France and which in no way violates French public policy.” Cf. Ernst Mezger, *Comment*, *id.* at 81 (such a clause is an example of “reality surpassing fiction”).

An agreement uncoupling the seat from the “applicable procedural law” would in fact be sheer folly: Doubling the number of jurisdictions with a plausible interest in seeing their law applied, and in entertaining actions to supervise proceedings or vacate awards, could only be calculated to create confusion -- and this alone would justify a virtually irrebutable presumption that it is not what the parties have done. No judge worthy of the name would be unable to avoid this result. E.g., *Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd.*, [2008] EWHC 426 (TCC) (“this arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow”; held, court has jurisdiction to entertain application for leave to appeal against award; Glasgow is merely “the place in which the parties agreed that the hearings should take place”).

But see, declining to set its face against such madness, *Restatement*, §§ 1-1, *cmt. f*, 4-16, *cmt. b.* (in the “infrequent circumstances” in which the “parties have unambiguously designated the arbitration law of [another] jurisdiction to govern the arbitration,” “the seat’s authorities cease to have exclusive set-aside powers,” which are then “shared”; that an award may thus “concurrently be the subject of set-aside actions in both a foreign and a US court” is a possibility “explicitly recognized” in the Convention).

Quaere: Is a clause drafted to provide for an arbitration “to take place in Santo Domingo subject to New York arbitration law,” (a) an agreement for a New York seat with merely the physical location of the actual hearings to be in the Caribbean; (b) an agreement for a Santo Domingo seat with instructions to the tribunal and (to the extent permissible) local courts that proceedings be conducted and supervised by applying New York law, or (c) an agreement that supervisory authority over the arbitration, including the power to annul, be “shared” between the two “competent authorities” of Santo Domingo and New York?

¹³⁰ See *Channel Tunnel Group Ltd.*, *supra* n. 128 at ¶¶ 62, as summarized in *Sulamérica Cia. Nacional de Seguros S.A.*, *supra* n. 128 at ¶ 15 (seat to be in Brussels, but the contract to be “governed by and interpreted in accordance with the principles common to both English law and French law”):

- It is “more common” [“less exceptional”] for the law regulating the substantive rights of the parties to be different from the curial law, than it is
- for this substantive law to differ from the law “governing the interpretation of the agreement to

Mustill has suggested that even this taxonomy--the distinction among the three possible sources of “governing law”---may already be something of an “over-simplification.”¹³¹ But it certainly seems more than subtle enough for me).¹³²

48. Gary Born has claimed that to apply the same law both to the parties’ arbitration agreement, and to their underlying contract, “will generally avoid complexities and uncertainties,” while by contrast “a contrary approach . . . will require characterizing different issues and demarcating the ‘border’ between them.”¹³³ But I fear that such a mode of argument *seems rather to lead in precisely the opposite direction*: After all, our decades-long experience in conducting exercises of “separability” makes the “borderline” between the “container contract” and “the arbitration agreement itself” familiar, accessible, and---if properly understood---eminently scrutable; the task of line drawing should in most cases become quite routine if performed by judges who are properly informed. By contrast

- the validity and scope of the agreement to arbitrate, and
- the body of law settled on as the *lex arbitri*,

are likely to be inextricably tangled all across the line: Some assurance with respect to the currency of the arbitration agreement (i.e., its enforceability and reach) will be necessary before an arbitral proceeding can be set in motion under

submit the dispute to arbitration” [that would by comparison be “exceptional”]).

But on the other hand, and rather uncomfortably co-existing with this, are *Black Clawson Int’l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG*, [1981] 2 Lloyd’s L. Rep. 446, 453 (arbitration “shall take place in Zurich” but “any question as to the construction or effect of this contract” was to be determined either by English or by German law, depending on the identity of the claimant); and *C v. D*, supra n. 120 at ¶¶ 24-26 (arbitration in London but the proper law of the insurance contract to be the law of New York), which assert that

- it is less common [“happens much more rarely”] that the law governing the arbitration agreement will be different from the law of the seat of the arbitration, with which it “will normally have a closer and more real connection” than with the place of the law of the underlying contract). See also *Shashoua v. Sharma*, [2009] EWHC 957 (Comm.) ¶¶ 29, 31 (“venue of the arbitration shall be London” [deemed after discussion to be a choice of the “juridical seat”], but Shareholders’ Agreement to be governed by the law of India; “it is much more likely that the law of the arbitration agreement will coincide with the curial law” [and “rare” that they will differ], than with the proper law of the Shareholders’ Agreement”).

¹³¹ Mustill & Boyd, supra n. 115 at 61.

¹³² And probably for the author as well, who in his judicial capacity conceded that resisting any further nuance might be justified in order not to “pile up the proper laws absurdly high.” (The possibility of adding the notion of “the “proper law of the reference”---to address a claim that an agreement to submit an individual dispute may have “come to an end [through frustration, rescission, or repudiation, although] leaving intact the continuous agreement to refer future disputes”---seems entirely unnecessary: The proper course is the application of ordinary contract law to such familiar questions---as well as to the identification of the appropriate decisionmaker; cf. *Black Clawson Int’l Ltd.*, supra n. 130 at 455 (Mustill, J.); cf. Mustill & Boyd, supra at 61 id. at fn. 6.

¹³³ Born, supra n. 12 at 591 (“a very plausible simplicity and attraction to the notion that an arbitration clause is ‘part’ of the parties’ contract” so that agreement to the law governing it “necessarily includes the arbitration clause”).

its governing law;¹³⁴ and by the same token the arbitration agreement itself can hardly be assessed in abstraction from the assumptions underlying the *lex arbitri*--- which is likely to contain any number of provisions that address it.¹³⁵ So any distinction between the two must seem artificial (or to be charitable perhaps, “elusive”).¹³⁶

49. For one example, we need travel no further than the familiar trope of “separability”: Does this doctrine amount to a mere rule of construction, attributing certain intentions to contracting parties with respect to the ambit of any duty to arbitrate (and as a default rule, subject to a finding that they have chosen to reverse and “contract around” it)¹³⁷? Or does it constitute a critical part of any national

¹³⁴ See, e.g., *Japan Educational Corp. v. Feld* (High Court, Tokyo, May 30, 1994), XX Yrbk. Comm. Arb. 745 (1995) (the arbitration agreement must “provide for various matters which are necessary in order to proceed to arbitration,” and “if the parties’ will is unclear, we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply”); Mustill & Boyd, *supra* n. 115 at 60 (“the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute” is “to be ascertained by reference to the express or implied terms of the agreement to arbitrate”).

¹³⁵ Cf. Peter Ashford, *The Law of the Arbitration Agreement: The English Courts Decide?*, 24 Amer. Rev. of Int’l Arb. 469, 478-79 (2013): The curial law “will govern, for example, the constitution of the tribunal [and] its entitlement to rule on its own jurisdiction”; in circumstances where there is a London seat and Indian governing law, it would be bizarre and anachronistic . . . to have English law determine the ability of the arbitral tribunal to rule on its own jurisdiction and the grounds of that challenge also to be subject to English law, and yet have the principal issue of the jurisdiction of the tribunal to be under a law other than England’s. Nobody would devise such a system. If therefore challenges in England as to due process concerning the effect or construction of the agreement to arbitrate are logically under English law it follows that the governing law of the agreement to arbitrate must be English law.

See also Berger, *supra* n. 118 at 315, 333 (“the close functional connection between the arbitration agreement and the arbitral procedure, which is reinforced if the parties include detailed procedural stipulations in the agreement to arbitrate”).

¹³⁶ Merkin, *supra* n. 40 at 191.

¹³⁷ This evokes the tedious Battle of the “Broad” and “Narrow” clauses; cf. Rau, “*Separability*” at 35-37.

curial law?¹³⁸ (The proper answer of course is “both.”)¹³⁹ The contractual expectations of the parties regarding any “duty to arbitrate” are as likely (if not more likely) to be found embedded in the constituent ground rules that govern “what it means to arbitrate,” than they are to be found in any body of law relating to the parties’ primary rights and obligations.¹⁴⁰

¹³⁸ England’s Arbitration Act provides conventionally in art. 7 that an arbitration clause, to be “treated as a distinct agreement,” is enforceable notwithstanding the fact that the broader agreement of which it was intended to form a part “is invalid, or did not come into existence, or has become ineffective”---unless of course the parties “otherwise agreed.”

- Art. 2(1) of the Act makes this default rule applicable where “the seat of the arbitration is in England, Wales or Northern Ireland.”
- And art. 2(5) equally makes the default rule of separability applicable “even if the seat of the arbitration” is elsewhere “or has not been designated or determined”---as long as “the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland.”

This latter provision of course leaves completely open the question of just what the “applicable law” shall be where the seat is to be in another country, a matter as to which English law has given us a jurisprudence of very limited predictive value. See also *id.* at art. 4(5) (the choice of a law as “the applicable law in respect of a matter [governed] by a non-mandatory provision” of the Act is “equivalent to an agreement making provision about that matter,” and if “determined in accordance with the parties’ agreement [or] objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties”).

But note this at least: Under art. 2(1), an English seat is alone sufficient to trigger the doctrine of “separability” *without regard to any argument that could be made about an alternative governing law*. And given the importance of the doctrine under English arbitration law, it should follow---and it apparently does---that where the seat is indeed in England, *a mere agreement to subject the contract to some other body of national law* will not be construed as sufficient under art. 7 to displace “separability” as an “agreement to the contrary”---unless it is somehow “targeted” by a specific exclusion that is expressly “directed” to it. See *National Iranian Oil Co. v. Crescent Petroleum Co. Int’l Ltd.*, [2016] EWHC 510 (Q.B.D. (Comm)) (seat in London but contract “governed by and interpreted in accordance with” the law of Iran).

¹³⁹ Cf. *Sulamérica Cia. Nacional de Seguros S.A.*, *supra* n. 128 at ¶¶ 29, 55, 61 (by submitting themselves to the *lex arbitri*, here the English Arbitration Act, the parties “must have foreseen and intended” that all its provisions would apply to any arbitration---including its provisions governing “separability” and “discharge”---which nevertheless appear “more substantive than procedural in nature”). See also Poudret & Besson, *supra* n. 125 at 256, who ask whether “the principle of separability” “result[s] from” the *lex arbitri* or from the law applicable to the arbitration agreement---and in the event that the answer is “the former,” ask further whether the parties can “deviate from the principle of separability as defined by the *lex arbitri* of the seat, notably by submitting their arbitration agreement to another law”? The result of the analysis here would foreclose the need for any such abstruse exercises in classification by treating all this as a pure non-issue.

¹⁴⁰ Some examples: Where not all disputants are parties to an arbitration agreement, can a single dispute be bifurcated---with only the “parties” referred to arbitration, and litigation proceeding as to the others? That is, may arbitration proceed on a “piecemeal” basis? Now, is this a matter of construing the precise parameters of the parties’ commitment to arbitrate? Or the arbitration law of the seat? Or both? See n. 21 *supra* (US cases holding that “any supposed interests of efficiency must give way to a respect for party autonomy and thus to a contractual preference for arbitration”); but cf. *Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings*, [2012] EWHC 3702 (Comm.) at ¶¶ 37-46 (expert testimony to the effect that Indian arbitration law is to the contrary, and that a dispute cannot be arbitrated “if the dispute concerns a person [who is not a] not party to the arbitration agreement”); W. Laurence Craig et al., *International Chamber of Commerce*

F. Substantive Law and the Mastrobuono case

50. The decision to privilege the law of the seat---as the law to which the parties have presumptively “subjected” their agreement to arbitrate---cannot be entirely unrelated to other conventional assumptions in our law: It is obviously linked, for example, to the familiar assumption that where the parties have stipulated the rules of decision to govern the “substantive” “merits” of any dispute, this choice will have little or no impact on the arbitral proceeding itself.
51. Consider the Supreme Court’s seminal decision in *Mastrobuono*:¹⁴¹ Here a standard-form contract provided that it “shall be governed by the laws of the State of New York”---and New York law at the time was thought to withhold from arbitrators the power to award punitive damages, a power jealously reserved “to

Arbitration § 5.11 (3d ed. 2000)(Indian cases refusing to defer to arbitration taking “into account the preferability of dealing with all the issues in one procedure”).

Or: Consider the authority of the tribunal to determine conclusively the scope of its own jurisdiction, in the form of a final award, should the parties prefer to confer that power on them. The *lex arbitri* will tell us

- to what extent such exercises of party autonomy are deemed legitimate, and to the extent they are,
- to what extent the parties’ manifestations of intent should be construed as providing for such delegations of power.

For all of this, see *Rau*, “*Arbitrating ‘Arbitrability,’*” at 511ff.

The well-known *International Tank & Pipe* case may superficially appear to look in the opposite direction, but it provides abundant fodder for the argument here. See *International Tank & Pipe S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C.*, [1975] 1 Lloyd’s L. Rep. 8 (C.A). Here a construction contract was to be governed by English law; the arbitration was to be held in Kuwait whose law the court assumed would “govern the arbitration procedure.” The contract contained a time bar requiring any party dissatisfied with a decision of the project Engineer to make a claim within 90 days, but the contractor applied for an extension of time as permitted by the English statute on the ground of “undue hardship.” The court held that it had jurisdiction to make such an order: Per Lord Denning, the provision of the English statute permitting an extension of time constituted “an additional statutory term written into the arbitration clause” so that “its interpretation, its application and effect are to be governed by English law.” Per Lord Justice Browne, “this is not a matter of procedure in the arbitration, which in fact does not yet exist, but a matter of the operation of the contract.” But Lawrence Collins quite properly objects to this line of reasoning---as it seems to suggest that the court might be powerless to grant an extension where by contrast, the seat of the arbitration was in England but the contract was governed by a foreign law---an obviously untenable result. And so the lesson he draws is that questions like this are right “on the borderline” and have “both a substantive and procedural character”---so that they should equally apply, “*irrespective of the proper law, to arbitrations to be conducted in England.*” Lawrence Collins, *The law governing the agreement and procedure in international arbitration in England*, in Julian Lew (ed.), *Contemporary problems in international arbitration* 126, 130-31 (1986).

See also *XL Ins. Ltd. v. Owens Corning*, [2001] C.L.C. 914(Q.B.D. (Comm.)) (“arbitration law is all about a particular method of resolving disputes. Its substance and processes are closely intertwined”; the various provisions of the Arbitration Act “could not readily be separated into boxes labelled substantive arbitration law or procedural law, because that would be an artificial division”).

¹⁴¹ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 50 (1995).

judicial tribunals.” Relying on this choice-of-law provision, the lower courts vacated a tribunal’s award of punitive damages, but the Supreme Court reversed: As properly read, the choice-of-law clause may have covered the “rights and duties of the parties”---but it did not, the Court concluded, embrace “special rules limiting the authority of arbitrators”---and so the award should have been enforced “as within the scope of the contract.”

52. *Mastrobuono* has been read as authority “in distilled form . . . for the proposition that a choice of law clause must be presumed *not* to include arbitration law.”¹⁴² Now that is perhaps a bit too “distilled,” and a more elaborate unpacking may be in order. The question posed is, “just what is it sensible to make of this choice-of-law clause---how is it to be read? What does it *mean* to “choose” a body of “law?”¹⁴³ The result of this inquiry in the case was responsive both to an explicit and complex interpretive strategy, and to a conscious choice of a default rule:

- a. To begin with, and least controversially, it is usually assumed that a choice-of-law clause is intended to operate *horizontally rather than vertically*: That is, the parties presumably chose “New York law” in order to exclude the law of Tennessee or of Nigeria---but not *the law of the United States*. After all, “New York law” does include the full panoply of federal law---or to put it another way, it is axiomatic that federal law *is* the law of New York.¹⁴⁴
- b. In addition, it is also usually assumed that a reference to state law---as a surrogate for the conflict-of-law analysis that would be performed in its absence---is intended to capture only the “*substantive rights and obligations of the parties*, the rules of decisions that a local court would apply to decide the merits of the dispute.¹⁴⁵ Neither, then, will reach such matters as the

¹⁴² Petrochilos, *supra* n. 115 at 32.

¹⁴³ The discussion that follows tries to engage with this question. Legal commentary that doesn’t even *try* (or doesn’t even perceive the problem) is, shall we say, “flawed.” E.g., Sarah Rudolph Cole, *Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding Powers Count*, 68 Ala. L. Rev. 179, 206-07 (2016)(asserting *ex cathedra* that “the New York law the parties chose was clear---arbitrators do not have the authority to award punitive damages”---so that the award in *Mastrobuono* “ignores the parties’ choice of law”).

¹⁴⁴ “The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution,” *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

More recently the Supreme Court has decided another case quite reminiscent of *Mastrobuono*. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). The facts are complex---involving the supposed “unconscionability” under state contract law of contractual provisions in which a consumer purports to “waive” the right to proceed in arbitration on a classwide basis. Rather than indulging in a detour here, I merely refer the reader to *Rau*, “*Punitive Damages*” at 348 fn. 45 (2016). It should suffice here to say this: *DIRECTV* confirms even more strikingly that should parties truly wish to exclude the application of federal arbitration law in favor of a (permitted) choice in favor of state law, they will be expected to do so with an unmistakable degree of clarity; a federal court will insist on being satisfied that a choice of law clause was meant to accomplish the same result indirectly that the parties themselves could have reached more directly on their own.

¹⁴⁵ *Mastrobuono*, *supra* n. 141 at 60. See generally Russell J. Weintraub, *Commentary on the Conflict of Laws* 524-25 (6th ed. 2010)(and therefore “does not cover issues that US courts have

powers of the arbitrators, “the requisites of a legitimate arbitral proceeding,” the “permissible scope of arbitral autonomy,” “what authority the arbitrators possess,” “the state’s allocation of power between alternative tribunals,” or “the regimen or scheme of arbitral procedural law under which the arbitration was conducted”¹⁴⁶---all of which of course is the domain of the *lex arbitri*.¹⁴⁷

- c. There was still more in the way of clause construction, although that now must seem a bit like “piling on.”¹⁴⁸ The “bottom line” in any event is that for

traditionally characterized as ‘procedural’ for conflict-of-law purposes, such a statutes of limitation”). The work of classification is responsive to concerns of convenience or ease of administration, cf. Symeonides, *supra* n. 35 at 400-401 (“it would not be sensible or practical to impose on a court the burden of complying with the rules of conducting a trial or with other purely procedural rules of another state”); as labels will be affixed after the fact, and will vary across different contexts, the terminology is manipulable rather than self-defining or endogenous, and need not be taken with undue seriousness. It should not require too strong an infusion of “Legal Realism” for us to perceive that the “procedural” catchword is largely devoid of any explanatory power. But sadly to the contrary---dogmatic in a way that one would have thought had disappeared with the formalism of the century before last--- with a touching faith in verbal formulations---in Holmes’ cutting epigram, “thinking words and not things”---is Milo Molfa, *Pathological Arbitration Clauses and the Conflict of Laws*, 37 Hong Kong L.J. 161, 170 (2007)(issues of the validity and construction of the arbitration agreement “are not procedural, but substantive”; by contrast the choice of a particular seat, as it merely “has a procedural dimension,” “has nothing to do [sic] with the selection of the substantive rules applicable to the agreement to arbitrate”).

¹⁴⁶ See Rau, “Jurisdiction” at 50 fn. 10; *Mastrobuono*, *supra* n. 141 at 60; Int’l Standard Electric Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F.Supp. 172, 178 (S.D.N.Y. 1990).

¹⁴⁷ By contrast, the question of “what authority the arbitrators possess” is precisely what the restrictive New York jurisprudence was all about---with the state’s “take” on the subject purporting to override party preference. Note that there was no suggestion whatever in *Mastrobuono* that any state-law constraints limited awards of punitive damages to a successful plaintiff in his claim for fraud and breach of fiduciary duty--such a remedy presumably *being available in state courts* under well-defined circumstances. In light of this---without venturing too far into the morass that dooms any attempt to demarcate “substance” and “procedure”--- we can at least agree that a rule of law *framed to govern arbitral proceedings alone, to the exclusion of the usual course of litigation in state courts*, may not qualify as the former. Professor Bermann writes that the *Mastrobuono* Court’s characterization of the “New York rule” as “a rule of arbitral procedure rather than a substantive rule of law” is “debatable,” George A. Bermann, *Ascertaining the Parties’ Intentions in Arbitral Design*, in Thomas E. Carbonneau (ed.), *Building the Civilization of Arbitration* 17, 22, 30 (2010). But just what any such “debate” would look is unclear.

If the choice-of-law clause had provided, say, for the governing law to be German law---under which it may be assumed that punitive damages are unavailable across the board--- *Mastrobuono* of course becomes simply beside the point: This is precisely because if there is any supposed obstacle in the posited case to the award of punitive damages, it results---in this respect quite unlike *Mastrobuono*---from the parties’ (a) horizontal choice of (b) a substantive law. To what extent the fidelity of arbitrators to this applicable law can effectively be policed, is of course a separate matter; see Rau, “Punitive Damages” at 350-57.

¹⁴⁸ For example, the Court found support for its reading in “the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it,” *Mastrobuono*, *supra* n. 141 at 62; cf. Alan Scott Rau, “Gap Filling” by Arbitrators, in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* (ICCA Cong. Series no. 18) 935, 983 fn. 160 (2015)(serving “as little more than a makeweight, wheeled

all these reasons, any contractual attempt to capture a restrictive state law in apparent opposition to a federal “presumption of arbitrability” will have to be particularly “unequivocal and express,” and that no generic choice-of-law clause will suffice.¹⁴⁹

d. In any event, *once the choice-of-law clause was safely out of the way*,

- there was no reason to believe that the parties had attempted to “capture” the New York rule in order to bar arbitral awards of punitive damages;
- nor was there anything left that one could possibly point to as an attempt by the parties to “contract around” what would otherwise be the usual understanding in FAA cases: As we have seen, unless they clearly chose to depart from it, the “presumption of arbitrability” would not only teach that in cases of doubt particular claims are presumed to be “arbitrable,” but also, and in particular, that arbitrators have virtually unlimited discretion in choosing appropriate remedies.¹⁵⁰

out to bolster a result already reached and chosen for more functional purposes”). The Court also seems to have taken some comfort from a fairly meaningless provision in the NASD Code of Arbitration Procedure to the effect that securities arbitrators may award “damages and other relief.” *Mastrobuono* at 61. I am afraid I can discern no “mixed signals” in such an offhand reference; cf. Bermann, *supra* n. 147 at 21: What *Mastrobuono* is most fundamentally about is *the presumption, found in the arbitration statute, of arbitrability in the absence of any express exclusion*. One must not make the error of mistaking face-saving “piling on” for a true *ratio decidendi*.

¹⁴⁹ See *Flintlock Construction Services, LLC v. Weiss*, 991 N.Y.S.2d 408 (A.D. 2014)(state law would not be captured “in the absence of language expressly invoking the [New York] rule or expressly excluding claims for punitive damages”). Compare *Johnson v. Gruma Corp.*, 614 F.3d 1062 (9th Cir. 2010)(provision that arbitration is to be “conducted and subject to enforcement pursuant to the provisions of” the California Arbitration Act “exhibits the parties’ clear intent” that California’s rather than the “FAA’s rules” are to control standards for vacatur).

¹⁵⁰ Gary Born interprets *Mastrobuono* as exemplifying some of the same policies that underlie what he calls the “validation principle,” which is so much a centerpiece of his magisterial work: See Born, *supra* n. 12 at 544 fn. 377 & 545; see generally ¶ 63 *infra*. But to shoehorn the case into this overall agenda seems a bit like overreaching: The *Mastrobuono* decision,

- at its narrowest, is nothing but a sensible and purposive reading of what a choice-of-law clause is generally expected to do;
- at its broadest, it is simply a means of setting to one side local parochial rules which seem to interfere with the policies underpinning the dominant *lex arbitri*.

As it contradicts the implied agreement---and indeed, would contradict any express agreement---to arbitrate punitive damages claims, the New York rule could hardly withstand federal scrutiny as a regulatory matter---being able to come into play only to the extent the parties are found to have “chosen” it. It is therefore completely untenable to assert that it “does not interfere or abridge the parties’ right to arbitrate,” Cole, *supra* n. 143 at 208. Compare *Rau*, “Punitive Damages” at 340-45 (“indefensible” implications of New York rule that “requires a judicial forum” and otherwise “discourages recourse to arbitration”). Indeed it would be a mistake to underestimate the strong preemptive power of the decision. The case arose in federal court---but even in state courts a strong, hard-to-rebut presumption that a generic and boilerplate

53. Once we have reached this point, we might conclude that *Mastrobuono* is indeed of some help in our present inquiry---a plausible implication is that the currency of an agreement to arbitrate does indeed fall outside the gravitational force of whatever law has been chosen to govern the overall agreement. For the question posed in the case is, “precisely what powers did the parties wish to confer on their arbitrators?”; the case “comes down to what the contract has to say about the arbitrability of petitioner’s claim for punitive damages.”¹⁵¹ As a means of determining the parties’ expectations, federal law---as the *lex arbitri*¹⁵²---interprets the arbitration clause as reflecting a willingness on their part to entrust the arbitral tribunal with the power to award punitive damages¹⁵³; a reluctance to find that they wished to exclude that power through the choice of a “chosen law” thus renders the putative “chosen law” essentially irrelevant.¹⁵⁴

agreement was intended to deprive arbitrators of authority to award punitive damages, would seem incompatible with the overriding federal default rule favoring arbitrability

¹⁵¹ *Mastrobuono*, supra n. 141 at 58.

¹⁵² In *Mastrobuono* itself the substantive law chosen was the law of New York, but the place of arbitration was Chicago. Cf. Bermann, supra n. 147 at 23 (for this reason the “oversight” in *Mastrobuono* of lack of attention to the seat “cannot be said” to be “harmless”). But I am not sure why this should be true: If the contract had provided instead for a seat in New York, the result should be precisely the same. As we have seen, it may well be that one is expected to find the content of “contract law” by looking to the established body of “state law,” see supra ¶ 34. But the fact remains that where the Federal Arbitration Act applies to a transaction “in commerce,” *the relevant “seat” is the US as a whole*. See Rau, “Waiver,” at 259-60 (a contractual choice of another forum within the US should be probative of absolutely nothing, since “it is hard to believe that the same policies [that underlie the holding of *Mastrobuono* with respect to choice-of-law clauses] would permit the Court to tolerate *choice-of-forum* clauses being read much differently”).

So it may perhaps be true that in *Mastrobuono*, “the *lex arbitri* passed entirely unmentioned,” Bermann, supra n. 147 at 22. But it was hardly overlooked; indeed *the powerful significance of a US seat was in fact at the foundation of the whole analysis*.

Whether from this critical but unspoken premise that *in a case governed by the FAA the “seat” is in fact the entire nation*---or from a lack of comfort or familiarity with what seems a sophisticated alien concept--- it is certainly true that the importance attributable to the “seat” of the arbitration is rarely articulated in American domestic cases; cf. id. at 24 (“ignoring the *lex arbitri* in domestic FAA cases introduces a strange dissonance between the interstate and the international cases,” and “there is no principled reason why” this should be so). A good illustration of the resulting confusion is provided by *Meadows v. Dickey’s Barbecue Restaurants, Inc.*, 144 F.Supp.3d 1069 (N.D. Cal. 2015) (“binding arbitration at the AAA office in Dallas, Texas” plus a choice-of-law clause calling for application of Texas law; the federal court sitting in California assessed the “unconscionability” of the arbitration clause under Texas law after duly finding there was a “substantial relationship” between the parties *and the chosen state’s law*---although curiously, and inexplicably, it had already applied the federal “common law of arbitrability” to determine that the parties had not effectively “delegated” this question to the arbitral tribunal).

¹⁵³ This is simply the usual “presumption of arbitrability,” a “strong presumption” of federal law to the effect that the intention of the parties “was indeed to submit the merits of this dispute to arbitration”; e.g., Alan Scott Rau et al., *Arbitration* 112ff. (3d ed. 2006); *Mastrobuono*, supra n. 141 at 60 (the choice-of-law clause was “not, in itself, an unequivocal *exclusion* of punitive damages claims”)(emphasis added).

¹⁵⁴ Cf. *Recyclers of Australia Pty. Ltd. v. Hettinga Equipment Inc.*, [2000] FCA 547. Here a seller asked for a stay of proceedings in Victoria in favor of arbitration; the contract of sale between the parties provided that it “shall be governed, construed, and interpreted under the law of the State of

54. The law governing the arbitration agreement is less likely, then, to be dependent on the proper law of the overall contract than it is to be dependent on the “arbitration law” of the arbitral forum. By the same token it is equally likely to be dependent on the work performed by the local courts, work mandated by the curial law:

- a. As we know, throughout the course of the disputing process any number of national courts across various legal systems may be called upon to pass on the agreement’s validity (at the time, say, of a motion to stay litigation, or later, at the time of a motion to recognize and enforce the award). But as a practical matter it is the courts of the seat that will be called upon to set the arbitral process in motion: Thus, for example, what a court of the seat does in helping to constitute a tribunal¹⁵⁵ will at one and the same time be a function of
 - its reading with respect to just what the parties have said about the matter,
 - its assessment as to whether whatever guidance the parties have provided is adequate for the job,¹⁵⁶ and then,
 - juggling law and contract, of how the *lex arbitri* is designed to deal with party failure---how it should best give effect to the parties’ preferences in order to ensure an effective and efficient process.¹⁵⁷

Iowa.” Concluding that the validity of the agreement to arbitrate was itself a “matter of substantive law” governed by Iowa law (“the proper law of the contract”), the court considered the plaintiff’s argument that under this law the dispute was not “capable of settlement by arbitration” because it was an unenforceable “contract of adhesion”---but rejected it, relying on *Mastrobuono* to conclude that Iowa law was preempted by the “federal policy favouring arbitration.” Working from the *a priori* premise that the enforceability of the arbitration clause was necessarily subject to the overall governing law, the court was thus led to ignore completely the interpretive question that was at the heart of *Mastrobuono* itself. But at the same time, the court ignored completely the significance of the fact that *the chosen seat of the arbitration, too, was to be in the US*---in particular, in Iowa. So, perhaps, as so often happens in the common law, a proper result for all the wrong reasons.

¹⁵⁵ With trivial exceptions, this is “the exclusive role for the state of the seat”; see generally, *Rau*, “*Jurisdiction*” at 52-54.

¹⁵⁶ Abundant litigation has arisen out of the common dilemma presented whenever the will of the parties has been imperfectly expressed and so cannot, literally and in its entirety, be given effect---say, when an arbitrator specifically named in the agreement becomes unavailable due to age or infirmity, or when the arbitration forum agreed on by the parties declines jurisdiction over the case or goes out of business. See, e.g., *Lipschutz v. Gutwirth*, 106 N.E.2d 8 (N.Y. 1952)(three members of a family were parties to a partnership agreement; the clause providing for tripartite arbitration called for the father and his son together to name one arbitrator, and the brother/uncle to name another, but the dispute that actually arose reflected a change of alignment in the partnership not originally contemplated).

¹⁵⁷ See FAA § 5 (“if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire”); Decree No. 2011-48 of 13 January 2011 (Fr.) arts. 1451-55 (“If the parties have not agreed on the procedure for appointing the arbitrator(s),” unless the arbitration agreement is “manifestly void or manifestly not applicable”);

- b. A plausible corollary to all this is that a reference to “the law of the seat” should not only capture
- the teachings of that law with respect to the validity of the arbitral agreement and proceedings, but also,
 - with respect to the same question, that state’s particular allocation of decision-making authority between courts and arbitral tribunals.¹⁵⁸

UNCITRAL Model Law, art. 11 (“failing such agreement” “on a procedure of appointing the arbitrator or arbitrators”).

Going through each of these steps---although winding up in the end with a result that can hardly commend itself to our good sense---is *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223 (4th Cir.1994). Here a contract for the delivery of rice provided that any disputes “shall be resolved by means of the judgment of arbitrators *appointed by mutual agreement*. This could be in Nicaragua or the Rice Millers’ Association [RMA] in the United States.” An award rendered under RMA rules by arbitrators appointed by the Association was vacated, the court holding that the seller was instead “entitled” to an arbitration before arbitrators chosen by mutual agreement of the parties. “The arbitration clause does not set forth how this choice of arbitrators by the parties should be conducted.” So the district court was instructed to require that arbitration “be conducted under the standard method,” deemed to be a tripartite procedure with party-appointed arbitrators; in case of a failure of agreement on the third arbitrator, appointment would be by the court under Chapter One of the FAA. (This exercise of the court’s power would presumably mean that the arbitration would have to have its seat in the United States; see *Rau*, “*Jurisdiction*” at 54, highlighting the inability of a US court to order arbitration in another country where a foreign seat has not been specified).

¹⁵⁸ An extremely suggestive case on this point is *A. v. B.*, [2007] 1 Lloyd’s L. Rep. 237 (QBD (Comm.)). This involved an attempt to enjoin a Geneva arbitration. Prior to his appointment, the sole arbitrator had been “occupying a hybrid role” as a business advisor and “independent honest broker” in order to “facilitate settlement” between the disputants. One party sought an injunction directly against the arbitrator himself to “prevent him from continuing to take any steps as arbitrator” or otherwise to “hold himself out as having or exercising any jurisdiction” to hear the dispute; the agreement to arbitrate was claimed to be “illegal and unconscionable,” since the arbitrator “was not independent from the parties” and thus could not “validly act as arbitrator,” and it was also challenged on the ground that it been procured by “fraudulent misrepresentation” and “induced by economic duress.” The court refused relief:

- The “existence” of the agreement to arbitrate had been established; the basis of the plaintiff’s case was “*not* that [he] had never entered into [an arbitration] agreement, for it is quite obvious that he did so.” ¶¶ 108, 137. [See the earlier discussion at ¶ 22 *supra*].
- At that point deference to Swiss law, which “governed the relationship established by the arbitration agreement”---“the operation and supervision of the arbitration and the arbitrator”---became necessary. *Id.* at ¶¶ 70, 125. And under Swiss arbitration law “the *Kompetenz-Kompetenz* principle” would leave such matters to the tribunal in the first instance, subject to local review, since by choosing the seat “the parties expressly agreed that this dispute resolution regime should apply”; the “natural consequence” of the arbitration agreement was “not merely” that the validity of the arbitration clause would fall to be resolved in Switzerland according to Swiss law, but also that “anything done by any party which was contrary to the scheme “whereby supervisory authority was vested exclusively in the Swiss courts *would in substance equally amount to a breach of the agreement to arbitrate*.” *Id.* at ¶¶ 111, 112.
- And finally---tying the case back to our earlier discussion---“not only” was the meaning of the terms in the arbitration agreement to be determined in accordance with Swiss law, but so, too, “was the effect of the alleged misrepresentation and duress . . . on the enforceability of the arbitration agreement” itself -----“in other words, how far the principle of separability applied in this case,” *id.* at ¶¶ 111, 134 (“also . . . [a] matter of Swiss law”). [See the discussion at ¶ 49 *supra*].

- c. And above all, the legitimacy of an agreement to arbitrate will be inextricably linked to the fate of the arbitral proceeding itself---as to which the role of the “seat” is predominant: If the “jurisdiction” of a tribunal depends on “consent” manifested in an agreement, the *lex arbitri* will determine the power of the supervisory court to resolve any “jurisdictional” dispute, and parties may naturally wish to “ensure consistency *between the law and the procedure* of determining the validity of the arbitration agreement.”¹⁵⁹ And so, with the inevitable qualifications:
- The courts at the seat are for all practical purposes the only national courts with the power to annul an award (although any state may of course by legislation surrender its right to do so).¹⁶⁰ And
 - the national courts of the “seat” may exercise this power to annul awards on the basis of whatever grounds for vacatur the local *lex arbitri* provides -- unfettered by international conventions.¹⁶¹

See also *AVR Communications, Ltd.*, supra n. 116 (respondent’s assertion that the claims “were not encompassed by the agreement to arbitrate” was rejected by the courts of the seat (Israel), which referred the dispute to arbitration and later entered judgment on the award; held, motion to confirm granted, since the question of scope may not be revisited by the court on a *de novo* basis; the parties “not only specified which law would apply to the question (Israeli law), but also which courts would supply the answer---the Israeli courts”) Obviously this holding could be justified either on the basis of a preference for the “law of the seat” as the proper applicable law, or on the basis of preclusion).

¹⁵⁹ FirstLink Investments Corp. Ltd., supra n. 115 at ¶ 15.

¹⁶⁰ See *C v. D*, supra n. 120 (injunction granted to bar any challenge in New York courts to a partial award rendered in London, despite the fact that the parties had made an “express choice of New York law to govern their obligations under the policy”; this conclusion would still hold even if “the arbitration clause itself was governed by the law of New York,” although in the absence of an express choice, “the law with which that agreement has its closest and most real connection” is the law of the seat).

¹⁶¹ This is at least the conventional wisdom. See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int’l L.J. 1, 11 (1995) (“the Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration”); W. Laurence Craig, *Uses and Abuses of Appeal from Awards*, 4 Arb. Int’l 174 (1988) (“no international agreements control how national courts supervise arbitrations taking place on their own territory,” with the result that each state “is free to apply whatever measures of judicial control it wishes to international arbitration taking place within its own jurisdiction”).

So for example, the arbitration legislation of a given state may not permit

- ad hoc arbitrations; or
- arbitrations conducted under the ICC Rules; or
- arbitrations in which the witnesses did not swear to an oath in a prescribed form before making their statements.

See, e.g., *Apple & Eve, LLC v. Yantai North Andre Juice Co. Ltd.*, 499 F.Supp.2d 245 (E.D.N.Y. 2007)(under the law of the seat [China], arbitration agreement was allegedly “null and void” because it failed to designate an “arbitration commission”); *TermoRio S.A. v. Electrantra S.P.*, 487 F.3d 928 (D.C. Cir. 2007) (deferring to “lawful” Colombian annulment, where Colombian law “did not expressly permit the use of ICC procedural rules in arbitration”); *Int’l Bechtel Co. Ltd. v. Dept. of Civil Aviation of the Govt. of Dubai*, 300 F. Supp. 2d 112 (D. D.C. 2004)(local court overturned award after finding that witnesses in the arbitration had not taken oaths in the form prescribed by Dubai law); Minas Khatchadourian, *Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards*, <http://kluwerarbitrationblog.com/2013/09/23/controversial-ruling-of-the-qatari-court-of-cassation-regarding-arbitral-awards> (Qatar; in a now obsolete decision the local court annulled an award on the ground that it had not been rendered in the name of the Emir). See also *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 712 F.2d 50 (3rd Cir. 1983)(expert testimony was to the effect that “an arbitration clause calling for an even number of arbitrators is null and void” under Italian law “even if” there is a provision for the designation of a tie breaker). Any of these grounds alone might justify annulment of awards rendered locally--- although under art. V it would presumably not in itself justify a refusal to enforce an award that had originally been rendered in another contracting state.

There is obviously some tension here with the mandate of art. II of the Convention: Could the courts of the seat---consistently with their obligations under art. II---take the extreme position that arbitration awards are inherently non-binding -- that they may routinely be vacated and re-examined de novo by local tribunals? Gary Born points to this difficulty in an attempt to challenge the received learning: If a contracting state, “through its treatment of arbitral awards,” in effect “violates its obligations with regard to recognition of arbitration agreements,” “that is still a breach” of art. II---which should thus be interpreted as “apply[ing]” at least to some extent in annulment proceedings, that is, as “placing limits on substantive grounds for annulment of international arbitral awards,” and thus “preclud[ing]” “application of idiosyncratic local rules” on a motion to vacate. See Born, *supra* n. 12 at 3168-73.

I confess I am extremely skeptical about any such claim:

- For one thing, it seems to assume that a contracting state is somehow under an international obligation, imposed by the Convention, to honor agreements calling for “international” arbitrations *to take place within its own territory*. (To be fair, Born is indeed consistent in making this claim elsewhere, see *id.* at 315 (“compelling argument” that the Convention applies to “international” agreements generally, although “there is no text in the Convention that would specifically mandate” such a result)). While the text of the Convention is hardly crystalline, I find this exceedingly dubious.
- That the Convention imposes no obligations with respect to arbitrations conducted within a state’s own territory is uncontroversially true with respect to awards---as art. I clearly leaves it to the discretion of each state to choose if, and to what extent, such awards are to be accorded Convention status *in the first place*. [In fact the U.S. is rather unusual, if not actually unique, in having elected to make anything at all of the “non-domestic” category in art. I. Compare FAA § 202 (extending Convention coverage even to US-seated arbitrations arising out of a relationship “entirely between citizens of the United States,” as long as there is some “reasonable relation with one or more foreign states”), and Alan Scott Rau, *The New York Convention in American Courts*, 7 Am. Rev. Int’l Arb. 213 (1996), with Australia International Arbitration Act 1974 §§ 3(1), 7(1) (enforcement of “foreign arbitration agreements” where “the procedure in relation to arbitration ... is governed ... by the law of a Convention country” [a term defined to exclude Australia], or by the law of a country “not being Australia or a Convention country,” where a party to the agreement was domiciled in Australia)].
- And on the generally-accepted value of congruence between art. II and art. V---on reading the Convention to require enforcement *only of agreements that would in turn lead to awards that themselves come within the protection of the treaty*---see ¶ 39 *supra*. See generally Reinmar Wolff, *New York Convention: Commentary* at “Art. II: ¶¶ 26-30 (art. II “applies if a subsequent award will be foreign in terms of art. I . . . or if the forum state will not consider the award as domestic”;

- And then, finally and most critically: Should the legitimacy of the arbitral proceeding be called into question by annulment at the seat (on whatever grounds), such a determination will be conclusive.¹⁶² So, then---to return to the point where we started---there is an obvious need to read art. V(1)(a) of the Convention *so as to make it congruent with the general understanding of art. V(1)(e)*: Imagine an agreement found to be enforceable under some other body of law---but at a later stage, held to be invalid, with universal effect, by the courts of the seat after application of the *lex arbitri*---all in all, a rather pointless exercise: Given these implications of the choice of the seat, would it not seem more closely to mirror the probable intention of “rational businessmen”¹⁶³ to presume their *ex ante* expectation that the law of that state would recognize the validity of the agreement to arbitrate---and to infer that “their attention” to that subject “would *primarily* be focused” on that body of law rather than on the proper law of the contract generally?

G. The *Sulamérica* Case

under the Convention “party nationality and the internationality of the underlying transaction are irrelevant”); apparent second thoughts, however, at ¶¶ 212-213.

- I also doubt whether it is wise in any event to go any distance down this path---indulging in some sort of “reverse-*Erie*” inquiry, weighing in particular cases, in some ill-defined and unpredictable way, the strength of parochial local interests against some overriding transnational substantive policy. Cf. Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 Nev. L.J. 169, 193 (2007) (the “respective roles of state and federal law,” requiring an inquiry into “the federal interest in particular outcomes,” and “what obstacles may be thrown up in the way of the federal scheme by the organization of a state’s judiciary”). A state’s refusal to countenance awards on any of the grounds mentioned earlier in this note---however scandalous in the eyes of the international arbitration establishment -- is unlikely to amount to a repudiation of that state’s solemn treaty obligation, even assuming such an obligation has “teeth.”

The prospect of idiosyncratic local grounds is of course increasingly marginalized by the fact that many states, in an attempt to promote their “arbitration friendliness,” have chosen to tie their own hands---enacting modern statutes with respect to international arbitration that now commonly provide only one means of recourse, available during a fairly short period of time, and for a limited number of reasons, themselves increasingly homogeneous across legal systems.

¹⁶² I am aware of course that there may be exceptions---that states of “secondary jurisdiction” may nevertheless choose to enforce awards regardless of the fact that they may have been annulled at the seat. I am equally aware that attempts are routinely made to justify the irrelevance of local annulment on “philosophical” grounds, Emmanuel Gaillard, *Aspects philosophiques du droit de l’arbitrage international* (2008). But I would suggest that the recent decision of the French Cour de Cassation in *Putrabali* cannot inspire much confidence in the practical wisdom of this “philosophy” for our workaday world: The legal regime that can countenance the absurdities of *Putrabali* is one that needs to take a close look at itself in the mirror -- asking itself, as many of us do with chagrin and dismay on dark mornings, how we could possibly have wound up, after a series of small and imperceptible steps, in this condition. See the extended discussion in Rau, “*Jurisdiction*,” at 83-113.

¹⁶³ Sic; see *FirstLink Investments Corp. Ltd.*, supra n. 115 at ¶ 14.

55. The courts of England, perhaps more than those in any other state, have devoted inordinate attention to this question---although without managing to attain any considerable degree of coherence.¹⁶⁴ For a while indeed they seemed to be converging on the proposition that is advanced here---that divergence between the law governing the arbitration agreement and the curial law is both the least desirable of all possible scenarios in terms of systemic efficiency, and as a consequence the least likely in terms of party expectation.¹⁶⁵ But more recent authority has muddled the waters still further.
56. In the leading *Sulamérica* case, certain insurance policies provided for the governing law to be that of Brazil, but also contained a London arbitration clause. The insured resisted arbitration---arguing that although the clause allowed “either party [to] refer the dispute to arbitration,” the effect of Brazilian law was that arbitration could not be invoked against it without its consent. In the principal speech by Lord Justice Moore-Bick, the Court of Appeal wheeled out the familiar “three-step” analysis in order to determine the validity of the clause:
- a.** While it was apparently, and correctly, conceded that there had been no “express choice of law” governing the arbitration agreement itself,
 - b.** the Court conceded that the choice of Brazilian law amounted to a “strong indication,” “a strong pointer” towards an “implied” choice of law to govern the arbitration agreement. Nevertheless such a conclusion was rejected---for two reasons, each of which speaks volumes:
 - i.** The possible invalidity of the agreement under Brazilian law would be a “powerful factor” “suggest[ing] that the parties did not intend” the agreement to be governed by that body of law, as it would “significantly undermine” the commitment to arbitrate, and

¹⁶⁴ As Lord Justice Neuberger remarked, in the latest foray by the Court of Appeal into this area---and with considerable understatement---that although “one might have expected the cases to have provided clear and consistent guidance,” their attitude “over the past twenty years or so has not been entirely consistent,” *Sulamérica Cia. Nacional de Seguros S.A.*, supra n. 128 at ¶ 52.

¹⁶⁵ See the cases at supra n. 130.

See also *Sulamérica Cia. Nacional de Seguros S.A.*, supra n. 128 at ¶ 55 (suggesting that this may be attributable in part to the notion of “separability” having at last come to the forefront of the judicial consciousness). Nevertheless an appeal to “separability” should not push us very far in the direction of counselling resort to the law of the seat and away from the realities of the underlying transaction: “Separability,” as we have seen, reflects nothing more than a presumed party preference that the chosen dispute-resolution process be preserved in the face of challenges to the container contract alone; by uncoupling the agreement to arbitrate from the rest of the transaction, it asks arbitral tribunals, first, to identify the proper law of the container contract and then, to assess that contract in accordance with the proper law. See ¶¶ 10-13 supra. While it permits the inference of a separate governing law it hardly mandates it, and nothing whatever in the policies underlying “separability” necessarily forecloses reference to *the same body of law* to judge the legitimacy of *the arbitration agreement itself*. To this effect, see Molfa, supra n. 145 at 170.

- ii. having chosen an English seat, the parties “must have foreseen and intended” that the provisions of the English Act would apply to an arbitration---including those provisions which would be considered “substantive” rather than “procedural in nature.”

- c. So with no guidance either at “a.” or at “b.,” all that was left was an inquiry into the legal system with which the arbitration agreement was thought to have “the closest and most real connection”: And this, the Court concluded, could hardly be the body of Brazilian law governing the overall insurance policy (“whose purpose is unrelated to that of dispute resolution”) but instead must be the place where the arbitration is to be held--- whose provisions “will, on any view,” “govern all aspects of the arbitration agreement.”¹⁶⁶

57. Now, what can one possibly make of all this? To begin with---once any “choice” of Brazilian law has been set aside---it might have seemed natural to go on to conclude that the parties, by their designation of the seat, had made at least a tacit “choice” to the effect that *English* law instead would govern the agreement to arbitrate: Certainly the second reason given [“b.ii.” above] would tend to suggest as much.¹⁶⁷ (Indeed the Court’s reliance on the intended implications of the choice of a seat might be thought to have swallowed up its entire analysis---calling into question everything that went before---rendering insignificant its view that the choice of Brazilian law to govern the overall agreement was a “strong pointer” towards an “implied choice” of law for the arbitration clause as well).¹⁶⁸

¹⁶⁶*Sulamérica Cia. Nacional de Seguros S.A.*, supra n. 128 at ¶¶ 29-32, 61; see supra n. 139 (with particular reference to questions of separability and discharge). See also *C. v. D.*, supra n. 120 at ¶ 26 (“the reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes have arisen under a contract governed by the law of another place”).

¹⁶⁷ See *id.* at ¶ 61 (eschewing any recourse to the clunky “three stage” architecture of the principal opinion, L.J. Neuberger finds that the applicability of certain provisions of the Arbitration Act “tends to support the respondents’ case that English law applies”); *XL Ins. Ltd.*, supra n. 140 (“policy shall be construed in accordance with the internal laws of the State of New York”; “the parties cannot have intended . . . that all aspects of the arbitration agreement should be governed by New York law, for that would be inconsistent with the stipulation in the arbitration clause that any dispute should be determined in London under the provisions of the Arbitration Act 1996”; therefore by this stipulation the parties “by implication chose English law as the proper law of the arbitration clause”); *FirstLink Investments Corp. Ltd.*, supra n. 115 at ¶ 17 (agreement to submit to “the jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce”; “having determined parties’ implied choice of the proper law, it would not be necessary to proceed to the third stage of the inquiry to determine which law has the closest and most real connection with the agreement”).

Cf. North, supra n. 18 at 172 (one element of choice “may be involved indirectly,” “where it is not the applicable law which is chosen but rather [what is chosen are] the factors or elements [such as the place of arbitration] which go to constitute the connecting factor which our rules of private international law have laid down for determining the applicable law”).

¹⁶⁸ At least in cases---which happen to be the only interesting cases---where the parties had chosen

58. The case might well have ended there. But---and this is perhaps marginally defensible---that was not the path that was ultimately taken: Before the parties may be found to have set aside what would otherwise be the conflict rules of the forum pointing to a particular body of national law, we might reasonably expect them to express their alternative choice with some degree of lucidity and explicitness, such that a clear textual inference is compelled.¹⁶⁹ And we might agree that they failed to do anything like this in *Sulamérica* itself. But assuming an adequate textual hook to be missing: If the next step is to deploy those conflict rules to identify the law of the state with the “closest” or “most significant” relationship to a given issue, we may be on the point of using this analysis as nothing more than a surrogate for a supposed contractual choice---at least this is close along the line. For what remains paramount is the search for a body of law that best corresponds to the parties’ *ex ante* “justified” “expectations.” To the extent this is true, one might plausibly say that “c.” is to be found somewhere on the same continuum with “b.”¹⁷⁰

both the seat and the governing law.

¹⁶⁹ See Rome I, art. 3(1) (parties’ choice of law “shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case”); Adrian Briggs, *Private International Law in English Courts* 509 (2014) (“if one asks whether art. 3 will give effect to an ‘implied choice,’ its wording suggests that the answer is no”); cf. Beaumont & McEleavy, *supra* n. 70 at ¶¶ 10.83ff. (under Rome I an “implied choice of law” is presumably acceptable but this must be “so obvious that it went without saying and was one to which the parties would have said ‘of course’ if anyone had suggested it”; while it may be enough for the contract to be in a standard form known to be governed by a particular system of law, or to make reference to specific articles of a national code,” the mere fact that it would be ‘reasonable’ will not suffice”). Cf. *Restatement, Second, Conflict of Laws* §187 cmt. a (an “express reference to the state of the chosen law” “is the best way of insuring that their desires will be given effect,” but if, for example, “the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state,” this “may provide persuasive evidence that the parties wished to have this law applied”; nevertheless it “does not suffice to demonstrate that the parties, if they had thought about the matter, would have wished” to have this law applied).

¹⁷⁰ See *Restatement, Second, Conflicts of Law* § 188 cmts. *a, b* (“where there has not been an effective choice of the applicable law by the parties,” “protection of [their] justified expectations” and “certainty, predictability, and uniformity of result” are “of considerable importance” in contracts cases, and even within the realm of contracts, these concerns are most critical “with respect to issues involving the validity of a contract”), § 218 cmt. *b* (applying the principles of § 188 to arbitration; where a contract whose principal elements are located in state X provides for arbitration in state Y,” “it may be” that “Y is the state of most significant relationship with respect to the issue of arbitration”). Professor Symeonides suggests that the superficial similarities between the Restatement approach and the “closest connection” “catchphrase” of European law is “only terminological,” but the principal difference appears to center on the possibility of “*dépeçage*,” Symeonides, *supra* n. 35 at 112.

Cf. *Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317 (Iowa 1977) (under the law of Iowa, where the contract was made and was to be performed, “the requirements for an enforceable arbitration agreement” included a prior specification of the names of the arbitrators; however, the parties had agreed to arbitrate under AAA rules, and the AAA chose New York as the “locale” for the arbitration”; this meant *both*

- *that under the Restatement § 188, New York was the state “with the most significant relationship to the arbitration issue,” and also*
- *that the parties had “consented to the application of the laws of that state”;*

59. This was the route finally taken in *Sulamérica*: Since the validity of the agreement to arbitrate did not implicate the parties’ primary conduct---that is, their substantive rights and obligations---but instead the process by which those rights fell to be determined,¹⁷¹ the canonical search for the “closest connection” is likely in any event to lead us right back to London, where the agreement was to be performed.¹⁷²
60. Now in the absence of an express choice of law [“a.”]---that is, where the text of the agreement has not *explicitly and immediately directed us* to any conclusion with respect to intent—some methodology becomes necessary to deal with the resulting “silence”:
- A weak account of contractual “silence” might begin by “worrying” the text of the agreement---the way a dog worries a bone---in order to discover some sort of underlying “narrative,” or by looking to context and circumstances (“surrounding” by definition) to help determine the “commercial meaning” of the language and any shared “framework of common understanding.”¹⁷³

on either rationale we are “protecting the reasonable expectations of the parties”).

¹⁷¹ See ¶¶ 14, 46-47 *supra*.

¹⁷² *Quaere* whether this trip was even necessary. The Court in *Sulamérica* did not explain why the state of “closest connection” was assumed without more to be that of the seat (nor did the court in *C. v. D.*, *supra* n. 120, nor did the court in *Arsanovia Ltd.*, *infra* n. 174 [“implied choice” of Indian law so “the question does not arise,” but if “I had to decide which system of law has the closest and most real connection with the arbitration agreement, I would have concluded that it is English law”]). Perhaps it was simply too obvious that the parties had, in the absence of any deviant choice, wished to link the fate of their agreement to the *lex arbitri*.

In theory I suppose the choice-of-law inquiry is multi-dimensional, the law applicable to the “validity” of an arbitration agreement possibly turning on any number of additional factors: In the US, for example, the Restatement of Conflicts (Second) suggests the need to “weigh” in each particular case “the interest of a state in having its contract rule applied” against “the value of protecting the justified expectations of the parties,” see §6, § 188 *cmt. c*. Certainly no attempt was made here to assess the nature or purpose or scope of any supposed Brazilian rule of invalidity of arbitration agreements, and it is hard to see what such an inquiry would look like. Cf. *Eli Lilly do Brasil Ltda. V. Federal Express Corp.*, 502 F.3d 78 (2nd Cir., 2007)(in a case involving the validity of a limitation of liability in a FedEx waybill, the court weighed the interests of Brazil, as the “most interested state” [state of origin of the goods and the domicile of injured plaintiff] against the parties’ “expectation of enforceability” and the “paramount importance of enforcing freely undertaken contractual obligations”---but held the latter “predominates over other factors”).

Nor was any exercise of the kind performed in a similar High Court case decided just a few months before: Where London arbitration was resisted on the ground that proceedings not “held in public” were contrary to the Constitution of Nigeria, the court--- cutting through all the cackle imposed by *Sulamérica*---found Nigerian law (applicable by virtue of a choice-of-law clause) simply “irrelevant to the validity of the arbitration agreement”; the agreement “has its closest and most real connection with England because the seat of the arbitration is here,” *Abuja Int’l Hotels Ltd. v. Meriden SAS*, [2012] EWHC 87 (Comm) at ¶¶ 20-24.

¹⁷³ Cf. UCC § 1-303 *cmt. 3* (“the commercial meaning of the agreement that the parties have made”; usage of trade, as well as the parties’ “course of performance” and “course of dealing,” “furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when

This is in fact precisely where much of the work in the decided cases seems to be done.¹⁷⁴

- A stronger account---acknowledging perhaps that an agreement may have “run out of guidance for settling a dispute”¹⁷⁵---may involve moving from “interpretation” as the term is commonly understood, to the necessary process of “filling a gap” in a responsible way. The inescapable tactic, as we have seen, is to adopt a presumption that is aimed at mirroring or mimicking the hypothetical bargain that the parties themselves would have reached---perhaps what “the parties would have agreed upon” in a completely spelled-out agreement---“or what most similarly situated parties would have chosen”¹⁷⁶ (hence the common term, “majoritarian default”)---or even, what it would have been rational for such parties to have chosen *ex ante*. Any default rule, in other words, is likely to privilege a meaning towards which most sensible people would gravitate.¹⁷⁷

there is no such understanding”).

¹⁷⁴ See, e.g., *Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings*, [2012] EWHC 3702 (Comm.). In *Arsanovia* “the *lex causae*” was expressly stipulated to be the law of India, whereas the chosen seat was London. What seemed decisive was that the arbitration agreement included a specific provision that barred either party from seeking interim relief under the Indian Arbitration Act: “Where parties have expressly excluded specific statutory provisions of a law, the natural inference is that they understood and intended that otherwise that law would apply”; this was sufficient to justify a conclusion that “the parties evinced an intention that the arbitration agreement should be governed by Indian law except insofar as they agreed otherwise.” Along similar lines, see *Klöckner Pentaplast GMBH & Co. KG v. Advance Technology (HK) Co. Ltd.*, [2011] HKEC 1218 (“arbitration venue shall be in Shanghai” but the governing law of the contract was to be German law; in determining that German law was also to be the applicable law for determining the validity of the arbitration agreement, the court relied both on the breadth of the choice-of-law clause [“this [memorandum of understanding] and all of the obligations contained herein shall be governed in its entirety” by the law of Germany], and on the fact that the two party-appointed arbitrators were to select a third arbitrator who was “admitted to practice law in the Federal Republic of Germany”).

¹⁷⁵ Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. Cal. Interdisc. L.J. 115, 130 (1993).

¹⁷⁶ Laurent Lévy, *L’interprétation arbitrale*, [2013] Rev. de l’arb. 861, 889 (“the views that people with characteristics similar to those of the parties in the suit, and placed in analogous circumstances, would have shared”). Or even---since he is the quintessential “reasonable person” by definition---what the judge himself believes he would have chosen.

¹⁷⁷ Even if a court foregoes any pretense of conjecture about the bargaining process, or any attempt to reconstruct what the parties “would have chosen”---even if it prefers to proceed directly to select the solution which appears most economically efficient, or “a term which comports with community standards of fairness and policy,” see *Restatement, Second, Contracts* § 204 cmt. d---we can be pretty sure that such a bluff and straightforward attempt to “supply” a term which is simply “reasonable in the circumstances,” is not likely to stray too far from what at the very least were the tacit assumptions of the contracting parties underlying the deal. See, e.g., Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. Legal Stud. 105, 106 (1989) (“what rational parties would have agreed to is . . . strong evidence of what these parties did, in fact, agree to where there is silence or ambiguity”). See generally Rau, “Gap Filling” at 974-76.

61. Lord Justice Neuberger wrote in *Sulamérica* that the sole issue posed in these “applicable law” cases is in the end one of “contractual interpretation”: “It is inevitable that the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense.”¹⁷⁸ Despite conventional commentary doughtily insisting on the doctrinal separation between mere questions of “interpretation (necessarily focused on the search for the appropriate “intent”), and exercises in “gap filling,”¹⁷⁹ we must not lose sight of the fact that the latter, too, is to a large degree “interpretive”---*precisely to the extent that it represents an effort to determine “how the parties would have resolved the issue that has arisen had they foreseen it when they negotiated their contract.”*¹⁸⁰
62. Therefore: Many cases may readily and straightforwardly be resolved at level “b.”---but to conclude (as the Court does in *Sulamérica*) that inquiries at “b.” and at “c.” will send us in different directions is a result that should I think have to be strenuously justified.¹⁸¹ The rather wooden taxonomy of *Sulamérica* has the effect of dichotomizing a continuum; it seems fair to conclude that any difference there between levels “b.” and “c.” reduces itself---at best---to a difference of degree.¹⁸²

¹⁷⁸ *Sulamérica Cia. Nacional de Seguros S.A.*, supra n. 128 at ¶ 51.

¹⁷⁹ See, e.g., 5 *Corbin on Contracts* § 24.3 (Kniffin ed. 1998) (a court’s action in filling a gap “with respect to a matter which the parties did not have in contemplation and concerning which they therefore had no intention” “may be called construction” but “should not be called interpretation”). Cf. *Restatement, Second, Contracts* § 204 *cm. a.* (“the supplying of an omitted term is not technically interpretation, but the two are closely related”); *id. cm. c.* (where there is “a common tacit assumption” or where “a term can be supplied by logical deduction from agreed terms and the circumstances,” then “interpretation may be enough”; nonetheless “the supplying of an omitted term is not within the definition of interpretation”).

¹⁸⁰ The bottom line, in other words, is that “gap filling” and a semantic inquiry into “meaning” are both at bottom “interpretive”; see Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 *Tex. L. Rev.* 1581, 1586 (2005).

¹⁸¹ *Dicey* (although for reasons somewhat different from those advanced here) writes that “the line between the search for the inferred intention and the search for the system of law with which the contract had its closest and most real connection [“b.” and “c.” in the taxonomy of *Sulamérica*] was a fine one which was frequently blurred”; as “in practice the same result could be reached by the application of [either,] frequently the courts move straight from [“a.” to “c.” and the tests] “merged into each other.” 2 *Dicey, Morris & Collins on The Conflict of Laws* ¶ 32-006 (14th ed. 2006). Cf. *Hamlyn & Co.*, supra n. 111 at 207 (considering “what law is to govern” the validity of the arbitration clause “with reference to what the law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined”).

¹⁸² Of course, of course, “differences in degree matter.” Cf. Charles H. Brower II, *Mind the Gap*, [2016] *B.Y.U. L. Rev.* 1, 4. So Professor Brower takes exception to the analysis here, positing that “interpretation and gap filling involve distinct undertakings”---and in support of this proposition, brings in the quaint analogy of splitting wood: “It makes a huge difference whether one splits southern yellow pine (which weighs roughly 52 pounds per cubic foot) or quebracho (which weighs over 77 pounds per cubic foot and takes its name from the Spanish words for ‘axe-breaker’).”

Fine: Assume that all the wood in the natural world is laid out in a line, from the softest to the most dense. One starts out with a given blade, and works one’s way along. Increasingly one finds the task difficult---requiring greater time, effort, and energy. One sweats a little. And then, at a given moment, one has to give up: The wood becomes too hard to cut, or requires effort and energy disproportionate to the benefit---or perhaps, risks being dangerous either to the blade or to the user himself. Well, then, at that point, *one selects a different blade*. Working in the law is no different:

For the Court, then, to end up by relying on the law of the London seat, seems a result that is not only perfectly defensible but indeed overdetermined.

H. “The Principle of Validity”

63. It is only natural that the decision in *Sulamérica* has called forth an endless flow of ink---contributing further to the “epidemic conspiracy for the destruction of paper” from which we all suffer.¹⁸³ And it is only natural that the reading of the opinion, particularly by members of the Arbitration Establishment, has been somewhat tendentious: Some will prefer to believe that the Court of Appeal---in setting aside an “implied choice” of an invalidating Brazilian law---has lent support to an alternative and universal conflict rule, one aimed above all at “saving” an arbitration agreement whenever necessary. Eschewing any presumption in favor of either the governing law or the law of the seat, this rule posits that the proper law to govern an arbitration agreement should rest instead on a principle of “validation”: The *result* of recourse to such a “principle” would be to “apply *any* potentially-applicable national law that would *uphold*” it; the *purpose* of doing so is to give effect to the parties’ “overriding objective . . . to make an agreement that is valid and enforceable (rather than mere waste paper’).¹⁸⁴ And commentators now regularly trot out the decision as justifying or exemplifying this newly-respectable position.¹⁸⁵
64. Now the existence of such a principle of “validation” does perhaps contain a kernel of relevance: Its purchase is real, albeit limited. Imagine, say, that the parties have in the abstract “consented” to arbitration, but that some supposedly applicable law--
- appearing perhaps in the local Code in large neon letters, and
 - sweeping broadly, in a blanket fashion and without nuance,

It is only when the analytical tool one is using no longer does the job---when one has to reach for a different blade---that differences in degree become “differences in kind.” My point here is precisely that if one steps back, takes a deep breath, raises one’s eyes above traditional doctrine, and focuses them on the purpose of the enterprise, that the normal tools of “default-rule-analysis” work perfectly well for all the choice-of-law cases we are dealing with here---indeed, for all the analysis throughout these Lectures.

¹⁸³ Samuel Johnson, *The Adventurer*, no. 115 (Dec. 11, 1753).

¹⁸⁴ E.g., Born, *supra* n. 12 at 545, 563 (“it makes no commercial sense to assume that the parties intended” that any body of law would be extended to the arbitration agreement “if the consequence thereof was to invalidate that agreement . . . and leave them facing all the uncertainties, expenses and other problems of international litigation that the arbitration agreement was meant to avoid”).

¹⁸⁵ E.g., Bond, *supra* n. 32 at 35-38; Peter Tzeng, *Favoring Validity: The Hidden Choice of Law Rule for Arbitration Agreements*, 27 *Amer. Rev. of Int’l Arb.* 327, 340-48 (2016); Sabrina Pearson, *Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, 29 *Arb. Int’l* 115 (2013); Renato Nazzini, *The Law Applicable to the Arbitration Agreement: Towards Transnational Principles*, 65 *ICLQ* 681, 700-01 (2016).

- would render the agreement, in all circumstances and at the very outset, unenforceable.

It is easy enough in these circumstances to conclude that the parties simply could not have chosen it---whatever our working presumption might otherwise be. It would in fact do them a considerable injustice to attribute any such intention to them.¹⁸⁶ As very few people would enter into a contract “*expecting not to be bound by its terms*,” this is not a choice-of-law “factor,” but rather “an assumption about facts.”¹⁸⁷ It seems unlikely that applying such a banal truism will often lead us very far away from the law of the seat. (For after all, is not the whole point of the choice-of-seat exercise---whether the choice is mutually hammered out or imposed by the dominant party---to identify an arbitration-complaisant jurisdiction?)¹⁸⁸ But should it do so, the compelling inference must be that we are now faced with something like a fatal misunderstanding or “mutual mistake”---a vitiating factor that typically under forum law will negate any apparent consent to the choice in the first place.¹⁸⁹

65. But whatever “validity” means, it is far too multi-faceted a concept to be entirely cabined within the scenario posited in ¶ 64: In other circumstances, a “principle of validation” can no longer amount to a simple factoid---still less can it constitute a

¹⁸⁶ This is perhaps *Sulamérica*; it is certainly, *inter alia*, *Abuja Int’l Hotels Ltd.*, supra n. 172; *Hamlyn & Co.*, supra n. 111; *Wilmotte & Co.*, supra n. 170. In all these cases---and this appears by far to be the most likely scenario---a “principle of validation” would lead to the law of the seat in any event.

Some decades ago I wrote about a case in which the parties had provided by contract that an arbitration was to take place “pursuant to the laws of the State of Texas”---which at the time required all contracts to contain a prominent notice, “typed in underlined capital letters or . . . rubber-stamped prominently on the first page,” that it was subject to arbitration. The court held that since the parties had chosen to arbitrate under Texas law, “the arbitration agreement is unenforceable because it does not conform to the statute.” I wrote: Apparently, then, we are to suppose that the parties to this contract had agreed to arbitrate---and . . . that they *simultaneously* intended to adopt a body of state law that would in all possible circumstances make the agreement to arbitrate invalid! If you can believe that, as the Duke of Wellington was supposed to have remarked in another context, you can believe anything. Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of Waiver*, 6 Amer. Rev. Int’l Arb. 223, 249-50 (1996).

It is the prophylactic, absolutist nature of the statutory prohibition that makes the supposed “choice of law” improbable; the parties’ ignorance would at the worst set up the conditions for a vitiating mistake. See also *Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718 (2nd Cir. 1982), discussed in *Martinez v. Bloomberg LP*, 740 F.3d 211, 231-32 (2nd Cir. 2014)(Newman, J., concurring). Here a contract contained a forum-selection clause specifying Dallas, Texas, and a choice-of-law clause specifying Texas law. The plaintiff challenged the forum-selection clause on the ground that Texas law “does not recognize” such agreements---but the court held that in this “rare, perhaps unique” case, to apply the choice-of-law clause would render the forum selection “meaningless,” which “could not have been the intention of the parties.”

¹⁸⁷ Symeonides, supra n. 35 at 357.

¹⁸⁸ See n. 122 supra.

¹⁸⁹ *Restatement, Second, Conflicts* § 187 cmt. e; see also Symeon C. Symeonides, *Codifying Chioce of Law Around the World: An International Comparative Analysis* 124 (2014)(“the contract is then governed by the objectively chosen law, for example through the factors of § 188”).

“rule favoring the validity of the arbitration agreement.”¹⁹⁰ Although a *lex arbitri* may of course contain lenient standards, or retrograde standards, there can be no “rule of validity,” if by this is meant the suggestion that in determining whether the parties have entered into a contract, a thumb is to be placed on the scale. That would be suspect even as a mere heuristic, when choosing between alternative bodies of law in circumstances of ambiguity where contractual interpretation proves indeterminate:

- a. Defenses like unconscionability, lack of arbitral independence, mistake, duress, frustration, rescission or novation, are not prophylactic but are irremediably and intensely fact-dependent; in addition, that circumstances have arisen in which such defenses begin to seem relevant may only become apparent long after the agreement was first entered into.¹⁹¹ In such cases the parties might plausibly—if asked---have preferred to see the challenge assessed---that is, to have their duty to arbitrate defined---under the same standards which under the *lex arbitri* would determine whether an arbitration should be set in motion.
 - This point must seem somewhat abstract, so here is a nice and more concrete illustration: The “arbitration law” of a given jurisdiction may allow courts to refuse to stay litigation or compel arbitration, in situations where all related parties to a complex transaction---some of them irredeemably “non-signatories”---cannot be swept into a single arbitral proceeding.¹⁹² Contacting parties may indeed share an *ex ante*

¹⁹⁰ Tzeng, supra n. 185. Nikolaus Pitkowitz properly criticizes such a formulation of the “validation principle” on the ground that it “presupposes that the arbitration clause is valid---that jurisdiction is given”---and thus “shifts the burden of proof onto the respondent to prove otherwise.” Nikolaus Pitkowitz, *The Law Applicable to the Arbitration Agreement*, in Liber Amicorum William Laurence Craig 275, 282 (2016).

Swiss law represents an unusual and extreme application of the “principle” and one that indeed is precisely subject to such criticisms: Under the conflict-of-law rule incorporated in art. 178(2) of the PILA, an arbitration agreement is deemed to be valid “if it conforms either

- to the law chosen by the parties, or
 - to the law governing the subject-matter of the dispute, in particular the law governing the main contract, [N.B.: As phrased, this is not necessarily a law *chosen by the parties* at all, but could merely be the contract law of the state of “closest connection”], or
 - if it conforms to Swiss law.”
- The result is a validating “principle” which can certainly be contracted around [see art. 176(2)---and of course, the parties may simply choose to go elsewhere]---but which seems very hard to square with the notion of autonomy that is enshrined in art. V. See Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* 115 (2015) (noting the risks that may ensue should recognition or enforcement be sought in a state of “secondary jurisdiction”).

¹⁹¹ See supra ¶¶ 26, 37 and n. 111; see also *Restatement* at § 2-13 *Reporters’ Notes*, n. a. (providing a non-inclusive list of “generally applicable contract defenses that may render agreements to arbitrate invalid” such as fraud, duress, mistake, illegality and unconscionability).

¹⁹² See, e.g., Cal. Code Civ. Proc. 1281.2(c): Under this statute, if the court determines that a party to the arbitration is also a party to litigation with a third party “arising out of the same

preference for their arbitration agreement---in ordinary circumstances---to be “effective.” But at the same time---should they later be faced with the possibility of multiple litigation and inconsistent results---they might plausibly have wished to carve out this kind of case from any such obligation, and to rely on the law of the seat to allow them to do so.¹⁹³ This is not the counter-intuitive choice of an invalidating law, as some commentators would have it, but merely a case of hedging their bets.¹⁹⁴

- b. Issues of interpretation---delineating the proper scope of the agreement to arbitrate---do not appear on the surface to have much to do with the agreement’s “validity” at all---although of course, just like “validity,” they equally determine the ambit of the duty to arbitrate. It might well be thought that for this inquiry, recourse to a “governing law” is simply otiose---after all, it merely calls on a court or arbitrator to take note of simple “matters of fact,”¹⁹⁵ or to apply “common sense,”¹⁹⁶ or at most, to

transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact,” the court “may refuse to enforce the arbitration agreement” or may indeed “stay arbitration pending the outcome of the court action.”

I would assume that the effect of successfully invoking the statute would not be to render the agreement to arbitrate “void *ab initio*,” but, like many other challenges, it certainly calls into question its continuing enforceability (or “validity”).

¹⁹³ On the recurring tactical difficulties faced by the “party in the middle” in multi-party disputes, see, e.g., Alan Scott Rau et al., *Arbitration* 300-311 (3d ed. 2006).

This of course is the setting of the *Volt* case, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989). The precise holding of the Supreme Court there---that a California choice-of-law clause “captured” California’s restrictive arbitration legislation---is profoundly flawed for the reasons I adumbrated at ¶¶ 51ff. *supra*; see also Rau, “*Waiver*” 247-58. But imagine---unlike *Volt*---that some “horizontal” jurisdiction had a statutory framework similar to that in California [such as India perhaps, see n. 140 *supra*], and that the parties had chosen that jurisdiction to be the seat of the arbitration.

¹⁹⁴ Of course, there may be better ways to accomplish this, see, e.g., *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 191 Cal.Rptr. 15 (Cal. App. 1983)(by contract, the Owner in a construction contract is relieved from any obligation to arbitrate if, “in order to fully protect its interests, [he] desires in good faith to bring in or make a party to any [dispute] * * * the Architect, or any other third party who has not agreed to participate in and be bound by the same arbitration proceeding”). But when we are trying to interpret the choice-of-law clause, that’s not the point.

¹⁹⁵ See Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?*, 17 Arb. Int’l 539, 552 (2011) (“nowadays” many arbitrators “tend to consider that the determination of the scope of the arbitration clause does not have to be determined in the first place on the basis of a national law” but should instead simply be “founded upon an analysis of facts.”). Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, in Loukas A. Mistelis & Julian D.M. Lew (eds.), *Pervasive Problems in International Arbitration* 71, 83 (2006) (“[I]t would be easier to avoid looking at the applicable law . . . if it can be done via only the interpretation of the contract”).

¹⁹⁶ Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* 112 (2013)(quoting an “interviewee” to the effect that “there are really only two rules of contractual interpretation. Common sense is one. Commercial sense is the other”); *Restatement at* § 2-14 *cmt. d.* (courts “often make their determination of the legal principles governing the scope

routinely apply familiar and “generally applicable rules of contract construction” often “not derived from any single national legal system.”¹⁹⁷

Nevertheless “Contract Law,” as we have seen throughout, invariably calls on us for much more than an untethered exercise in the application of abstract principles---most obviously, what is thought to constitute the proper reading of any text will be rooted in national policy. For example, an integral part of the *lex arbitri* of a “modern” or “arbitration-friendly” state may be an interpretive “presumption” to the effect that in case of doubt, we should conclude that the parties have indeed wished to submit a given dispute to arbitration: This is a rule chosen, like most default rules, because it is thought to be responsive at the same time to majoritarian assumptions, and to normative concerns, (That is, it may constitute a conscious strategy aimed at advancing the state’s policy preference that disputed issues be directed to alternative fora). Elsewhere, by contrast, a more grudging reading may reduce the currency (if not the enforceability) of the agreement.¹⁹⁸

While interpretation then does not usually require us to identify a governing law, it is not surprising that should this be deemed necessary, the general and (usually unarticulated) assumption is that the applicable

of an agreement to arbitrate without reference to any particular jurisdiction’s law,” reflecting perhaps the view that this “turns more on a commonsense understanding of the words used to define scope than on legal rules of interpretation”). Cf. Mayer, *supra* n. 36 at 367 (“any judge or arbitrator believes himself to be capable of ascertaining the parties’ intent without having to analyze the matter through the prism of some law”).

¹⁹⁷ See Born, *supra* n. 12 at 1321-23; cf. Grigera Naón, *supra* n. 111 at 92 (ICC arbitrators will frequently determine “the meaning of the arbitration clause” by relying on “interpretation criteria directly identified and found in general principles of contract or commercial law” “without identifying any applicable national laws or going through any choice-of-law reasoning to identify the law or rules of law governing the interpretation of the arbitral clause”).

Cf. *Restatement of Conflicts, Second*, § 204, *cmt. a.* (when engaging in “interpretation”---to “consider the ordinary meaning of the words, the context in which they appear in the instrument, and any other evidence which casts light on the parties’ intentions”---application of any choice-of-law rules at all is apparently unnecessary, although when meaning “cannot satisfactorily be ascertained,” resort is necessary to “construction” and thus to the forum’s usual choice-of-law rules); cf. Rau, “Gap Filling” at 976-77 (expressing “skepticism about the coherence or utility” of any such dichotomy).

¹⁹⁸ That is, one may readily identify any number of legal systems where incorporation by reference will be relatively difficult---that is, where the proponent will be required to satisfy a court that an obligation to arbitrate has been assumed in some particularly explicit manner; lurking in the background is the troubling view of arbitration as being in some sense unusual or even suspect; see Born, *supra* n. 12 at 1338-1340 (“‘restrictive’ presumptions regarding scope of international arbitration agreement” are “out of step with more recent authority”).

Born characteristically finds a state’s “pro-arbitration” construction of the scope of a clause to be in fact *mandated* by art. II, even though it would not seem to implicate any tie-breaking “principle” of “validity,” Born, *supra* n. 12 at 1397 (“regardless” of the law of the seat, “regardless of the law applicable to the parties’ arbitration agreement”). So, one gathers that such departures from the “presumption of arbitrability,” represented by the cases in the preceding paragraph, would constitute a violation of a state’s treaty obligations. Such bullying has at least the value of consistency, though little else.

body of law will be the same as that governing the agreement’s “validity.”¹⁹⁹

I. “Federal Common Law”

66. Across diverse legal systems the task of identifying the law applicable to the agreement to arbitrate is usually taken to require some presumption (textual “interpretation” failing) that looks either to the law of the seat or to the law chosen to govern the overall contract. But this is by no means universally the case.²⁰⁰ For

¹⁹⁹ See *Restatement* at § 2-14 *cmt. d.* (“It is reasonable to subject claims of contract invalidity and claims based on contract interpretation to the same body of law”); *Hague Principles on Choice of Law in International Commercial Contracts*, art. 9 and *Commentary* § 9.5 (“chosen law” governs both “interpretation” and “the validity and the consequences of invalidity of the contract”; “where the meaning of a word in a contract is ambiguous, the meaning must be ascertained using the canons of interpretation and construction of the law chosen by the parties”). See also *Insurance Co. v. Reinsurance Co.*, XXII Yrbk. Comm. Arb. 800 (Trib. Féd. Switz. March 21, 1995)(did the “Reinsurance Agreement” cover four separately-concluded “optional reinsurance agreements” which did not themselves contain a dispute settlement provision? *held*, this “is a matter of substantive validity of the clause” and “as the parties had not agreed on a different law to apply to the arbitration agreement, Swedish law, as the law of the place of arbitration, applied”). For arbitral awards that also treat the scope of the arbitration agreement as a matter of “validity” under Swiss conflict rules ---and, where the seat is Swiss, deduce from this that the applicable law under the PILA is to be the one most “favorable” to the arbitration clause, “i.e., which permits to assign it the largest possible scope”---see Grigera Naón, *supra* n. 111 at 121-26; see n. 190 *supra*.

Cf. *Yavuz v. 61 MM Ltd*, 465 F.3d 418, 428 (10th Cir. 2006) (Swiss choice-of-law clause and “place of courts is Fribourg,” but “it is hardly obvious what claims, against what parties, are governed by the clause”; “words may take on different meanings depending on the law used to interpret them,” and so “a court can effectuate the parties’ agreement concerning the forum only if it interprets the forum clause under the chosen law”; “the same reasoning applies” to both “the meaning of the contractual forum-selection provision” and “its enforceability”); *Martinez*, *supra* n. 186 at 218, 221 (“if we are called upon to determine whether a particular forum-selection clause is mandatory or permissive, or whether its scope encompasses the claims or parties involved in a certain suit, we apply the law contractually selected by the parties”; “contract law---including the rules governing contract interpretation---is quintessentially substantive”); *contra*, *Chloe Z Fishing Co., Inc. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1252 (S.D. Cal. 2000) (conceding nevertheless that “there is a colorable argument” that either the choice-of-law provision governing the P & I policies or the reference of disputes to ‘arbitration in London’ in the arbitral clauses themselves, subject the scope of the arbitration clause to English law”).

²⁰⁰ Among the more piquant variants, see *Civil Code of the Republic of Lithuania* art. 1.37(7)(2011):

An arbitration agreement shall be governed by the law applicable to the principal contract, and in the case of invalidity of the principal contract, by the law of the place where the arbitration agreement was concluded, where it is impossible to identify the place of conclusion, the law of the state in which arbitration is situated shall apply.

Presumably there still remains room for party choice, and art. 1.37(7) merely consists of default rules for the identification of the state of “closest connection” in circumstances where such choice has not adequately been expressed; see art. 1.37(1),(4). Nevertheless:

- It is hard to believe---in a post-Beale world, and in a world in which transactions routinely and indiscriminately flow across territorial borders---that the Holiday Inn where a contract is “concluded” should be deemed particularly relevant, let alone decisive.
- A further puzzle, far more fundamental: While the notion of “separability” is assumed, it is not self evident how the law that ultimately governs the validity of the arbitration agreement can sensibly be made to vary depending on whether the overall contract has itself been found to be valid or invalid---since the whole function of “separability,” if properly understood, is to *entrust*

example, if one were to engage in the unedifying process of counting heads---not, as I have told generations of law students, the way to “do law”---one might well conclude that *each* of these choices is a “minority position” in the US, where courts instead speak as if they were applying, not “normal” conflict-of-law rules, but a “judicially fashioned” body of “substantive federal common law” to questions of both the agreement’s formation and its validity.²⁰¹ While this formulation is a common one, I find it curious; it certainly needs to be unpacked, and I would suggest that there is considerably less there than meets the eye:

- a.** We have already spoken at length about one partial explanation: Where arbitration is resisted on the ground of a core lack of assent, the absence of any “meeting of the minds,” then any possible inference from a “chosen” law or “chosen” seat must fall away; in such circumstances federal law *simply as the lex fori* may be all that remains.²⁰² This is *Sarhank* (which as we have seen, rejected the notion that absent a threshold finding of “an objective intention to agree to arbitrate,” an expressed “choice” can be treated as somehow self-validating). And there are any number of quite similar cases arriving at solutions that are equally sensible---sometimes by the quirkiest of routes---but which somehow do not seem to have drawn the same opprobrium as that much-maligned decision.²⁰³

that very question to a final determination on the part of the arbitral tribunal.

²⁰¹ See, e.g., Born, *supra* n. 12 at 535-38.

²⁰² “Federal common law” here is but a “signal that international arbitration remains a matter of national concern,” with a nod to state contract law for purposes of administrative convenience and as a “benevolent gratuity.” See ¶¶ 34ff. *supra*.

²⁰³ *Sarhank*, for example, is infinitely more elegant---and brings with it far less risk of missteps en route to a conclusion---than cases like *Todd v. Steamship Mutual Underwriting Ass’n, Ltd.*, 2011 WL 1226464 (E.D. La.). Here the question was whether the plaintiff, an injured seaman, could be bound to an arbitration agreement between his employer and the defendant, the employer’s liability insurer; the agreement called for an English seat and English governing law. Beginning with the centrality of “federal substantive law” in Convention cases, the next move was a familiar one---that the federal court was required first to look to “generally applicable state contract law.” Under the relevant state law, choice-of-law clauses are generally given effect to determine the “validity” [sic] of an arbitration agreement. Under the chosen English law, in turn, whether a non-signatory can be bound to arbitrate is determined by the *lex fori*. And *this, finally*, sends us right back to Louisiana state law. Q.E.D. Another perfectly sensible result, also in tune with *Sarhank* although also reached through no small amount of question-begging, is *Authenment v. Ingram Barge Co.*, 878 F.Supp.2d 672 (E.D. La. 2012). On facts similar to *Todd*, the court held that “under federal maritime choice of law rules, the law of the forum applies to procedural questions.” “The question of whether a non-signatory can be bound to arbitrate is a procedural one.” “Accordingly, the Court applies the law of the forum, or federal maritime law, to determine whether Plaintiff can be compelled to arbitrate as a non-signatory.” No prizes for judicial craftsmanship here either. See also *Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 WL 3476430 (S.D.N.Y.) (insurer as non-signatory/subrogee sued to recover amounts it had paid its insured, where damages were allegedly caused by defendant; Brazilian governing law and seat in New York; as New York was both the forum and the seat, “the application of federal arbitration law” seemed overdetermined; in any event “the arguments about Brazilian law are not relevant”).

By contrast, *for recourse to the “chosen law” to determine the right of a non-signatory to compel arbitration against a signatory*, see n. 118 *supra*. As with the allocation of decision-

Assertions that the law applicable to the agreement to arbitrate is in fact “federal common law” surface in other contexts as well---many of these revealing, shall we say, a certain degree of misunderstanding---explicable perhaps only in the straightforward way that Dr. Johnson accounted for his own erroneous definition, in his great Dictionary, of the word “pastern” as the “knee” of a horse.²⁰⁴

- b.** Consider, for example, cases like *Cape Flattery*:²⁰⁵ Here the owners of a vessel had entered into a salvage agreement, to be governed by English law and calling for arbitration in London. When the vessel was damaged, and the owners brought suit seeking indemnity for “gross negligence,” the defendant moved to compel arbitration. The court held that it was not English law, but “the federal law of arbitrability,” that determined whether there was an obligation to arbitrate: For a general choice-of-law clause may not amount to “an agreement to apply non-federal arbitrability law” unless there is a “clear and unmistakable evidence” of the parties’ intention to do so.”²⁰⁶

What is this all about? As we have seen, it is a familiar proposition, well-entrenched in US law, that no mere choice of state substantive law---as a surrogate for the conflict-of-law analysis that a court would perform in its absence---may function to exclude otherwise-applicable federal law---not, at least, *without some particularly explicit direction from the parties*. This is a rule designed for cases like *Mastrobuono*, and seems to be what the court in *Cape Flattery* is channeling.²⁰⁷ It reflects a simple recognition that in a federal system the function of choice-of-law clauses is simply not to perform a vertical choice, as well as a recognition that any interpretation of such clauses must be congruent with the strong preemptive policies underlying the dominant federal arbitration law.²⁰⁸

making authority, so a fortiori here: Such challenges implicate the “consent” of the contracting parties in only the most tenuous way, suggesting that the law of the seat appropriately serves to determine how the challenge should be dealt with. See Alan Scott Rau, “Consent” to Arbitral Jurisdiction: Disputes with Non-Signatories, in Permanent Court of Arbitration (ed.), *Multiple Party Actions in International Arbitration* ¶¶ 3.82ff. (2009).

And finally, for recourse to the “chosen law” where a non-signatory has first been found to have “consented to” it under the contract doctrines of the forum, see the discussion at n. 90 *supra*. *Quaere* whether the plaintiffs in *Todd* or *Authenment*, too, might be thought to have “accepted” or “ratified” the “chosen law” found in the choice-of-law clause---by some application of “estoppel”---by virtue of having sought to assert their right to receive “benefits” that were “depend[ent] on the existence of the insurance contract” between the defendant and their employer? To that effect see *American Steamship Owners Mutual Protection & Indemnity Ass’n, Inc. v. Henderson*, 2013 WL 1245451 (S.D.N.Y.).

²⁰⁴ “Ignorance, Madam, pure ignorance.” w. Jackson Bate, *Samuel Johnson* 251 (1977).

²⁰⁵ *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914 (9th Cir. 2011).

²⁰⁶ *Id.* at 921.

²⁰⁷ See ¶ 52 *supra*.

²⁰⁸ Another teaching of *Mastrobuono*, as we have seen, is that a choice-of-law clause should presumptively be read as intended to govern the primary obligations of the parties, but not to affect the allocation of power between alternative tribunals as laid down by the *lex arbitri*. This was recognized by the court in *Holzer v. Mondadori*, 2013 WL 1104269 (S.D.N.Y.), which held that the question whether the plaintiffs’ claims “fall within the scope” of the agreement was to be

But none of this of course has much if anything to do with *Cape Flattery* itself---and none of it glances in the direction of the parties’ selection of the seat, which as I have already noted constitutes a critical element in *Mastrobuono*.²⁰⁹ “Non-federal” is hardly a term of art nor is it particularly meaningful; the trick---as always---is not to lose sight of what one is trying to do: “Federal” after all can at the same time suggest “national legislation as opposed to local” (the subject of *Mastrobuono*) and “US law as opposed to the law of a foreign jurisdiction of equivalent status where the arbitration will be held” (the subject of *Cape Flattery*). So the appropriateness of moving from one case to the other, to the situation where the parties have chosen a foreign seat and a foreign curial law, is hardly self-evident.²¹⁰ The court betrayed no awareness of the importance attributed in

resolved by applying “federal arbitrability law” rather than the law of the state (Dubai) mandated by the choice-of-law clause—because, the court said, “under the umbrella of *Mastrobuono*,” the issue of scope “is one peculiar to arbitration”---the potential conflict of law “is specifically directed at arbitration proceedings and bears on the allocation of power between arbitrators and courts.” Kudos for having gotten that far---but not far enough: For there was not the slightest recognition of the fact that *Dubai, too, was by contract to be the seat of the arbitration*. Precisely the same error appears in *Kamaya Co., Ltd. v. American Property Consultants, Ltd.*, 959 P.2d 1140 (Wash. App. 1998). Here a contract contained a Japanese choice-of-law provision, and plaintiffs resisted arbitration on the ground that “under Japanese law, general arbitration clauses do not cover fraud-in-the inducement claims.” The court compelled arbitration, noting that even if plaintiffs were correct in their reading of Japanese law, nevertheless---“following the Court’s reasoning in *Mastrobuono*”---“a general choice-of-law provision is not an effective means by which to unequivocally exclude an otherwise arbitrable dispute from arbitration.” But that the agreement equally provided for “*arbitration in Japan*” was not deemed worthy of the slightest notice.

²⁰⁹ See n. 152 *supra*.

Equally missing the point is the similar decision in *Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd.*, 432 F.Supp.2d 1305 (S.D. Fla. 2006). Here the plaintiff entered into a shipbuilding contract, containing both a choice-of-law clause calling for application of Australian law, and an arbitration clause stipulating an Australian seat. When it later brought suit alleging defective construction, the defendant/guarantor moved to compel arbitration, but the plaintiff asserted that Australian law would not permit a non-signatory to do so in these circumstances and so “would disallow arbitration of this dispute.” The court, relying entirely on *Mastrobuono*, compelled arbitration, taking *Mastrobuono* to mean that “when the parties fail to contract out of the FAA” then “a return to *the default of federal law* for interpretive assignments is appropriate”; here---despite the choice of a governing law and the choice of a seat---“the parties failed to specify the law that governs the arbitrability of claims,” a matter as to which “the agreement itself” is insufficiently explicit---indeed, “silent.”

If these courts so dramatically miss the point, so inevitably do “commentators” like this student author, Kristen Sanocki, *Note, Determining the Arbitrability of the Dispute: The Clear and Unmistakable Standard for Choice of Law in Arbitration Agreements*, [2013] J. Disp. Resol. 251, 254 (*Mastrobuono* “may point to the reasoning that the Supreme Court would apply in determining whether or not parties have contracted to apply non-federal arbitrability law,” although as yet the Court has not “decided whether federal arbitrability law permits parties entering into an arbitration agreement to agree to use foreign arbitrability law,” nor “how to determine” whether they had “sufficiently contracted” to do so; on this point, of course, no mention anywhere of the Convention).”

²¹⁰ So it seems incorrect simply to conflate all these cases; nevertheless see Born, *supra* n. 12 at 538, 587 (“the better reasoned decisions” “apply a judicially-fashioned body of federal common law” to questions of the “formation and validity of international arbitration agreements, rather than

international commercial transactions to the proper choice of the “seat”---or awareness of what are usually understood to be the implications of that choice---or awareness of the vast learning devoted to this question in the international literature ²¹¹

How, then, can it be thought remotely sensible---*in circumstances where federalism is not in issue*--- for courts to assert that since the FAA is after all the “supreme law of the land,” issues of “scope” are to be governed by “the federal substantive law of arbitrability”? ²¹² (Do courts that say this have anything in mind at all, or are they merely parroting familiar formulae? Is it possible that art. V(1)(a), too, is the “supreme law of the land”?)

- C.** There was (inexplicably) no discussion at all in the *Cape Flattery* opinion of the arbitral seat---but in another group of US cases, the law of the seat---

looking to either state or foreign law”), 587 (citing indiscriminately cases arising in a domestic context and cases where the chosen law or chosen seat is foreign); Bond, *supra* n. 32 at 39 (same); Blackaby, *supra* n. 124 at ¶ 3.29 (FAA “appears, of itself, to constitute the law governing the arbitration agreement”; recent cases “focusing on the relationship between the FAA and state (and even foreign) law . . . emphasize the former’s pre-eminence”).

²¹¹ Cf. Alan Scott Rau, *Out to Sea in the Ninth Circuit: Bungling Questions of Arbitrability*, in *Kluwer Arbitration Blog*, Nov. 21, 2011, <http://kluwerarbitrationblog.com/author/alan-s-rau/>.

Not only did the court misapply the commonly-accepted rule that if a choice-of-law clause is to exclude federal law, it must do so explicitly. At the same time, it seems also to have conflated this with another trope equally familiar in our law of arbitration---that before contracting parties may be found to have *entrusted* “jurisdictional” issues to an arbitrator, their intention to do so must have been expressed in a “clear and unmistakable” manner. I find this latter requirement to be shallow and routinely misapplied, see Rau, *Arbitrating “Arbitrability”* at 528 (“On the ‘Clear and Unmistakable’: ‘This is All One Big Overblown Latke’”). But in any event it is hard to perceive its relevance here:

- That is a question of the default rules for the allocation of authority: It asks, in an agreement subject to federal arbitration law, whether the parties have in fact contracted around the law’s baseline attribution of power---whether they have “reallocated” final decisionmaking power to arbitrators that the FAA had originally entrusted to courts.
- But the logically prior inquiry---that asks, “on what basis is the court to make the determination with respect to governing law in the first place?”---is an entirely different question. As to *this* question, is it truly compatible with the premise of party autonomy to require a higher burden of proof for the application of foreign as opposed to federal law? Where parties have contracted for English governing law and an English seat, is it sensible to suggest that “if courts were to interpret silence or ambiguity concerning the applicable arbitrability law as providing for a non-federal arbitrability law, parties could be subjected to a foreign arbitrability law when they reasonably thought that federal arbitrability law would apply”? *Cape Flattery Ltd.*, *supra* n. 205 at 921.

²¹² *Chloe Z Fishing Co., Inc.*, *supra* n. 103 at 1252.

An identical error appears in *Alghanim v. Alghanim*, 828 F.Supp.2d 636 (S.D.N.Y. 2011). Here, the agreements did not contain a choice-of-law clause, but provided for arbitration to take place in Kuwait. While the resisting party argued that “Kuwaiti law construes arbitration agreements narrowly,” the court---relying on the familiar preemption cases asserting “a liberal federal policy favoring arbitration agreements *notwithstanding any state substantive or procedural policies to the contrary*”---refused to consider Kuwaiti law to the extent it “treats arbitration agreements differently from any other contracts.”

although directly implicated---seems rather to have been willfully set aside, also purportedly in favor of “federal common law.” In one well-known decision [*Rhone Mediterranee*]²¹³ the parties had “consented” to arbitrate in Italy; when suit was nevertheless brought in the US, the plaintiff resisted a stay on the ground that the agreement was unenforceable under Italian law--as it allegedly contravened Italian law by providing for an even number of arbitrators. A stay was nevertheless ordered---the court holding that an agreement to arbitrate could only be found “null and void” under the Convention where it was subject “to an internationally recognized defense such as duress, mistake, fraud or waiver”: Here, by contrast, the supposed Italian restriction “does not implicate the fundamental concerns of either the international system or forum.”²¹⁴

This refusal to make even a perfunctory nod towards the privileged role of the state of “primary jurisdiction” under the Convention scheme, has been termed “quixotic” and “amazing.”²¹⁵ More often perhaps it has been lauded as making that great conceptual leap so dear to the heart of the arbitration community---the explicit choice not to subject international arbitration agreements to any “parochial”²¹⁶ national law, but rather to extend to it the protection of “transnational rules”---or at least a “substantive international rule of non-discrimination” that (in accordance with the supposed mandate of the Convention) authorizes “only the applicable of generally applicable, internationally neutral contract law defenses.”²¹⁷

²¹³ *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 712 F.2d 50 (3d Cir.1983).

²¹⁴ Quite similar is *Marchetto v. DeKalb Genetics Corp.*, 711 F.Supp. 936 (N.D.Ill.1989), although there by contrast the “defense” to arbitration was not particularly idiosyncratic: The resisting party argued that Italy would not enforce arbitration where all defendants were not parties to the agreement, and where a claim for “tortious interference” is “beyond the scope of the arbitration clause.” Here too the litigation was stayed---because the validity of the arbitration agreement also had to be determined “by reference to the Arbitration Act and the federal substantive law of arbitrability”---and because (channeling here *Rhone Mediterranee*) Italy, too, can be counted on to “honor this arbitration clause” and not reject it “on legal principles unique to the signatory nation.”

²¹⁵ Adam Samuel, *The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate*, 8 Arb. Int'l 257, 268-69 (1992).

²¹⁶ In arbitration law, the ultimate pejorative.

²¹⁷ Born, *supra* n. 12 at 553, 642. This of course forms part of a wider agenda asserting that a preference for “transnational rules” is not even a matter of national choice---but that the effect of art. II itself is to impose mandatory limits on any “parochial” national law restrictive of arbitration---limits that parallel those imposed, say, by the preemption doctrine of US arbitration law that invalidates any individual state law “discriminating” against arbitration. (In the first of these lectures I have earlier expressed considerable doubt about that position; see also n. 161 *supra*).

The search for “internationally recognized defenses” will inevitably lead astray those who are weakly grounded in both the law of arbitration and the law of contract, but who nevertheless stumble along in a hapless attempt to follow. Consider, for example, those courts that purport to follow *Rhone Mediterranee* by holding flatly that “unconscionability” may not be used as a doctrinal ground for refusing to compel arbitration under the Convention. E.g., *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1287 (11th Cir. 2015) (“because it cannot be

We can, though, look at such cases from a different angle altogether: Perhaps at bottom they amount to nothing more than an acknowledgment of comparative advantage--expressing the simple recognition that Italian courts, exercising the supervisory authority of the courts of the seat, are often in fact “much better placed than U.S. courts to apply Italian arbitration statutes, and ought to be given the opportunity to do so where arbitrations in Italy are contemplated.”²¹⁸ More recent decisions on similar facts do seem pretty clearly to be responding to the concerns that underlie the *forum non conveniens* doctrine---although (while occasionally coming pretty close) not quite saying so in so many words.²¹⁹

applied neutrally before international tribunals”). See the first of these lectures (“the obvious error here is that ‘unconscionability’ merely broadens out, reformulates, and synthesizes the familiar common law grounds of fraud and duress---it is a doctrinal tool for policing those instances of contractual abuse that cannot readily be shoehorned into those time-honored writs, but it is sensitive to precisely the same concerns although without all the baggage that has grown up around them”).

Further on the use of “transnational” rules to determine validity, see Paul D. Friedland & Robert N. Hornick, *The Relevance of International Standards in the Enforcement of Arbitration Agreements Under the New York Convention*, 6 Am. Rev. Int’l Arb. 149, 162, 186 (1995) (“the decision of the Third Circuit in *Rhone Mediterranee* is thus an eminent example of the application of internationalized federal law”; while the court does not say where we are to look to identify “internationally recognized defenses,” “the answer must be in the various available sources of transnational law, including other treaties, reported decisions of public and private international arbitral tribunals, and writings by international legal scholars”).

See also Park, *supra* n. 51. Professor Park suggests that to seek recourse in “transnational norms” of “agreement,” “divorced from any particular national legal system” and relying instead on “common sense notions of contract,” may (at least for the arbitrator) be “one way out” of the proverbial “chicken and egg” dilemma. I am a little puzzled by the apparent assumption that such a move---supposedly quite dissimilar in this respect to reliance on some national “governing law”---will alone enable a decisionmaker to avoid resting any judgment with respect to the presence of “agreement” “on a single version of contested facts” or on “the story told by one side to the dispute,” *id.* This is indeed a danger---and thus something to guard against--- *whatever* the source of the norm nominally being applied, whether [assuming the dichotomy for the sake of discussion] it is “law on the books” or “common sense”).

²¹⁸ Gary Born himself in fact suggested this alternative explanation many years ago; see Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* 315 (1994)(“‘submerged’ *forum non conveniens* considerations”).

²¹⁹ See *Apple and Eve, LLC*, *supra* n. 161, *vacated on other grounds*, 610 F. Supp. 2d 226 (E.D.N.Y. 2009). Here the plaintiff had argued that an agreement calling for arbitration in China was invalid under Chinese law because it failed to name an administering institution; the court nevertheless stayed the action and compelled arbitration: Under Chinese law the parties are allowed to “cure the defect” in their arbitration clause, and the court “decline[d] to assume” that PRC courts would deem the mere filing of a lawsuit to conclusively establish that no such supplemental agreement could be reached; “[g]iven the factual and legal variables required for the agreement to be declared invalid in the PRC, the Court cannot determine as a matter of law that the Arbitration Clause is incapable of being performed in China.” See also *A. v. B.*, *supra* n. 158 (refusing to enjoin Swiss arbitration because under the Swiss rule of *compétence/compétence* it would be left in the first instance to the tribunal itself to decide whether the agreement to arbitrate was in fact “‘illegal and unconscionable’”; the judge suggested that he would “have reached the same conclusion on *forum non conveniens* grounds” in order to avoid “this court having to apply Swiss law to a jurisdiction issue where the parties have agreed that the seat of the arbitration and the source of judicial regulation will be Geneva”).

Viewed in this light, then, such invocation of “internationally recognized standards” begin to look a little less like lofty and high-minded principles of universal application---and a little more like a winnowing device, the simple announcement of a limiting principle (at a very high level of generality) enlisted *to identity and exclude at an early stage extreme cases where a choice of law is not yet necessary*. Such a “wait and see” attitude would ask us then to envisage what might happen next:

- An award in favor of the claimant might in fact pass without objection at the seat, in which case any further objection would be precluded.²²⁰
- Conversely, an annulment at the seat would also put an end to the work of a US court---again, without any choice-of-law determination at all being necessary.²²¹

See also *Pepsico Inc. v. Oficina Central de Asesoría y Ayuda Técnica, C.A.*, 945 F. Supp. 69 (S.D.N.Y. 1996). In *Pepsico* a contract provided that it was to “be governed by the laws of the Republic of Venezuela”; in the same paragraph, it was stipulated that arbitration under ICC rules was to take place in New York,” and “the arbitrators shall apply the substantive law of the State of New York.” The respondent argued that the arbitration clause was “inoperative” because of its “obscurity and ambiguity,” but the court held that the determination of this question was “plainly a matter of Venezuelan law”: For the agreement “clearly contemplates that matters subject to determination by a court, such as threshold disputes over arbitrability, will be governed by” the law of Venezuela. [*Quaere*: Does this ill-conceived, ramshackle clause amount to a stipulation of a body of “procedural law” separate from the law of the seat? Or is it perhaps that *rara avis*, an attempt to subject the arbitration agreement itself to a body of law different from that governing the overall agreement?] What is most striking for our purposes is the precise holding: The court declined to compel arbitration for the moment but ordered a 60-day stay of proceedings “to allow the Venezuelan court to determine, if it chooses, a threshold question of Venezuelan law”; Venezuelan courts should first “be afforded the initial opportunity to determine this threshold question of Venezuelan law before a non-Venezuelan court is called upon to do so.”

See also Briggs, *supra* n. 2 at ¶ 12.27 (to send a case to arbitration after a mere “*prima facie* examination” is “distantly consistent with the principle of *forum non conveniens*”; in both cases, while the court of the forum “could investigate and decide these issues for itself,” “it is hard to deny the seat of the arbitration as the natural forum for the investigation, and as the only forum which can give a final answer which directs the arbitrators”). See generally Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 *Amer. Rev. of Int’l Arb.* 1 (2012); Rau, “*Jurisdiction*” at 174-75 (“all the concerns that properly inform the *forum non conveniens* doctrine -- the comparative advantage of foreign courts, particularly in light of the complexity of the legal issues presented; the relatively advanced status of proceedings in parallel fora; the extent of possible conflict with other sovereign legal systems; the extent of the movant’s interest in an American forum and the ‘bona fide connection’ of the parties or the dispute to the United States”).

²²⁰ See n. 219 *supra*; see also *Rhone Mediterranee*, *supra* n. 161 at 54 (suggesting that “even in Italy this procedural rule on arbitration is waivable and a resulting award” may be enforced; if the claimant later seeks to enforce the award in a US court the respondent---who was after all the party relying on art. II to seek a stay of the action in favor of arbitration---“will hardly be in a position” to rely on Italy’s arbitration law”).

²²¹ The court in *Rhone Mediterranee* suggested that even if the supposed defect in the agreement could not be cured under Italian law, “an award may still result, which can be enforced outside Italy.” *Id.* Such a curious and counterintuitive remark can hardly be taken seriously, as it obviously fails to account for the robust and uniform jurisprudence to the effect that awards vacated at the seat are under art. V(1)(e) denied enforcement in states of secondary jurisdiction. (Yes, one can always go to Paris; see Rau, “*Jurisdiction*,” at 83-113). Certainly no US court would deem itself free to proceed to the enforcement of an award *previously vacated in Italy*---even on what FAA jurisprudence teaches are “idiosyncratic” or “parochial” local grounds---on any pretense of “public policy” or on the basis that Italy has violated the state’s sacred obligations

d. I can hardly presume to take the measure here of every decided case: The fruitful sloppiness of the common law would make it unfeasible in any event to do so, and I can always take comfort in claiming that decisions escaping my taxonomy are, well, simply “wrong.” Although “a.,” “b.,” and “c.” above probably account for most of the disparate American jurisprudence, there certainly remains a residual group of cases that still purport to apply “federal law” to the agreement to arbitrate but which resist easy classification. The compelling explanation is that any threatened investigation into the teachings of a contractually “chosen law” would be far too likely to take both court and counsel outside of their usual comfort zone:

- There is, as already noted, an instinctive or “reflexive” recourse by US courts to the *lex fori* in order to assess the enforceability of forum-selection clauses---not only in the absence, but even in the presence, of a choice-of-law clause, and without consideration of or even reference to any chosen law or forum.²²² Doubtless this reflects in part the fear (exaggerated where the very “existence” of agreement is not in question) of the supposedly “logical” conundrum posed by bootstrapping.²²³ At this point conflation of foreign fora and arbitration (perceived as merely a somewhat more exotic “kind of forum-selection”) becomes inevitable. Eventual ratification of the Hague Convention will presumably effect the necessary changes in time, but not quite yet.²²⁴

under the Convention. Cf. *Alghanim*, supra n. 212: Should that dispute proceed to arbitration in Kuwait, it is (to put it mildly) unlikely that a Kuwaiti annulment grounded on a “narrow” construction of arbitral jurisdiction ---not “liberal,” but one that treats arbitration agreements “differently from any other contracts”---would be deemed so “internationally unacceptable” as to nevertheless justify enforcement of the award in the US. See *Rau*, “*Jurisdiction*” at 107-08 fn. 161 (this would mean that “the supposed international policy in favor of the enforcement of arbitral awards would invariably trump---would ‘effectively swallow’---the non-recognition presumptively mandated by art. V(1)(e)).

A US court that may be tempted to “adjudicate arbitrability”---particularly by applying its own “common law”---ought then to consider whether the courts of the seat not might have something useful to say on the subject. Where that appears to be the case--and where it appears that at least some minimal indicia of “assent” are present---it is surely the case that a forum should shrink from deploying its own law for the purpose of enjoining a foreign arbitration.

²²² See n. 35 supra and Symeonides, supra n. 35 at 445-460.

²²³ See ¶ 17. supra; cf. Clermont, supra n. 35 at 655 (applying the *lex fori* to questions of the enforceability of a forum-selection clause “would avoid the slight, and not insuperable, illogic of assuming an enforceable forum-selection or choice-of-law clause in order to choose the law to determine enforceability”); *Javier v. Carnival Corp.*, 2010 WL 3633173 (S.D. Cal.) (challenge to agreement on the ground that it was signed “under oppressive circumstances”; “it seems obvious to the Court that domestic law ultimately controls” and that, “obviously, the Seafarer Agreement’s choice of Panama law is irrelevant. To proceed otherwise and actually consult Panamanian law on contract formation would be to treat the Seafarer Agreement as a valid agreement”). *Kamaya Co., Ltd.*, supra n. 208 (“it is axiomatic that courts must have some law to apply when initially determining whether the parties agreed to arbitrate a particular dispute,” and “the FAA provides courts with this necessary analytical framework”).

²²⁴ See supra n. 126.

- Perhaps as a consequence---in any event troublingly---it appears that quite often the content of the putatively “chosen law” was not even argued to the court, with the effect that “federal law” came to be applied merely through acquiescence.²²⁵
- For whatever reason, at some point the iron law of the conservation of effort undoubtedly kicks in, making it seem more attractive simply to cite the long string of Supreme Court opinions that ritually emphasize (for quite other purposes) the predominance of the “federal law of arbitrability”²²⁶---and thence, still following the path of least resistance, to look to the holdings of the thousands of domestic cases that have considered (and largely rejected) challenges to the arbitral process.²²⁷

67. The *Sarhank* case reminds us, in summary, that

²²⁵ See, e.g., *Holzer*, supra n. 208 at *10 (whether defendant/non-signatory can compel arbitration of claims against her is determined by “applying federal law”; plaintiffs “do not assert that Dubai law governs the issue of whether [defendant] may invoke the arbitration clause” but “to the contrary, they rely primarily on federal arbitrability law”); *Martinez v. Bloomberg LP*, 740 F.3d 211, 223 (2nd Cir. 2014)(distinguishing earlier cases that interpreted forum selection clauses under federal law, on the ground that in none of them was there any indication “that the parties urged the application of any specific element of the contractually chosen body of law,” so that they “simply stand for the proposition that litigating parties by their acquiescence may induce the trial court to assume that foreign law is similar to that of the forum”); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 386 (2nd Cir. 2007)(“the parties neither objected to the district court’s citation to federal precedent in its interpretation of the clause before us, nor construed the clause under English law [both the governing law and the law of the chosen forum] in their briefs”); *Al-Salamah Arabian Agencies Co., Ltd. v. Reece*, 673 F.Supp. 748 (M.D.N.C. 1987)(“the parties have not briefed the court” on the issue whether the agreement was binding under the law of Saudi Arabia, the state of the arbitral seat; “however, given the policy of the Arbitration Act in favor of arbitration, the court will assume that the contract is binding”).

In the seminal *Mitsubishi* case the Supreme Court---before proceeding to consider whether a Sherman Act claim was *per se* “inadmissible” as a matter of public policy---thought its “first task” was to determine whether the parties had “agreed to arbitrate the dispute” in the first place. It is all well and good to point out that the Court went about this task by applying “the federal substantive law of arbitrability,” thus relying on “the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act”; see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985), and the inevitable significance attributed to this language in Born, supra n. 12 at 1395. But at the same time one feels compelled to point out that *neither of the parties in their briefs had paid the slightest attention* to the enforceability or scope of the arbitration clause under the law of either Switzerland [the chosen governing law] or Japan [the chosen seat].

²²⁶ Quand on a longtemps dit les mêmes

On les redit sans y penser . . .

(Paul Gerald, *Toi et moi*)

²²⁷ See *Martinez*, supra n. 186 at 220 (distinguishing between the “enforceability” of forum-selection clauses and their “interpretation”---“the meaning of the terms used in the contract”; to limit the application of foreign law *to the latter alone* “prevents courts from having to engage in a potentially complex and protracted inquiry into the enforceability of a forum selection clause under foreign law, which would defeat the purposes of the forum selection clause”).

- While resort to “federal law” may indeed be necessary or appropriate in circumstances where even the barest indicia of mutual assent are in question,
- it otherwise sheds no particular light on anything much except where the litigation happens to have been brought.²²⁸

J. Dalico and the “Règle Matérielle”

68. Now it is not unusual—although I always find it curious---to come across commentary on US arbitration law in which an attempt is made to re-frame it, tendentiously, in such a way as to suggest that it is “after all” “really” congruent with sophisticated Continental models (usually exemplified by the French decree).²²⁹ But this is rarely convincing.²³⁰ There are, as we have seen, any number of explanations for the apparent fact that in determining the law applicable to the agreement to arbitrate, US law fails to take very seriously the law of the chosen seat:²³¹ In some respects this may be seen as purposive behavior, as a concomitant of a party’s assertion that core assent is lacking; in most respects it appears as the largely inadvertent byproduct of other concerns entirely.

²²⁸ See *FR 8 Singapore Pte. Ltd.*, supra n. 90 at 636 (raising the bugaboo that plaintiffs who seek to compel arbitration “but whose choice-of-law clauses specify a law more restrictive than the United States’ with respect to such actions” may “simply elect to come to the United States” whenever a basis for jurisdiction over the defendant exists “and thereby avail[ing] themselves of favorable American law”).

²²⁹ So, for example, I have always found quite puzzling the suggestion that “some US courts have adopted [an] analysis” that would permit arbitral tribunals “initially to consider and resolve the jurisdictional disputes,” while retaining “ultimate responsibility to consider and resolve such jurisdictional disputes” after the arbitrators “had first considered the issue.” See Born, supra n. 12 at 1145-46, 1201; see also 1 Gary Born, *International Commercial Arbitration* 958 (2009) (“it is ironic, but perhaps comforting,” that such an “interim allocation of competence to consider jurisdictional issues” would arrive at a result “very similar in many cases to the *prima facie* standard applied in France and elsewhere”). See also George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 Yale J. Int’l L. 1, 38 (2012) (US courts “sometimes” refer parties to arbitration “as long as the clause may plausibly be thought to cover the dispute”; when they thus “confine themselves to a mere screening function at the threshold, they require only a *prima facie* showing that the dispute falls within the scope of the arbitration clause” and “to this extent . . . do something not unlike what French courts do”).

²³⁰ See Rau, “Culture,” at 450 (reflecting “on the peculiarly American approach to the arbitration of commercial disputes” and calling attention to “distinctive features that are characteristics of our understanding of the subject” which serve “markedly to distinguish our own perspective from that of most other legal systems”; telling---in distinction to the usual “sunny account of the globalization of international arbitration in the form of increasingly shared norms and expectations”---“a story that focuses rather on peculiarity and divergence”).

²³¹ See supra ¶ 42 & n. 152. Redfern & Hunter thus appear to get things completely backwards, in writing that “the importance of the law of the seat of arbitration is particularly marked in the United States”—and then for good measure, in a perfect non sequitur, adducing *as evidence* the fact that “once the dispute is covered by the FAA, *federal law applies* to all questions of interpretation, construction, validity, revocability and enforceability.” Blackaby et al., supra n. 124 at ¶ 3.28.

So it seems like a simple case of overreaching to repeat the familiar trope in the present context, and to claim that in applying “federal common law” rather than “state or foreign law,” the US approach “bears significant parallels to French law.”²³² (For all I know French observers too may see the US jurisprudence as yet another poignant illustration of the common tendency of our courts, despite an often-profound misapprehension of the structure of the entire system, to somehow stumble upon plausible results—a simpler account might owe something to the proverb about blind chickens occasionally able to find a grain of corn.).

But the two have less in common perhaps than may superficially appear. In contrast to our ungrounded bumbling, the French model serves a distinct and well-articulated agenda, one that pursues a very different vision in a characteristically relentless manner.

69. It is now a routine formula of French jurisprudence and commentary to say---in the words of the seminal *Dalico* decision-- that the validity of an international arbitration agreement is to be determined by means of

“a rule of substantive law [*règle matérielle*] of the international law of arbitration,” by virtue of which “the existence and the application [*efficacité*] of the agreement to arbitration is (subject to the mandatory rules of French law and of international public policy), to be judged in accordance with the common intentions [*commune volonté*] of the parties, without the need for reference to any national law.”²³³

This “*règle matérielle*” is to be applied by a French judge without regard to the capacity in which he is sitting, and without regard to where the arbitration was (or is to be) held.²³⁴

70. The rule in *Dalico* is the matrix out of which a number of features of the French law of arbitration have developed. In its effort to facilitate the arbitral process it is indissolubly linked to what is often called a “*principe de validité*.”²³⁵ There is a preliminary point that this raises, but one that need not detain us long: The idea is hardly that arbitration clauses can be in some undefined sense self-validating; rather the idea is that at the same time,

- the proponent---in order to properly evoke the “common intentions” of the parties---must nevertheless satisfy the court of the existence and soundness of “mutual assent,”²³⁶ but

²³² Born, *supra* n. 12 at 538, 576.

²³³ Comité populaire de la municipalité de Khoms v. Soc. Dalico Contractors, 83 RCDIP 663 (Cass. Dec. 20, 1993).

²³⁴ Although some formulations of the “rule” may be somewhat ambiguous, it should be abundantly clear that it is intended to apply both to international arbitrations with their seat in France, and to arbitrations where the parties have selected a seat in some other country; see Seraglini & Ortscheidt, *supra* n. 124 at 492 fn. 37.

²³⁵ Zanzi v. de Coninck, [1999] Rev. de l’arb. 260 (Cass. Jan. 5, 1999).

²³⁶ See Philippe Fouchard, *Note [to Zanzi v. de Coninck]*, *id.* at 262, 268; cf. Gaillard & Savage, *supra* n. 119 at 231-32 (“where the disputed issue is whether a party agreed to be bound by an arbitration agreement, it is unhelpful to refer to the ‘validity’ and ‘effectiveness’ of an agreement

- that once such a meeting of the minds is demonstrated, the validity of the agreement to arbitrate may be presumed,²³⁷
- and that as a necessary corollary, the requirements of French law as to validity---while not “nonexistent”---must be liberal and “minimal.”²³⁸

71. That the “common intentions” of the parties are thus to be privileged without regard to “any national law” has naturally led some commentators to indulge themselves in the belief that this represents some adoption of international law---that it is the incarnation of a “transnational” or supra-national rule by which international arbitration agreements are to be judged.²³⁹ But this is clearly going down the wrong path: In reality *Dalico* amounts to nothing more than a rule of *French law*---the *lex fori*---but one fashioned by French courts to be responsive to the perceived needs of international trade.²⁴⁰
72. At its most elemental, this is simply a rejection of traditional restrictions on arbitration, rooted in French domestic law but which increasingly appear inappropriate or surprising to those engaged in international transactions:

which may not even have been concluded in the first place”); Pierre Mayer, *L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence*, 217 Rec. des Cours 319, 433 (1990)(“the very notion of a *principe de validité* is devoid of any sense”; “can it possibly mean that an arbitration clause may not be nullified on the ground of incapacity or defect in consent?”).

²³⁷ See François-Xavier Train, *Droit applicable à la convention d'arbitrage international*, in ICC Institute of World Business Law, “*Jurisdictional Choices in Times of Trouble*” 145, 149 (Dossier XII, 2015); Louis d'Avout, *Note [to Al Shamsi v. société Shackleton]*, [2016] Rev. de l'arb. 818, 826.

²³⁸ Seraglini & Ortscheidt, *supra* n. 124 at 492-93..

²³⁹ A view, curiously, that seems above all to be held by benevolent commentators from other legal systems: See, e.g., Graffi, *supra* n. 114 at 51-52 (according to French courts, the validity of the arbitration agreement should depend “on widely-accepted principles of transnational law,” and thus it “is subject to an *ad hoc* legal regime arising from general principles of international law, which override domestic principles”); Bond, *supra* n. 32 at 33 (“French courts generally shun national laws in determining the existence and validity of arbitration clauses” and instead “consistently look to general principles of international law rather than national laws”); Born, *supra* n. 12 at 549 (“Direct Application of International Law to Arbitration Agreement under French Law”; “substantive principles of international law [continue] to apply to international arbitration agreements in French courts”); Berger, *supra* n. 118 at 309 (the French “transnational [as opposed to “territorial”] approach”); Morten M. Fogt, *The Interaction and Distinction between the Sales and Arbitration Regimes---the CISG and Agreements or Binding Practice to Arbitrate*, 26 Amer. Rev. of Int'l Arb. 365, 369 (2015)(“*direct application of international principles* on formation and validity without any recourse to . . . the applicable national law”).

²⁴⁰ See Mayer, *supra* n. 236 at 433 (“when French caselaw imposes a rule, this---necessarily, indeed by definition---amounts to a rule of French law”); Train, *supra* n. 237 at 148 (although “formally French,” recourse to “*règles matérielles*” “has the ambition of promoting---incidentally, with a certain degree of success---transnational solutions detached from particular national idiosyncrasies”).

Dalico had spoken originally of the “*droit international de l'arbitrage*.” More recent formulations by French courts speak instead, tellingly, of the “*droit de l'arbitrage international*.” E.g., *Société Uni-Kod v. société Ouralkali*, [2005] Rev. de l'arb. 959, 960 (Cass. March 30, 2004). An exquisite variation, and---viewed against the backdrop of a certain cultural finickiness with respect to verbal precision, and filtered through the characteristically lapidary and formulaic style of French judicial opinions---one that could hardly have been inadvertent.

Examples suggested by the jurisprudence include the historical prohibition of arbitration agreements entered into by state entities, or the requirement that the transaction be “commercial” in nature, or that the arbitration clause take some particular form, or that there be some specific mention of an arbitration clause before an agreement in some other instrument can be captured “by reference.”²⁴¹ When French courts work at pruning away such historical remnants of the distrust of arbitration, they inevitably remind us of the work regularly performed by federal courts in the US federal system---also frequently faced with the necessity of overriding individual state laws thought to impede the arbitral process.²⁴²

73. Now “consent”---or as *Dalico* has it, the “common intention” of contracting parties---is itself hardly self-defining.²⁴³ So in a somewhat more elaborate form, the *Dalico* jurisprudence has set French courts the task of fleshing out the contours of this world of “substantive rules”:²⁴⁴ In performing this exercise they have naturally had occasion to address recurring and troublesome arbitration-related problems, in the process have settled on familiar principles that (at a sufficient level of generality) tend to underlie most common laws of contract. Consider, for example,

- the always-fraught question of the obligation of a non-signatory to submit to arbitration, or
- the question of the adequacy of a power of attorney to bind a respondent.

The search for “consent” is always necessarily context-dependent, but at the same time “consent” is constructed by recourse to widely-shared and readily-accessible analytical tools: Thus holdings in these cases may conveniently rest on such notions as

²⁴¹ See generally Jean-Baptiste Racine, *Droit de l'arbitrage* ¶¶ 139-142, 175-199, 250-261 (2016); Pierre Mayer, *Note [to Dalico]*, 83 RCDIP 664, 666 (1994)(as long as the document containing the clause is “integrated into the contractual *ensemble* in such a way as to establish the common intention of the parties to subject themselves to the clause”).

²⁴² Or, for that matter, with the work of the US Supreme Court, beginning with *Mitsubishi*—and thus in a context where “preemption” problems do not arise---in sweeping away barriers supposedly grounded in “public policy” to the arbitration of disputes arising under regulatory statutes; see generally Alan Scott Rau & Catherine Pédamon, *La Contractualisation de l'Arbitrage: Le Modèle Américain*, [2001] Rev. de l'Arb. 451.

²⁴³ That is largely the point of the first of these lectures (“Dimensions of the Problem: ‘Consent’ and Agreement”); cf. Sylvain Bollée & Bernard Haftel, *Note [to République de Guinée équatoriale v. société Fitzpatrick Equatorial Guinea Ltd.]*, [2011] Rev. de l'arb. 751, 752-53 (*Dalico* rests on an “unrealistic” vision of the notion of “common intention” as “a factual given, a datum that is indiscriminate [*brute*], objective, and identifiable”).

²⁴⁴ See Train, *supra* n. 237 at 151-52 (“any user of international arbitration may henceforth easily become familiar with the overall body of substantive rules of French law, which address all the difficulties that might be encountered in practice, and which resolve them by means of rules that are precise and well adapted to the efficiency of the arbitral process”).

- the “objective theory” of contract formation---dependent on a party’s manifestation having induced some “legitimate belief” on the part of the proponent;
- the “apparent authority” of a putative agent; or
- “ratification by conduct” on the part of the respondent.²⁴⁵

These are solutions at which any arbitration-friendly regime is likely to arrive on its own---and which then, unsurprisingly, become the subject of increasing convergence on the part of developed legal systems. A finding of “consent” here would be well within the line of the requisite manifested voluntary assent to the transaction.²⁴⁶ French curial law it may remain, but at least in that sense the content of such law can perhaps be said to be “internationalized.”²⁴⁷

74. The truly distinctive feature of the French model, however, lies elsewhere. The notion of a “*règle matérielle*” has this precise implication: that when a court

²⁴⁵ The celebrated *Dallah* litigation can in fact be explained in precisely this way---as can any number of more obscure decisions like *Compagnie tunisienne de navigation (Cotunav) v. société Comptoir commercial André*, [1991] Rev. de l’arb. 453 (Cass. June 25, 1991).

On the question of the power of representation, see *Al Shamsi v. société Shackleton*, [2016] Rev. de l’arb. 816 (Cass. March 16, 2016). Here an arbitration clause purporting to bind the Emirate respondent and its English counsel [claimant], was contained in an engagement letter signed only by the respondent’s local Emirate counsel; the respondent’s attempt to annul the resulting French award was rejected given what the court found was its “intention to submit to arbitration”---as indicated by its later instructions given to the claimant and its payment of his initial invoices, the “apparent authority” of local Emirate counsel, the claimant’s “legitimate belief” in the obligation, as well as the general “requirement of good faith.” See d’Avout, *supra* n. 237 at 824 (the “underlying concept” is one of “implicit ratification”); see also *Société Sidermetal SRL v. société Arcelor Int’l Export*, [2006] Rev. de l’arb. 210 (Cour d’appel de Paris, Feb. 24, 2005) (“a principle of capacity based on the legitimate belief in the power of [a party’s] representatives can be inferred [*déduit*] from the *principe de validité* of the agreement to arbitrate, in order to put an end to behavior contrary to good faith”). Article 1989 of the French Civil Code may provide that “an agent may act only within the scope of his mandate, and the power to settle disputes does not confer a power to enter into arbitration agreements”---similar prohibitions are found in other national legislation---but such a “restrictive philosophy is not well-suited to international commerce,” Gaillard & Savage, *supra* n. 119 at 251.

²⁴⁶ Although, as Lord Mance remarked in *Dallah*, this may well be as “relaxed” a definition as is permissibly “consistent with justice and reasonable commercial expectations.” *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 at ¶ 18.

²⁴⁷ All this strikes me as eminently sensible, but French academic commentary has not been uniformly indulgent. Professor d’Avout writes that while the concrete solutions in these cases may “doubtless be just, the reasoning that upholds them is insufficient.” D’Avout, *supra* n. 237 at 825. One is irresistibly reminded of that old jape in which an academic (in the telling, variously assigned to any number of nationalities or specialties) is said to object, “The thing may answer very well in practice, but will it work in theory?”

He also asserts that it remains preferable to “apply French civil law, in all its purity and technical rigor,” to some “vague judicial Esperanto that responds only to fleeting sensations of justice and judicial intuition” [*flair*]. *Id.* at 831. And *here*, one is reminded of the many US academics who continue to believe that the application of 19th century “black letter” “orthodox contract law” is somehow required by modern federal arbitration legislation: They too completely fail to perceive that statutes must benefit from a “dynamic, adaptive interpretive method” and that “‘Contract’ evolves, is “responsive to social policy,” “is concrete and intensively context-dependent and context-sensitive.” See nn. 10, 128 *supra*.

proceeds to assess the validity of an agreement to arbitrate, it does so by completely excluding any conflict-of-law analysis whatever.²⁴⁸

- Where the seat of the arbitration is in France, this simply means that any other national law the parties may have chosen to govern their overall agreement is simply set aside---the agreement to arbitrate itself existing in a “watertight compartment, cut off in particular from the *lex contractus*.”²⁴⁹ As I have tried to argue here, this is precisely as it should be. (There is a necessary but embarrassing exception made for the case, *rarissime*, where the parties have actually subjected their arbitration agreement itself to some body of law other than the law of France---although their intention to do something like this must be made particularly clear.²⁵⁰
- Now where the seat of the arbitration is another country, the *lex arbitri* has no more of a claim to regulate the agreement to arbitrate than does the contract’s governing law:
 - It follows from this that if an award has been rendered, but its validity has not yet been adjudicated at the seat, a French court asked to recognize or enforce the award has no reason to take the law of the seat into account.²⁵¹

²⁴⁸ Cf. Richard Garnett, *Substance and Procedure in Private International Law* 62-63 (2012)(“forum law-specific choice of law rules,” which “select the law of the forum directly with little or no scope for application of another law.” The result, in a celebrated phrase, is that the agreement to arbitrate is “not a contract without a governing law, but a contract without a choice of law,” Gaillard & Savage, *supra* n. 119 at 233.

²⁴⁹ Bollée & Haftel, *supra* n. 243 at 752.

²⁵⁰ The ability of the parties to specify the application of some other body of national law may be inferred from *Société Uni-Kod*, *supra* n. 240. On the need for any such choice to be particularly explicit, see Seraglini & Ortscheidt, *supra* n. 124 at ¶ 591 (“expressly and precisely designated” to govern the agreement to arbitrate, “leaving no room for doubt”); Train, *supra* n. 237 at 147 (“expressed specifically with regard to the arbitration clause itself”). I say this exception is “embarrassing” because any *règle matérielle* that purports---like *Dalico*---to rest on the “common intention” of the parties must leave some opening for this. Yet at the same time it seems hard to cabin any “exception” in such a way as to bar choices that are merely “tacit” or “implied”---something that would take us a considerable distance down the road back towards the banished “conflicts” methodology. In *Société Uni-Kod* itself Russian law had apparently been selected to govern the overall transaction, and yet the Cour de Cassation held that it would be error to “inquire into the consequences of applying Russian law,” given the failure of the parties to “subject the validity and effect of the arbitration agreement itself to that law, or indeed to any given law at all.”

²⁵¹ This is *Société Uni-Kod*; see the preceding note. See also *X v. Y*, 30 ASA Bull. 212 (2012)(Cass. July 6, 2011)(Swiss arbitration and Swiss choice of law; *held*, enforcement refused as arbitrator had ruled impermissibly on certain claims not covered by the agreement). This banal decision is criticized---inexplicably, and in apparent ignorance of the tenor of French law---in Eleanor Cashin Ritaine, *Contester l’incontestable? De la méconnaissance d’une compétence conforme à la lex arbitri Suisse dans une procédure d’exequatur en France*, *id.* at 214 (“the existence and scope” of the arbitration clause “should have been assessed in the light of Swiss law”; “it’s as if the Court had intended to obscure the application of Swiss law to the arbitration agreement by sanctioning a sort of ‘contract without a law’ in total disregard [*au mépris*] of the expectations of the parties”).

- And---the final step---*precisely the same thing should follow* in the event the award is annulled at the seat for failure to comply with local standards of “validity”; here too the law of the seat will be equally irrelevant to a French-court decision with respect to recognition and enforcement.

75. Having reached this point it must now seem obvious that *Dalico* swims very much in the same current as *Putrabali*---or, to change metaphors, that the two cases are joint pillars that mutually support each other, and that together support the French regime of international arbitration.

- That the enforcement of foreign awards may be entirely detached from any consequences of judicial review at the seat results from a vision of such an award as a “decision of international justice” “attached to no state judicial order.”²⁵²
- By the same token: Once we rule out *a priori* any attempt to connect an arbitration agreement to some body of national law by virtue of a conflict-of-law methodology, it will be easy to conclude that here too, deference to the law of the seat must seem “reductionist.”²⁵³

In both cases any view of the choice of a seat as instrumental behavior—with all that would bring with it in its wake in the defense of party autonomy---is rejected.²⁵⁴

²⁵² Société PT Putrabali Adyamulia v. Société Rena Holding, [2007] Rev. de l’arb. 507 (Cass. June 29, 2007); see generally Emmanuel Gaillard, *Note*, id. at 517, 518 (“French courts have no reason to concern themselves with decisions of vacatur”); Emmanuel Gaillard, *Aspects philosophiques du droit de l’arbitrage international* 96-97, 188-206 (2008). “Attached” perhaps to “no state judicial order,” but of course subject to the refusal of recognition or enforcement on the grounds specified in arts. 1520, 1525 of the French decree.

²⁵³ Seraglini & Ortscheidt, *supra* n. 124 at ¶ 581 (significantly adducing, “by way of example,” “the fact” that an award rendered by virtue of the agreement has “a pretension [*vocation*] to being enforced on an international basis”).

Occasional unguarded judicial effusions may sometimes suggest that the *Dalico* jurisprudence represents, not merely a claim of the presumptive legal validity of an agreement, but indeed a vision of an “autonomous” agreement, untethered from any legal system whatever; see, e.g., *Banque Worms v. Bellot*, [2000] Rev. de l’arb. 85 (Cass. Jan. 5 1999) (“an international arbitration clause, valid simply by virtue of the will of the contracting parties . . .”); the formulation is trenchantly criticized by Daniel Cohen, id. at 87, 89-90.

²⁵⁴ Nevertheless---and with a certain degree of chutzpah---a “contractualist” trope is often trotted out in civil-law commentary to justify the enforcement, say, in France of awards annulled at the seat. See, e.g., Horatia Muir-Watt, “*Party Autonomy*” in *international contracts: from the makings of a myth to the requirements of global governance*, [2010] 3 ERCL 1, 22 (as “a purely contractual or private act” an award, “like a contract,” “annulled or otherwise held to be unenforceable at the place of its conclusion may well be considered valid and enforceable elsewhere”); Emmanuel Gaillard, *Aspects philosophiques*, *supra* n. 252 at ¶ 9 (“to underline the contractual nature of arbitration is to allow ‘foreign’ awards to be free from the often restrictive regime applicable to the recognition of foreign court decisions”).

But see Rau, “*Jurisdiction*” at 94-95 (2010): “It is a rum form of [contractual] ‘autonomy’ that deems it desirable to insulate contracting parties from their mere ‘carelessness’ in

Although philosophical defenses of this detachment from [other state’s] law have been attempted, in both of these cases, of course, less exalted accounts of the French model are possible---just possibly,

- a judgment that some foreign states -- neophytes in the recondite world of international arbitration -- are not yet able to understand the proper standards that justify the enforceability of agreements;²⁵⁵
- a concomitant distrust or deprecation of the judicial systems of such states;²⁵⁶
- and above all perhaps, a vision of the French courts as the “enlightened guardians of the Convention,”²⁵⁷ able to assume a pedagogical role in providing instruction as to what is in the best interests of this new international legal order---which is itself, after all, so much an achievement of decades of Gallic thought.²⁵⁸

*“What’s the difference between provincialism, which unthinkingly takes its situation for everyone’s, and cosmopolitanism, which is confident it has the right to?”*²⁵⁹

K. “Formal Validity”

76. The “substantive” or “material” validity of the agreement to arbitrate is a question that is distinct from that of its “formal validity.”²⁶⁰ The former has been the

agreeing to submit to arbitration in a particular jurisdiction, or from their ‘weakness’ in being unable to obtain an alternative seat [the reference is to Emmanuel Gaillard, *Note* [to *Société Putrabali Adyamulia*], [2007] Rev. de l’arb. 517, 522]---or where the significance of the choice of a seat is deprecated because it may represent nothing more than a mere ‘concession made in the course of negotiations’” [sic; the reference is to Charles Jarrosson, *Note* [to *Société Hilmarton*]. [1994] Rev. de l’arb. 329, 331]).

²⁵⁵ See *id.* at 332 (agreement on a seat should not lead to “paralyzing the arbitration because of local decisions grounded in outmoded legislation, resulting in obsolete forms of control over the arbitral process”).

²⁵⁶ Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment*, 9 ICC Int’l Ct. Arb. Bull. 14, 29 n.60 (1998) (enforcement courts should not be “subjugated to the will of courts of the place of arbitration, which, as experience has unfortunately shown, are sometimes guilty of egregious chauvinism”). This is a common ground for deprecating the relevance of annulments at the seat -- at least when the seat is not asserted instead to have been merely a “fortuitous” choice, reproached precisely for having no connection to the dispute at all other than for its hotels or conference centers where the proceedings may be held, see Gaillard, *Aspects philosophiques*, supra n. 252 at 56. The whipsawing here is evident and dizzying.

²⁵⁷ Thomas Clay, *La Convention de New York vue par la doctrine française*, 27 ASA Bull. 467, 477 (2008).

²⁵⁸ See generally the extended discussion in Rau, “Jurisdiction,” 90-95.

²⁵⁹ James Richardson, *Vectors* 93 (2001).

²⁶⁰ See Berger, supra n. 118 at 303.

That is: One must first ask, *whether an “agreement” to arbitrate has been formed* under the applicable substantive law of contracts; if it has, one then has to consider whether the “agreement” has been formalized in such a way as to comply with the law governing *that*

principal subject of this lecture. In stark contrast to everything that has gone before, it is rarely suggested, and it is not plausible to suggest, that “the *form* an agreement to arbitrate must take” should ever be addressed through the prism of the governing substantive law.²⁶¹

question---whether the “agreement” *fails to become enforceable for lack of compliance with the requisite formalities*.

A textbook way of proceeding is exemplified by *Ferguson Bros. of St. Thomas v. Manyan Inc.*, 38 C.P.C. (4th) 91 (Ont. Sup. Ct. 1999):

- first finding that there was “a binding contract”; the seller's confirmation form made reference to standard terms and conditions that included an arbitration clause; the parties had dealt with each other in the past on the basis of similar terms, and the buyer had accepted and paid for the goods and had “appropriate[ed] [them] to the contract” [¶ 18];
- and then finding that the Model Law requirement of an “agreement in writing” was satisfied, on the grounds that the clause itself appeared in a written instrument, and the seller’s confirmation had been “confirmed by [the buyer’s] cheque . . . referring to [the seller’s] invoice.” [¶¶ 27-28].

In practice, however, courts often seem to find it difficult to keep these issues separate. Cf. *Marion W. Benfield, Jr. & Michael M. Greenfield, Sales: Cases and Materials* 45-46 (7th ed. 2015)(US

“Statute of Frauds”; “these two matters often become blurred in a practical situation, and thus tend to be confused, because the kinds of concrete factual matters that are deemed to satisfy the statute of frauds . . . also are likely to convince the trier of fact that a contract, in fact, was formed, just as concrete factual evidence of the formation of the contract is apt to satisfy the statute of frauds. But the careful analyst always recognizes that the two matters are separate and that both hurdles must be jumped”).

The unfortunate tendency to conflate the two issues seems to be exacerbated in Convention cases. One possible explanation is that the “formal validity” question---perhaps because it is seen as somehow implicating the court’s “jurisdiction”---is often addressed first, at the very outset; when the court proceeds in the reverse order from what is suggested by *Ferguson Bros.*, confusion naturally follows.

A good illustration of the point is *Filanto, S.p.a. v. Chilewich Int’l Corp.*, 789 F.Supp. 1229 (S.D.N.Y. 1992)(courts interpreting the “agreement in writing” requirement “have generally started their analysis with the plain language of the Convention” and “have then applied that language in light of federal law, which consists of generally accepted principles of contract law”; the court “will direct its analysis to whether there was objective conduct evidencing an intent to be bound with respect to the arbitration provision”). This failure to draw the necessary distinction still regularly recurs; see also *Lo v. Aetna Int’l, Inc.*, 2000 WL 565465 (D. Conn. 2000)(company's manager signed its “retirement plan” as a trustee and later asserted a claim as a beneficiary; finding that the defendant had cited “no Hong Kong authority for its assertion that by signing in her capacity as trustee, [plaintiff] legally bound [herself] and all other beneficiaries to arbitration”--and thus that it had “shown no agreement to arbitrate these claims signed by plaintiff in her capacity as beneficiary”---the court dismissed for lack of subject-matter jurisdiction); see also *Dynamo v. Ovechkin*, 412 F.Supp.2d 24 (D.D.C. 2006)(the claimant has not “affirmatively demonstrated” the respondent’s “acceptance of an agreement to arbitrate,” and there is no “evidence of an exchange of documents between the parties at all, let alone ‘a definite and seasonable expression of acceptance’ by [respondent] to a 2005-2006 contract with [claimant]”; *held*, the requirement of an “agreement in writing” is not satisfied and the motion to dismiss for lack of subject matter jurisdiction granted).

²⁶¹ Concededly one does come across occasional authority suggesting that on a motion to recognize or enforce under the Convention, the uniform “formal validity” rules of art. II drop out and the award is to be judged solely on the basis of the choice-of-law rules of art. V. This seems clearly wrong; see *van den Berg*, *supra* n. 56 at 284 (“Except for the Italian Supreme Court, no court has doubted that Article II(2) is also applicable at the stage of the enforcement of the arbitral award,” and indeed “in most countries the courts consider [this to be] self-evident”). See *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003). Here an

77. Put the Convention to one side for the moment---the paradigm case where this will be done is where the place of the arbitration is to be within the forum state itself.²⁶² Here application of the *lex arbitri* to this question seems overdetermined. In most states the *lex arbitri* is likely to contain mandatory provisions precisely designed to govern the form of an agreement to arbitrate: In particular, in recognition of the traditional view of arbitration as a derogation from the norm of adjudication in local courts, “formal validity” is likely to require some sort of a “writing” attesting to the fact that a commitment to arbitrate has been entered into.²⁶³

award was rendered in China. The Third Circuit held that--even though “[t]he absence of a written agreement is not articulated specifically as a ground for refusal to enforce an award” under Art. V--the district court had “an obligation to determine independently the existence of an agreement to arbitrate.” See n. 86 *supra*. The importance here lies in the separate concurrence of Judge Alito (as he then was), writing “to elaborate on the importance of Article IV” of the Convention: Since a party seeking enforcement of an award must under Article IV supply the court with an ‘agreement in writing’ within the meaning of Art. II”; “it is apparent that this means” he must provide “either a duly signed written contract containing an arbitration clause or an agreement to arbitrate that is evidenced by an exchange of letters or telegrams.” See also *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292-93 (11th Cir. 2004) (London award; “the party seeking confirmation of an award falling under the Convention must meet article IV’s prerequisites to establish the district court’s subject matter jurisdiction to confirm the award”; action dismissed for failure to satisfy the “agreement-in-writing prerequisite”). The need to treat art. II and art. V in a congruent fashion in *pre-arbitration proceedings to enforce agreements*, has already been touched on, see *supra* ¶ 39.

Also on the subject of the substantive governing law as irrelevant to formal validity: What about the CISG?. The Vienna Convention—an international convention of equal status with the New York Convention---- will be the default substantive law for most international sales contracts, and eliminates in its art. 11 all “formal validity” rules for such contracts. While as a general matter the CISG “is not concerned with the validity of the contract or any of its provisions” [art. 4]---thus leaving the matter to otherwise applicable national law---such an exclusion is subject to what is “otherwise expressly provided in this Convention”; and it should be reasonably clear that *art. 11 serves to displace any contrary national-law rules of “formal validity.”* And the contract-formation rules of the CISG do govern the formation of agreements to arbitrate as well, see art. 19. *Nevertheless*: I would conclude along with Professor Fogt that the scope of art. 11 “should be limited to the sales parts of the main contract,” with the “*lex specialis arbitri* rules on the form tak[ing] priority over the freedom of form principle in the CISG sales regime,” Fogt, *supra* n. 239 at 405. To the same effect is Robert Koch, *The CISG as the Law Applicable to Arbitration Agreements?*, in Camilla B. Andersen & Ulrich G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries* 267, 283-85 (2008)(the right to arbitrate is not “an essential feature of a contract of sale,” which deals with the primary obligations of the seller to deliver conforming goods and the obligation of the buyer to take delivery and pay the price). Leaving aside the conceptualism, this is a conclusion that not only seems sensible---state arbitration statutes and the Convention both establishing inclusive schemes to govern the “separable” agreement to arbitrate in an integrated fashion---but which equally seems mandated by art. 90 of the CISG (the CISG “does not prevail over any international agreement which has already been . . . entered into and which contains provisions concerning the matters governed by this Convention”).

²⁶² See n. 161 *supra*.

²⁶³ The Model Law as *lex arbitri* requires that “the arbitration agreement shall be in writing,” and goes on to define the term in a way that is closely modeled on the text of the Convention. For other national laws:

- See, e.g., FAA § 2 (“a written provision in any maritime transaction or a contract evidencing a transaction involving commerce . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract [or] transaction. . . .”). Section 6 of the Revised Uniform

78. The functions served by legal formalities are well-understood; the *locus classicus* is Fuller’s 1941 discussion in which he distinguished between their

- “evidentiary function”---“providing evidence of the existence and purport of the contract”; their
- “cautionary function”---serving a “cautionary or deterrent function by acting as a check against inconsiderate action” and “inducing the circumspective frame of mind appropriate in one pledging his future,” and their
- “channeling function”---offering contracting parties “a legal framework” in which they may fit their actions, or “channels for the legally effective expression of intention.”²⁶⁴

Arbitration Act makes enforceable “an agreement contained in a record” to arbitrate future disputes. (A “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”).

- See also Arbitration Act 1996 (Eng.) § 5: This also applies “only where the arbitration agreement is in writing”---and “there is an agreement in writing” where [§ 5(2)] the agreement is “made” or “evidenced” in writing or “by exchange of communications in writing,” or [§ 5(3)] where “the parties agree otherwise than in writing by reference to terms which are in writing.” In addition, the writing requirement is satisfied where there has been [§ 5(5)] “an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party.”

An “agreement in writing to submit to arbitration” would presumably require the arbitration clause to be an express part of some written agreement somewhere---however perfunctory or rudimentary the expression---in other words, it would prevent arbitration from being incorporated into a contract solely on the basis of custom, trade usage, or past dealing. See *C. Itoh & Co. (America) Inc. v. Jordan Int’l Co.*, 552 F.2d 1228, 1238 (7th Cir. 1977) (“battle of the forms”; the terms of the contract were created purely by conduct and the parties’ forms “do not agree on arbitration”; *held*, given the writing requirement of the FAA, arbitration cannot “be brought into that contract as a ‘supplementary term’ by implication from custom and usage”).

A skeletal clause-----saying nothing perhaps beyond a bare reference to “arbitration”---will usually suffice, and no more is necessary before a court will set an arbitration in motion, perhaps by proceeding to name an arbitrator; see *Born*, *supra* n. 12 at 763-70; *Hobbs Padgett & Co. (Reinsurance), Ltd. v. J.C. Kirkland, Ltd.*, [1969] 2 Lloyd’s L. Rep. 547 (C.A. 1970) (“suitable arbitration clause”; this means “any form of arbitration which reasonable men in this type of business would consider suitable”). If this is true, then it seems rather bizarre to say that an *oral agreement between the parties* as to the identity of the arbitrator should nevertheless be ignored as in contravention of a “writing” requirement: But see *id.* at 716 (yet that is nevertheless “the better view”); *Magness Petroleum Co. v. Warren Resources of California, Inc.*, 127 Cal. Rptr. 2d 159 (Cal. App. 2002) (written contract between the parties provided for arbitration before the AAA; a later oral modification designating an alternative arbitrator is “not specifically enforceable”). Here’s an analogy: In the US the “Statute of Frauds” requires that a contract of sale for a price in excess of \$500 must be evidenced by a signed writing “sufficient to indicate that a contract for sale has been made.” But if such a writing exists, it would make no sense to refuse enforcement of an agreement by which the parties *orally modified the price*---given that the price term did not have to be contained in the writing in the first place. (In the absence of evidence proffered as to an oral agreement on price, a court may fix a “reasonable price.”) See UCC §§ 2-201, 2-209, 2-305; *Benfield & Greenfield*, *supra* n. 296 at 101-102.

²⁶⁴ Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 800-801 (1941).

As Fuller recognized, this carries advantages both to contracting parties and to state courts before whom they appear; satisfaction of a condition of formal validity is itself likely to facilitate diagnosis by providing assurances to the court, with respect to both the reality of the parties’ consent and just what it is that they have consented to.²⁶⁵ That required formalities for the arbitration clause may seem either overinclusive²⁶⁶ or underinclusive in advancing these purposes,²⁶⁷ need not trouble us unduly---as long as they are sensibly tailored by legislation; appear to have at least a beneficial tendency in the desired direction; and do not create other distortions in the system (thus making the solution less than “second best”).

79. Now assume the Convention is in play---primarily, but not exclusively, where the seat is in some state other than the forum. Here art. II provides instead an “internationally uniform” substantive rule that to some extent at least is intended to supersede any provisions of any municipal law:²⁶⁸ Art. II(1) obligates contracting to “recognize an agreement in writing” to submit disputes to arbitration, and the term “agreement in writing” is defined in art. II(2) to “include” “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”²⁶⁹

²⁶⁵ See Yackee, *supra* n. 37 at 50; van den Berg, *supra* n. 56 at 156 (satisfaction of the form requirements of art. II of the Convention creates a “strong presumption” that there is a “meeting of the minds”).

²⁶⁶ Cf. Toby Landau, *The Requirement of a Written Form For an Arbitration Agreement: When “Written” Means “Oral,”* in Albert Jan van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions* (ICCA Congress Series, vol. 11) 19, 47 (2003) (“betray an outdated conception of arbitration, in which the process was seen as an inferior alternative to national courts, to be treated with caution, and closely policed”).

²⁶⁷ *Id.* at 48 (the “cautionary function ignores the many cases in which a party is held bound to an arbitration clause, without having signed a contract, or having had his or her mind focused upon the arbitration clause”).

²⁶⁸ See Graffi, *supra* n. 114 at 41 (“the formal prong does not require any conflict of law mechanics, since the answer to the interpretive query may be found within art. II itself”); see also Guillermo Aguilar Alvarez, *Article II(2) of the New York Convention and the Courts*, in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards* (ICCA Congress Series, vol. 9) 67, 71 (1999).

²⁶⁹ I can’t remember the last time I sent or received a “telegram” (or, for that matter, a “letter”)---but at least---unlike in this respect, I am sure, many of my readers---I do have some dim recollection of the practice.

Technology, as we know, evolves far more quickly than Conventions and legislation are able to keep up with, but the creaky nature of the text is not the major problem here. In the US the Electronic Signatures in Global and National Commerce Act, [15 U.S.C. § 7001 \(2000\)](#), affords “legal effect, validity, [and] enforceability” to signatures “in electronic form” in all transactions affecting interstate commerce. In November 2005, the United Nations General Assembly adopted a “Convention on the Use of Electronic Communications in International Contracts”: Under art. 9 a requirement that a contract be “in writing” is met “by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference”; a requirement that it be “signed” is met by an electronic communication, as long as some method is used “to identify the party and to indicate that party’s intention,” and the method is as “reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances.” In art. 20, these provisions are specifically made applicable to communications looking to the formation of an arbitration agreement under the New York Convention. Pending more widespread ratification, courts can be expected,

80. When faced with art. II, US courts often give the impression of flailing around blindly---although the matter really seems to me to be quite straightforward, and thus of only marginal intellectual interest. The *Sen Mar* case remains typical:²⁷⁰ Here an arbitration clause was contained in a telex sent by one party only, and the court refused to compel arbitration--because the arbitration clause was “not found in a signed writing nor is it found in an exchange of letters” as required by the Convention. Cases under the FAA in which courts had enforced arbitration clauses “contained in [an] unsigned writing” were deemed simply irrelevant--because the court was authorized to “enforce the arbitration clause only if it satisfies the Convention's more stringent requirement,” as “the Convention controls in case of any conflict” with the FAA.²⁷¹
81. The model envisaged by art. II and *Sen Mar* is of course strikingly discordant with much everyday common-garden-variety contracting behavior. We are all familiar with the fact that perfectly acceptable written contracts are entered into every day despite the fact that they are neither signed nor contained in any “exchange”--indeed, despite the fact that one party may not have given any written assent to arbitration in any form. For example:
- A written proposal to arbitrate has been sent by one party--and is then accepted orally---or tacitly, by the beginning of performance or other conduct.
 - As part of a longstanding practice extending over many years, a written confirmation of purchase (with an arbitration clause) is sent by a seller and retained without objection by the buyer.²⁷²
 - A third party---tellingly, a “non-signatory”---has participated in a transaction that is nominally between the “signatories” alone, or has assumed responsibility for some particular portion of it---perhaps as a subcontractor, or charterer or carrier, or lender or legal advisor---or has asserted some benefit under it.

endearingly, to struggle manfully to catch up; see *Gabriel Capital, L.P. v. CAIB Investmentbank Aktiengesellschaft*, 814 N.Y.S.2d 66 (A.D. 2006)(“‘exchange of letters or telegrams’ should be interpreted to include faxes”).

²⁷⁰ *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879 (S.D.N.Y. 1991).

²⁷¹ Note that the holding in *Sen Mar* could readily, and more satisfactorily, be explained on other grounds: The court---if only it had not felt compelled to begin its analysis with the question of “formal validity”---might easily have noted that since the recipient of the telex in that case had immediately objected to its contents, there was simply no acceptance in any form--even oral or tacit--of any proposal to arbitrate.

Sen-Mar is approved in *Friedland & Hornick*, supra n. 217 at 170 (“the basic fact that the Convention is an international instrument containing its own standard of what constitutes an agreement in writing”). A subsequent case along the same line is *Chloe Z Fishing Co., Inc.*, supra n. 103 (art. II constitutes “the mandatory requirement of what constitutes an ‘agreement in writing’ under the Convention”; ultimately holding, however, that the arbitral clause at issue did in fact satisfy the Convention’s “stringent definition”).

²⁷² A fortiori if the written instrument containing the arbitration clause is sent in “confirmation” of an earlier oral agreement.

In such circumstances it would not be difficult for a court---under the ordinary principles of the contract law of most jurisdictions---to find that an enforceable

arbitration agreement has been created.²⁷³ Nevertheless the drafters of the Convention apparently intended for such cases to be excluded from art. II.²⁷⁴

²⁷³ See generally Restatement (Second) of Contracts § 19(1) (“The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.”); *id. cmt. a.* (“Words are not the only medium of expression”); *id.* § 69 (“Acceptance by Silence or Exercise of Dominion”); UCC § 2-204(1) (contract of sale “may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract”).

For concrete cases, see *Al-Salamah Arabian Agencies Co. v. Reece*, 673 F. Supp. 748 (M.D.N.C. 1987) (“since both parties performed pursuant to the terms of the contract” even though it was unsigned, the claim was “based on a written contract subject to the Arbitration Act”); *Int’l Tin Council v. Amalgamet Inc.*, 524 N.Y.S.2d 971 (Sup. Ct. 1988) (retention of confirmation of sales form “without any objection constitutes a tacit acceptance of the arbitration clause contained therein,” given “past contractual history” in which confirmation letters containing arbitration clauses were signed); *Achilles (USA) v. Les Plastics Dura Plastics Ltd.*, [2006] QCCA 1523 (Cour d’appel Qué.) (same; parties had dealt with each other for more than ten years and the 3500 contracts between them had always contained an arbitration clause); *Transasia Lawyers v. Econova, Inc.*, 2014 WL 2112442 (D. Utah) (law firm sent client “terms of engagement” containing arbitration clause, and client later paid a retainer, requested and received services, and paid invoices; it thereby “manifested its assent to be bound by the contract containing the arbitration clause,” since “general contract principles can validate an unsigned agreement to arbitrate”); *Zambia Steel & Bldg. Supplies Ltd. v. James Clark & Eaton Ltd.*, [1986] 2 Lloyd’s Rep. 225 (C.A.) (oral assent to sales note containing arbitration clause is sufficient under English legislation intended to implement the Convention, as is “evidence of conduct from which the court is persuaded that the inference of agreement must be drawn”; if “the actual clause was in writing,” “any evidence which proves that the party has agreed to be bound . . . is sufficient” to create “an agreement in writing”); Decision of March 20, 1974 (Bundesgerichtshof [Ger.]), in *Basil S. Markesinis et. al., The German Law of Contract: A Comparative Treatise* 581 (2nd ed. 2006) (“it is mercantile practice to expect the recipient of a commercial letter of confirmation which does not reflect the prior dealings or what was agreed to make an immediate protest,” and if he fails to do so the sender is “entitled to rely on the transaction proceeding in the form in which he confirmed it”); cf. the current German version of the Model Law, which deems its formal requirements to be satisfied “if the arbitration agreement is contained in a document transmitted from one party to the other . . . and--if no objection was raised in good time--the contents of such document are considered to be part of the contract in accordance with common usage.” German Arbitration Act (1998) § 1031(2).

A well-known, if not universally beloved, case is *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (terms in a box; “[b]y keeping the computer beyond 30 days, the [purchasers] accepted Gateway’s offer, including the arbitration clause”).

On the non signatory problem, see *Rau*, “Consent” at ¶¶ 3.56ff. Most of the case law on this subject has been concerned with whether a “non-signatory” can be brought in by being treated as a party to the agreement. Far more troublesome---and in light of art. IV, perhaps insuperable---is the question whether liability for payment of a rendered award can under the Convention be imposed on a non-party merely on “alter ego” grounds: Compare *Javor v. Francoeur*, 13 B.C.L.R. (4th) 195 (2003) (the arbitrator held the defendant “personally liable for any debts of the corporation that might ultimately be imposed,” but did not “suggest that [he] had been a party to the arbitration agreement”; *held*, enforcement denied; the Convention’s requirement that a copy of the arbitration agreement must accompany the enforcement application “appears directed to the ability of the court to verify the signatory parties”), with *CE Int’l Resources holdings LLC v. Sit*, [2013] BCSC 1804 (although respondent “was not a signatory to the contracts in his personal capacity,” the claimant “alleged various theories by which a non-signatory may be made a party to an arbitration agreement” and on that basis “the arbitrator specifically found that [the respondent] was a party to the arbitration agreements”; award enforced). See generally Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 *Amer. Rev. of Int’l Arb.* 1, 14 fn. 43 (2012) (although the issue of a non-party’s liability for an award may be

82. Given this stark lack of congruence with domestic law, US courts in Convention cases have sometimes been tempted to resort to elaborate and disingenuous measures of evasion: Does the use of the word “include” in the English text suggest perhaps that the “writings” referred to in art. II are intended merely to be illustrative, and not to present us with an exhaustive list?²⁷⁵ Does the final phrase in art. II(1) following the comma modify everything that has preceded it---or does it merely modify the words “arbitration agreement---with the result that “an arbitral clause in a contract” need not itself be signed?²⁷⁶

83. But all this is a sideshow to the fundamental problem, which is this:

- The Convention is clearly intended to restrict the freedom of action of contracting states should they be tempted to limit the currency of international agreements or awards by refusing to honor them: That is, it obligates them to take certain minimum steps to ensure that agreements and awards will be enforced.
- By contrast, is it at all sensible to attribute a purpose to the Convention that imposes *a ceiling on what states are allowed to do*---that would

“separate and distinct” from that of the enforceability of the award itself under the Convention--with the consequence that an attempt to ““pierce the corporate veil” would not be appropriate in the course of a motion to confirm---a claimant's action to bind the unnamed defendant may in any event proceed at the same time if “construed as a separate action”).

²⁷⁴ See van den Berg, *supra* n. 56 at 196 (“The text of Article II(2) does not leave any doubt on this point”; the legislative history also “confirms that the drafters of the Convention wished to exclude the oral or tacit acceptance of a written proposal to arbitrate.”); see also Wolff, *supra* n. 161 at 132-33, 140 (“carrier’s signature on the bill of lading does not suffice, even if tacitly accepted by the shipper”); Poudret & Besson, *supra* n. 125 at ¶ 212 (“a less rigid application of this provision by the courts . . . is in our opinion difficult to reconcile with the text currently in force”).

²⁷⁵ See *Restatement* at § 2-4 cmt. b. (based on “the plain meaning of ‘include,’ . . . international trends, and sound policy”). Little joy here, however, in the equally-authoritative text in other languages; the French text, for example, begins by specifying, “*On entend par ‘convention écrite’ . . .*” Cf. UNCITRAL “*Recommendation Regarding the Interpretation of Article II, Paragraph 2,*” A/61/17 (July 7, 2006)(recommendation that art. II(2) “be applied recognizing that the circumstances described therein are not exhaustive”).

²⁷⁶ See *Sphere Drake Insurance PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994); *Verolme Botlek B.V. v. Lee C. Moore Corp.*, XXI Y.B. Comm. Arb. 824, (N.D. Okla. 1995). But such an escape device runs afoul of the grammarian’s sacrosanct “rules of punctuation” by which the insertion of a comma is meant to signal that the following modifier applies to *each* of its antecedents, *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210 (2d Cir. 1999)(a contrary reading “would render the comma mere surplusage”)---and again, is derailed by the French-language version (in which the plural “*signés*” suggests that the modifier applies to *both* “an arbitration agreement” and “an arbitral clause in a contract”). That the Panama Convention flatly forecloses such arguments---as it requires that an agreement to arbitrate “shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications,” Art. 4---is perhaps significant as well, given a legislative history indicating “Congress’ desire that the courts achieve a general uniformity of results under the two Conventions,” see John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 Amer. Rev. of Int’l Arb. 1, 19-23 (2000); *Freaner v. Valle*, 966 F. Supp.2d 1068, 1082 (S.D. Cal. 2013)(“unambiguous as to the need for signatures”).

involve tying their hands---so that despite all the appropriate evidence of “agreement” found in the cases mentioned above, Convention coverage is excluded? (This is *Sen Mar*).²⁷⁷ “Uniformity” and “symmetry” are all very well, but they are not ultimate values, and it is hard to see what such a purpose might be.²⁷⁸

84. The latter view then begins to seem increasingly dysfunctional.²⁷⁹ Where, say, a buyer has “accepted” a written proposal by beginning performance, a most curious result---given our notion of “separability”---would be that he is now able “to wash his hands of the arbitration clause but at the same time” sue for breach or “maintain an action for the price of the goods delivered.”²⁸⁰ The result is even

²⁷⁷ This position was first advocated with some dogmatism in Professor van den Berg’s seminal treatise of 1981; see van den Berg, *supra* n. 56 at 178-79 (art. II(2) “must in principle [sic] be deemed to be both a maximum and a minimum requirement; a court may not require more, but may also not accept less than is provided by art. II(2) for the form of the arbitration agreement,” and the “uniform rule” of art. II “does not leave any room for the application of municipal law”). But second thoughts seem detectable in Albert Jan van den Berg, *New York Convention of 1958: Consolidated Commentary*, XXVIII Yrbk. Comm. Arb. 562, 584-85 (2003) (conceding that this position is being “increasingly questioned” and acknowledging various alternative “approaches for adapting the requirements of art. II(2) to accommodate present day international trade practices”). See also DIETF Ltd. v. RF AG, XXI Yrbk. Comm. Arb. 685, 688 (Obergericht Basel-Land, July 5, 1994) (“Art. II sets not only a maximum but also a minimum requirement. Obviously [sic], a Contracting State may not set stricter requirements as to form, nor can it accept less far-reaching formal requirements”).

²⁷⁸ The Convention constitutes a set of obligations that contracting states undertake *towards each other*: Is the idea that they are violating *the rights of other states* by reducing---in their own courts---the burden of formalities that parties must meet? To the effect that art. II(2) merely “lays down the minimum [that states must do], not the maximum [that they may do] to enforce arbitral agreements,” see Adam Samuel, *The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate*, 8 Arb. Int’l 257, 269 (1992). Professor Bernini agrees that art II(2) should be read as “setting only the maximum requirements of form beyond which no further (or heavier) requirement can be imposed by national law”---and that to read it as also establishing “a minimum ceiling of formality [that agreements must meet], would limit the scope of the Convention as a whole.” Giorgio Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries*, in Jan Schultz & Albert Jan van den Berg (eds.), *The Art of Arbitration* 51, 52-53 (1982). As you can see, the unfortunate fact---language being as treacherous as it is---is that the terms “maximum” and “minimum” are susceptible here to being used in precisely opposing senses. I trust, though, that the thrust of the argument is clear enough.

The current state of the play on this question is summarized in UNCITRAL, *Note by the Secretariat: Settlement of commercial disputes: Preparation of uniform provisions on written form for arbitration agreements*, A/CN.9/WG.II/WP.139 (Dec. 14, 2005) at 16-19.

²⁷⁹ In the US, more than elsewhere: The exceptional American decision to extend the coverage of the Convention to “non-domestic” US arbitrations, see n. 161 *supra*, would mean that this expansive “pro-arbitration” choice will have had a curious and certainly unintended result---enacting a sort of Statute of Frauds for international arbitration agreements that gives them far less currency than they would have under domestic contract law.

²⁸⁰ Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 Arb. Int’l 27, 29 (1996). See also Janet Walker, *Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement*, 25 J.L. & Comm. 153 (2006) (“how could it be reasonable to suggest that the parties would reasonably expect to be bound by the substantive terms of a sales agreement and yet not by the arbitration agreement that it ‘contained’?”)

worse should one assume (as is often the case) that where a mandatory text imposes a requisite “formality”---one, say, that requires a signed agreement “in writing”--- this necessarily implies that *the actual arbitration agreement itself must be formed by the writing*, or at least *contained in the writing*.²⁸¹ That each party *must have declared in writing his consent to arbitrate* would be a conclusion that far exceeds any sensible purpose possibly served by legal formalities.²⁸²

²⁸¹ The legislative history of the Model Law---closely modeled on the Convention--- makes this quite explicit; see Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 260 (1989)(“this is not merely a requirement that there be written *evidence* of an agreement; the agreement itself must be in writing”); Howard M. Holtzmann et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration* 32-33 (2015).

On this precise point, however, there is abundant and far more sensible authority to the contrary under the Convention. See *Pan Australia Shipping Pty. Ltd. v. The Ship COMANDATE* (No.2), XXXII Yrbk. Comm. Arb. 224 (Australia Fed. Ct. 2006). Here a time charterparty was negotiated through brokers, and there was a lengthy exchange of telexes and e-mails. In an initial decision, the court held that the arbitration clause had not been “concluded in writing” because the shipowner’s recap telex had been made “subject to” the shipper’s furnishing a bank guarantee--- and so it was only after the guarantee was given that the charterparty “came into existence”: That being so, the agreement to arbitrate “*was not made by being signed by the parties or contained in an exchange of telexes or emails.*” This is the classic error just noted; the result is woodenly approved as consistent with “the law” in Max Bonnell, *How Not to Arbitrate*, 72 *Arbitration* 391 (2006)(despite the fact that the parties “had entered into a valid agreement to arbitrate,” their failure “to create a written acceptance of the offer” is fatal to an agreement’s falling with the Convention). On appeal, however, the Full Court sensibly reversed: Art. II does not say that the requisite agreement “is one which was formed or concluded by the act of signing or by the dispatch or receipt of a letter or telegram.” All that is required “is that there be more than a unilateral statement in writing of the arbitration clause or arbitration agreement”; it should not matter that the “contract springs into life [only] upon the provision of the bank guarantee.” *Id.* at 239-40 ¶¶ 35-36.

To the same effect, see also *APC Logistics Pty Ltd. v. CJ Nutracon Pty. Ltd.*, XXXIII Yrbk. Comm. Arb. 331 (Australia Fed. Ct. 2007)(“conduct might suffice” to “form” a contract; art. II merely requires that “the terms of the agreement and assent to those terms are in exchanged documents”). See also *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3rd Cir. 2003). Here a buyer sent an offer to purchase, to which the seller responded with a standard sales agreement that referred to industry guidelines providing for arbitration. Performing a flawless and classical analysis, the court first found

- that the arbitration clause had in fact become part of the agreement (since under the “battle of the forms” provisions of UCC § 2-207, it reflected “common industry practice” and therefore did not constitute a “material variation”).
- In a second step it found that---even using the strictest textual reading of art. II(2)---the agreement was formally valid as an “agreement in writing”: In the terms of art. II(2), it constituted an “exchange of letters”: “*Though the arbitration clause may not have been included in that exchange, it was incorporated by reference in the letters.*” *Id.* at 449-50.

See also Cécile Legros, *Note [to Coisplet v. société CH Daudry Van Cauwenberghe]*, [2003] *Rev. de l’arb.* 1342, 1346 (subsequent to an oral contract being formed, the buyer sent a letter of confirmation making reference to the general terms and conditions of a trade association providing for arbitration; an arbitration clause “contained in an instrument *which does in itself constitute the main contract* but which has become part of the contractual documents by virtue of the absence of protest from the party receiving it,” is enforceable).

²⁸² See ¶ 78 *supra*. The purposes of legal formalities are equally served, are they not, by a writing that merely provides evidence “sufficient to indicate that a contract . . . has been made.” See UCC

85. Of course it is true that given the obligation of mutual recognition lying at the heart of the Convention scheme, one state may have a natural interest in protecting itself against the singularities and idiosyncrasies of another--requiring assurance that a minimum of familiar formal features be present before it assumes the obligation to enforce an award rendered elsewhere. So, for example, assume an arbitration agreement that is, unusually, purely oral---but nevertheless the object of an award rendered in a state in which such agreements are tolerated. This might present “great difficulties” to an English respondent:

[A]n English party who has not signed anything would be exposed to foreign arbitration proceedings and to the enforcement here [in England] of a foreign award. This is a major legislative decision which the New York Convention did not require and which is open to much abuse.²⁸³

But none of this can possibly justify a reading of the Convention that would justify freezing the development of the contract law of any signatory. (In any event of course France would remain free to enforce the award locally; England should, if it chooses, be entitled to withhold recognition under Articles IV and V.)²⁸⁴.

86. That art. II should have no effect on a state’s domestic law is a conclusion reinforced by the evolution of the UNCITRAL Model Law, where recent “modernizing” amendments have been aimed at uncoupling the Law’s regime from that of the equally-obsolete but infinitely-harder-to-modify Convention. Originally drafted so as to be closely modeled on art. II, revisions to the “formal validity” requirements of the Model Law now present states with a new choice of two alternative liberalizing texts. One would simply eliminate any “writing” requirement altogether, making valid even oral agreements to arbitrate.²⁸⁵ The

§ 2-201; *Restatement, Second, Contracts*, § 131; Arbitration Act 1996 (Eng.) § 5(2)(c) (“if the agreement is evidenced in writing”). For this purpose any later written “ratification”---even subsequent to contract formation---could serve equally well; see, e.g., *Proctor v. Schellenberg*, XXVIII Yrbk. Comm. Arb. 745 (Manitoba Ct. App. Dec. 11, 2002) (after demand for payment was made on respondent, the respondent faxed the arbitration agreement to claimant’s counsel, thereby “making it clear that the dispute should proceed to arbitration”; held, the Convention’s requirements were satisfied). For that matter a party’s *repudiation of any obligations under the contract* could serve precisely the same function; see *Restatement, Second, Contracts* § 133 Ill.4: “A and B enter into an oral contract by which A promises to sell and B promises to buy Blackacre for \$5,000. A writes and signs a letter to B in which he states accurately the terms of the bargain, but adds ‘our agreement was oral. It, therefore, is not binding upon me, and I shall not carry it out.’ The letter is a sufficient memorandum to charge A.”

²⁸³ F.A. Mann, *An ‘Agreement in Writing’ to Arbitrate*, 3 Arb. Int’l 171, 172 (1987) (criticizing *Zambia Steel & Bldg. Supplies Ltd.*, supra n. 273, as going “far beyond anything contemplated by the Convention”).

²⁸⁴ See Rau, “*Jurisdiction*” at 61 fn. 32 (“the fact that a given state makes this choice, in the interest of ensuring congruence with its domestic law of ‘agreement,’ does not of course prevent *any other state* from withholding recognition of the award under Articles IV and V).

²⁸⁵ At least this is true where the Model Law is the *lex arbitri*. With respect to awards rendered in

other would in principle still insist that an arbitration clause be “in writing,” but deems the requirement satisfied “if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.”²⁸⁶ Where this can possibly leave the many state legislatures in the US that over the years have copied the Law verbatim in a hapless and poignant effort to mimic “international standards,” is anybody's guess.²⁸⁷

87. The Convention's art. VII further undercuts the idea that the mandatory “formal validity” rule of art. II is likely to have any impact on national legislation: Under art. VII the Convention is not to “deprive” any party “of any right he may have to avail himself of an arbitral award [and by extension, an arbitration agreement] in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied on.” Art. VII is routinely invoked in France to justify the French alternative “*règle matérielle*” with respect to formal requirements: To wit, that there are none at all.²⁸⁸ It will therefore send French

other states (the domain of arts. 35 and 36) the revision merely recognizes oral agreements as valid under this option “if the law governing the agreement so allows,” that is, presumably, if such an agreement is valid under the law of the seat. Holtzmann et al., *supra* n. 281 at 43-44.

²⁸⁶ See *Note by the Secretariat, Settlement of commercial disputes: Form of arbitration agreement*, A/CN.9/606 (April 13, 2006). While not as sweeping as the first alternative, this too is dramatic. There is no mention of a signature, and any requirement that the “writing” reflect or incorporate the actual process of contract formation is expressly rejected. [See here ¶ 84 *supra*.] What must be recorded is merely “*the content of the arbitration agreement*”; furnishing assurances on this subject is the sole function the “formal validity” requirement is to serve. See *id.* at ¶ 8. (By contrast, “the question whether the parties actually reached an agreement to arbitrate” is “a substantive issue to be left to national legislation” [see here ¶ 76 *supra*]). So the revision would legitimate, for example,

- cases “where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form,” but nevertheless
- this alternative would still exclude “a mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure.”

Line-drawing is always a fraught enterprise. This is a subtle line indeed; cf. Landau, *supra* n. 266 at 46 (“no distinction as a matter of logic”). But while fine, it is perhaps not indefensible: The first scenario represents a necessary nod in the direction of accommodating common business practices; while in both cases the existence of “agreement” will have to be proven by oral testimony, the second---unlike standard industry terms and conditions, like GAFTA contracts---does not purport to “*record*” any actual commitment to arbitrate at all.

²⁸⁷ The Model Law has been enacted---usually verbatim---in a number of US states, including five of the seven most populous states. See Alan Scott Rau, *Federal Common Law and Arbitral Power*, 9 Nev. L.J. 169, 179-192 (2007) (referring to the “powerful engine of careerism, fed with substantial doses of wishful thinking,” that drove passage of the statutes). The Model Law is of course nothing more than a state's own internal legislation: If agreements falling to meet the Law's “writing” requirement have routinely been enforced for generations, it is to say the least odd that state legislation would aim at taking away from its judiciary the power to enforce these contracts at all. The outlandish parroting in these statutes of alien concepts [what, for example, is a Texas lawyer likely to make of the concept of the *amiable compositeur*, Texas Int'l Arbitration and Conciliation Act, Tex. Civ. Prac. & Rem. Code § 172.102(d)? Or---more adorably---what is a North Carolina lawyer to make of the translated “amicable compounder,” N.C. Int'l Commercial Arbitration and Conciliation Act, N.C. Gen. Stat. § 1-567.58(c)?] ---might well cause damage if it were not for the redeeming bright spot, that such statutes are universally ignored.

²⁸⁸ Decree No. 2011-48 of Jan. 13, 2011, art. 1507: “The agreement to arbitrate is not subject to any

courts, as usual, to French law without regard to any conflicts rule. In other states art. VII should always be treated as a last resort (that is, after interpretive escape devices such as those mentioned in ¶¶ 87 and 88 fail). In such cases the only available alternatives following successful recourse to art. VII would appear equally to be the law of the forum itself (as the state “where such award is sought to be relied on”), or (through application of the forum’s conflict-of-law rules) the law of the seat.²⁸⁹

88. It has been asserted that the effects of recourse to art. VII are nuclear, in the sense that after making agreements or awards enforceable under a more “favorable” national-law regime, the Convention self-destructs---the party thereby advantaged being shut out entirely from the Convention scheme. The argument, that is, is that the Convention operates as a self-contained regime, in toto or not at all, and there is to be no “cherry picking.”²⁹⁰ Whether this absolutist view makes any sense at all may well be questioned; even by its proponents it seems to be advanced somewhat sheepishly, as a theoretical nicety that embodies merely a “technical point of view.”²⁹¹ Whether even on a worst-case scenario the practical effects of such a view can be any more than marginal, seems more doubtful still.²⁹²

requirements as to its form.”

²⁸⁹ See Decision of September 21, 2005, XXXI Yrbk. Comm. Arb. 679 (Bundesgerichtshof [Ger.]. In this case the contract was concluded orally, but the seller’s subsequent invoice made reference to general conditions calling for arbitration in the Netherlands. The formal requirements of art. II were clearly not satisfied. And in fact the standards of German arbitration law---based on the Model Law, although assumed to be in some respects “less strict”---were not satisfied either. Nevertheless the court held that art. VII includes German law in its totality---that is, it includes German “conflict of laws provisions” as well---and this in turn includes the foreign law to which German conflict rules may send us as being “applicable to the arbitration agreement.” Therefore “it cannot be excluded” that the formal validity of the agreement was to be decided according to Dutch law, under which an invoice is sufficient to incorporate standard conditions where the parties “are in a longstanding commercial relation.” See also Decision of May 8, 2014, XXXIX Yrbk. Comm. Arb. 401 (Bundesgerichtshof [Ger.] (“formal requirements of the validity of the extension of an arbitration clause to a non-signatory” should be examined under Indian law as both the governing law of the contract and the law of the seat); cf. Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 Arb. Int’l 211, 217 (1999)(relying on art. VII would suggest recourse to “the laws referenced in art. V(1)(a) for substantive validity,” thus giving effect to an arbitration agreement “which meets the form requirement of the law to which the parties have subjected it”).

²⁹⁰ Wolff, supra n. 161 at 149, 469 (no rationale given other than that “if the interested party would be allowed to mix different enforcement regimes, it could play legislator of his own”); see also van den Berg, supra n. 56 at 85-86 (no rationale given other than that to combine domestic law concerning formal validity with the remainder of the Convention would “contradict the interdependence of the Convention’s provisions which must be deemed to constitute a whole”); Berger, supra n. 118 at 326 (“would be contrary to the intention of [the] drafters”).

²⁹¹ See van den Berg, supra n. 277 at 586 (“if a court states that it is applying the Convention except for the formal validity of the arbitration agreement . . . it does not seem from the technical point of view that it is applying the Convention. . . .”)

²⁹² The force of this sentence turns of course on whether a state has in place an alternative structure of legislation or jurisprudence that---

- although ensuring the enforcement of foreign awards---is
- not at the same time dependent on the Convention.

To judge the extent of this problem would require a comparative-law analysis based on a hypothetical construct, and is thus well beyond my pay grade. But I can say with some confidence that this problem is unlikely to have much “bite” with respect to the US:

A “non-Convention” award with a seat in a foreign state---but located in a country that has not ratified the Convention---is likely under US law to receive “treatment similar to the treatment accorded to domestic awards in interstate commerce,” and thus be enforced in accordance with Chapter One of the FAA. See Restatement of the Law, *The U.S. Law of International Commercial Arbitration*, § 5-3 cmt. f. & Reporters Notes n.f. (Tent. Draft No. 1, March 29, 2010)(this is “most consistent with the text of the FAA and the federal policy in favor of arbitral dispute resolution”; while it is clear a US court may not in any circumstances vacate any award rendered abroad, the statutory §10 grounds for vacating awards could simply “be construed as grounds for denying enforcement”). There are occasional dissenting voices, e.g., Richard W. Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone*, 13 ICSID Rev.-Foreign Investment L.J. 124, 136-37 (1998)(“with one possible exception, no case has been found in which a federal court acted to confirm a foreign arbitral award in reliance on [Chapter One of the FAA],” although there are cases that have done so in reliance on state law).

So although one can point to certain consequences incurred by a claimant who is unable to bring himself within the Convention scheme, these not likely to be fatal to an award’s currency. At the moment the only significance of withdrawing, from the protection of the Convention,

- arbitrations to be held in other contracting states (i.e., just about every other state with few non-trivial exceptions, like Taiwan),
- and, in addition, US-sited “non-domestic” arbitrations, would be to
- deprive parties of the lengthier statute of limitations found in the US implementing legislation; and to
- deprive parties of the subject-matter jurisdiction of federal courts (at least where other jurisdictional grounds, like diversity of citizenship, are lacking).

By contrast, the grounds for vacatur of US awards and for the non-recognition of foreign awards are likely to be largely congruent, whether relief is sought under Chapter One (domestic awards) or Chapter Two (Convention awards) of the FAA. See generally Alan Scott Rau, *The New York Convention in American Courts*, 7 Amer. Rev. of Int’l Arb. 213 (1996) (“Why the Convention Matters”).

In France of course the preemptive scheme of the statute makes the Convention largely irrelevant so that there is “no need to refer to” it at all; see Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in Albert Jan van den Berg, *50 Years of the New York Convention* 689, 692 (ICCA Congress Ser. No. 14, 2009); Racine, *supra* n. 241 at 564 (application of the Convention is “residual and marginal in France”). In Model Law states it might be thought that the statute---until it is amended in accordance with suggested revisions---does not constitute a “more favorable law” in the first place [see arts. 7 (formal validity requirements closely tracking art. II of the Convention). But that might be too superficial a view; cf. n. 289 *supra*].

Professor Strong makes the usual argument for the use of art. VII as an alternative rationale for the deployment of domestic law---“problems associated with the need for a “signed” writing [mandated by art. II] would [thereby] disappear”---but does not discuss or even seem to perceive the importance of either of the problems discussed in the text at ¶¶ 87 and 88; S.I. Strong, *What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts between the New York Convention and the Federal Arbitration Act*, 48 Stan. J. of Int’l L. 47, 86-88 (2012).

89. In summary, then, it seems more than plausible to conclude that the structure of the Convention is “unlikely” to have been intended to entrust the writing requirement with a “rigorous gate-keeping role.”²⁹³

²⁹³ *Restatement* at § 2-4 *cmt. b.*