

International Public Contracts : Applicable Law and Dispute Resolution
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Introduction ¹

As do most private individuals, States and the entities they control, conclude contracts on a daily basis. One could expect that the bargains made with a private operator are extensively documented. This applies in particular for long term contracts involving massive amount of capital and touching upon key resources of the State. Experience indeed shows that such contracts tend to be meticulously drafted and include detailed provisions covering many questions.² Against this background, it could be asked why it is relevant to focus on the law applicable to such agreements. The importance of determining the law applicable to 'state contracts' ³ follows from the peculiar features of a contractual relation with a State, and most notably the additional risk this creates. As in the domestic context, the State is not a contractual partner like any other. It comes into the contractual relationship with its exorbitant powers and sometimes bad manners. This explains why, in contrast with private agreements, where such clauses are too often neglected, provisions on applicable law and settlement of disputes are often considered the “most sensitive legal issues” in the framework of contracts concluded by States.⁴ In the sovereign bond market for example, it appears that international investors pay due attention to the law which governs bond issues – staying away from debt securities of emerging market sovereign issuers that are governed by the law of the issuing state fearing that “the sovereign might someday be tempted to change its own law in a way that would impair the value or the enforceability of those securities”.⁵

The question of the legal regime governing contracts concluded by States or state entities with private partners is, however, made complex due to several elements. First, contracts concluded by States are quite often kept confidential – if not their existence, at least the detailed provisions thereof.⁶ This makes the examination more difficult as one must rely mainly on documentation disclosed during disputes.

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- 1 A large part of the research for this contribution has been carried out at the Max Planck Institute for Comparative and International Law (Hamburg), whose helpful staff deserves much credit for its kind assistance.
 - 2 Often the provisions of such contracts are directly dictated or at least, by statutory provisions – see *e.g.* the various provisions in the Petroleum Act of Turkmenistan (March 7, 1997) – articles 16 ff dictate the various elements which must be included in the licence agreements granted by Turkmenistan authorities. They could also find their source in model contracts, such as the IBA Model Mining Development Agreement, a preliminary version of which was released in 2011 to serve “as a negotiation template for investor-state agreements in the mining sector in developing countries”.
 - 3 In this contribution, this phrase is used without reference to specific doctrinal constructions as to the content and legal regime of contracts concluded by States. Rather it simply encapsulates all contracts concluded by a government or a government agency.
 - 4 *R. Dolzer & Ch. Schreuer*, Principles of International Investment Law (OUP 2008) at p. 74.
 - 5 As noted by *L. C. Buchheit* and *M. Gulati*, 'Restructuring a Nation's Debt', 29(5) Intl. Fin. L. Rev. 46, 48 (2010). Messrs Buchheit and Gulati also note that by contrast, local law-governed debt securities issued by industrialised countries are welcomed by the international capital markets, probably because investors believe that “industrialised countries are less likely than some of their emerging market brethren to risk eroding future investor confidence by opportunistically changing their own law in order to reduce government debt service burdens”.
 - 6 Contracts concluded in the oil sector are, however, a notable exception as they are frequently published – see *e.g.* the collection Basic Oil Laws and Concession Contracts (Barrows Company, New York).

Uncertainty remains therefore on the true extent of practice.

Second, there is a wide diversity of agreements which a State could conclude with private partners.⁷ If one leaves aside the contracts which have no cross-border aspects,⁸ a rapid overview learns that there is indeed a large variety of contract which may be signed by a State, as States and their offshoots often engage in international contractual bargains : beyond the agreements for very large projects such as energy exploration and production agreements and the agreements relating to utilities and infrastructures (such as the 'build, operate and own', 'build, operate and transfer' schemes and other contracts linked to project finance ventures⁹), States may also conclude loan agreements - or attempt to finance their budget shortfalls through issuance of state bonds -, contracts for supplies and services, rental agreements and contracts of employment. A State could further conclude a contract for a long or a short term. The contract could heavily concerns the public interests of the state – such as when a State grants a foreign company the right to explore important natural resources such as oil and gas – or barely touch upon such interests – which will be the case when a State hires a local administrative assistant to work in an embassy opened in another country. It may finally be that the contract is signed directly by the State or one of its sub-entities¹⁰ or is concluded by a state-owned company. It could even be signed by a consortium of States.¹¹ Given this variety, it must be recognized that “no general pattern applicable to all situations has emerged in practice”.¹²

Finally, the question has long been obscured by a lively debate on the nature and essence of contracts concluded by States.¹³ This debate cannot properly be understood

7 As observed by *I. Brownlie*, *Principles of Public International Law* (OUP, 7th ed. 2008) at p.546.

8 Without attempting to define when a contract becomes international. In the famous *Texaco Overseas* arbitration, Prof. Dupuy adopted a simple definition of the international nature of a contract, holding that an international contract is that “whose elements are not all located in the same territory” - *Texaco Overseas Petroleum Co., California Asiatic Oil co. v. Government of the Libyan Arab Republic*, 17 ILM 11, § 22 (1978).

9 Project finance is used among others for the financing of the development or exploitation of a right, natural resource or other asset. Under this scheme, the government grants a concession agreement or license to the project company which is at the center of the project.

10 Which could take the form of a contract concluded between several local entities, such as cities or regions. See generally *M. Audit*, *Les conventions transnationales entre personnes publiques* (LGDJ, 2002).

11 This was the case for the agreement which led to the famous rulings of the Swiss Supreme Court in the *Westland* case : the court was requested to determine whether the Republic of Egypt was party to an arbitration agreement included in a contract signed by an organization enjoying separate legal personality, which has been set up by treaty by several States (among which Egypt and Saudi Arabia). The arbitral tribunal reached through what they considered to be a legally transparent organization to take jurisdiction over Egypt and the other State which had created the organization by treaty (ICC Award, Case No. 3879). The award was later annulled by the Swiss Supreme Court (*Westland Helicopters v. Egypt, AOI & Arab British Helicopter Co.*, XVI Yearb. Com. Arb. 174 (1991)).

12 *R. Dolzer & Ch. Schreuer*, *Principles of International Investment Law* (OUP, 2008) at p. 72.

13 The ultimate form of questioning of the legal nature of state contracts probably relate to loans extended to States. As is well known, Drago argued in 1907 that such loans were not legally binding contracts, the relationship between the State and the creditor being not one based on contract but on sovereignty (*L. M. Drago*, 'Les emprunts d'Etat et leurs rapports avec la politique internationale', *Revue générale de droit international public* 251 ff. (1907)). For a thorough discussion of this issue, see *G. van Hecke*, *Problèmes juridiques des emprunts internationaux* (Brill, 2nd ed., 1964), pp. 17-25. In a more recent past, some States have attempted to portray the contracts as 'administrative

without taking into account the historical climate which presided to this doctrinal discussion. Those were the days where contracts concluded by States were still a rarity – or at least, thought to be not so frequent.¹⁴ When such contracts were concluded, they largely concerned very important projects, vital for the interests of the States concerned and, most importantly, these contracts were from time to time called in question by States¹⁵ – with some contracting States going as far as unilaterally repudiating the agreement, an attack which the system of diplomatic protection could on its own not sustain.

This explains why scholars attempted to build a legal framework protecting private contracting parties.^{16 17} In doing so, they borrowed from both public international law and French administrative law.¹⁸ The theory sometimes involved the creation of a distinction between the law applicable to the contract and another set of rules, which would provide a legal grounding for the contract.¹⁹ This Kelsenian legal grounding - '*ordre juridique de base*' or '*Grundlegung*' – which would precede the applicable law

contracts, which would entitle the State to modify unilaterally the content of the agreement. In *BP v. Libya*, the claimant submitted a legal opinion stating that concession contracts should under Libyan law be considered to belong to the category of administrative contracts, which the government has the right to change unilaterally (*British Petroleum Exploration Company Ltd. (BP) v. Government of the Libyan Arab Republic*, 53 ILR 297, 324 (1979). Judge Lagergren dismissed this view cursorily (53 ILR 297, 327).

- 14 In reality, States have always engaged in cross-border contractual relationships, as may be evidenced from case law. See *e.g.* the decision of the French Supreme Court of January 22, 1849, *Spanish Government v Lambeje and Pujol* (D, 1849, 1, at p. 5) – which concerned the sale to the Kingdom of Spain of shoes by two businessmen established in Bayonne.
- 15 The most well-known attempts by States to modify the terms of contracts they have concluded, concerned long term agreements in the oil industry. History shows, however, that States have also attempted to modify or otherwise set aside provisions of loan agreements they have concluded. See the various cases summarized by *R. H. Ryan*, 'Defaults and Remedies', in *Sovereign Lending : Managing Legal Risks* (M. Gruson & R. Reisner (eds.), Euromoney, 1984), 157, 158-160 – and in particular the ruling in *United States v National City Bank of New York* 90 F. Supp. 448 (SDNY 1950)).
- 16 It has been pointed out that the attempts to build a specific framework protecting contracting parties bound with a States, emanated from academics from capital-exporting countries – see *M. Sornarajah* *The International Law on Foreign Investment* (CUP, 2nd ed. 2004) at pp. 403-404. It is true that scholars from (formerly) less developed nations often have taken argument with the grand scheme of 'internationalized state contracts'.
- 17 A first attempt to disconnect contracts concluded by States from the application of municipal law, was to argue that such contracts were governed by certain legal standards which existed outside municipal law and were not strictly part of international law. See on this autonomous approach to State contracts and the writings of Lord McNair and Verdross, the thoughtful explanations of *I. Alvik*, *Contracting with Sovereignty : State Contracts and International Arbitration* (Hart, 2011), 48-50.
- 18 See mainly *P. Weil*, 'Problèmes relatifs aux contrats passés entre un Etat et un particulier', *Collected Courses of the Hague Academy*, vol. 128, 98 ff., in particular 159 (1970).
- 19 See *e.g. Texaco* (fn. 8), 17 ILM 1, 11-12, § 26 (1978) – where the arbitrator explains that “it seems desirable to establish a distinction between the 'law which governs the contract and the legal order from which the binding nature of the contract stems’” (quoting Prof. van Hecke's Report to the Institute). According to the arbitrator, the latter was to be found in “international law itself”.

to the contract,²⁰ was sometimes found in “general principles”²¹ but most often in international law.²² At its most extreme, the doctrine involved a claim that contracts concluded between States and foreign companies should be assimilated to treaties.²³

These attempts, which resulted in the use of specially created terminology such as 'investment contracts' or 'economic development agreements', were backed by some milestone arbitral awards²⁴ which culminated with the *Texaco* award rendered by Professor René-Jean Dupuy,²⁵ in which the arbitrator held that an oil concession agreement between a company established in the United States and the government of Libya, had been 'internationalized', i.e. that it was directly governed by international law.²⁶ The arbitrator rested its case on two main elements : first the reference in the contract itself to principles of international law²⁷ and second, the nature of the

20 See the critical discussion by *P. Mayer*, 'Le mythe de l'ordre juridique de base ou *Grundlegung*', in *Le droit des relations économiques internationales – études offertes à Berthold Goldman*, (Litec, 1982) 217 ff. and *A. Kassis*, *Le nouveau droit européen des contrats internationaux* (LGDJ 1993) 231-243.

21 This is the approach adopted by Verdross and Rengeling, as summarized by *I. Seidl-Hohenveldern*, 'The Theory of Quasi-International and Partly International Agreements', *Revue belge de droit international* at p. 569-570 (1975).

22 See most notably, *K.-H. Böckstiegel*, *Der Staat als Vertragspartner ausländischer Privatunternehmen* (Athenäum, 1971), at p. 185 (who referred to the '*völkervertragsrechtliche Natur*' of such contracts) and more recently, *I. Seidl-Hohenveldern*, *International Economic Law* (Kluwer, 1999, 3rd ed.), at p. 43-44.

23 See for this claim, e.g. *A. Verdross*, 'Quasi-International Agreements and International Economic Transactions', *Yearb. World Affairs* 230 (1964).

24 One may distinguish in this respect early awards which essentially accepted that a contract concluded with a State, could be disconnected from the law of that State, without attempting to build this disconnection within a general theoretical framework (see e.g. *Lena Goldfields Arbitration* 36 Corn. L. Q. 31 (1950); *Petroleum Development Ltd v. Sheik of Abu Dhabi* 18 ILR 144 (1951); *Saudi Arabia v Arabian American Oil Co.* 27 ILR 117 (1963); *Sapphire International Petroleum Ltd v. National Iranian Oil Co.* 35 ILR 136 (1967)) from later cases where parties relied on the process of internationalisation as such (see most famously the three arbitration which arose out of the nationalisation by Libya of oil concessions : *British Petroleum (Libya) Ltd. v. Government of the Libyan Arab Republic* 53 ILR 297 (1979); *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic* 62 ILR 140 (1982); *Texaco Overseas Petroleum Co., California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, 17 ILM 1 (1978); see also *American Independent Oil Company Inc (Aminoil) v Government of the State of Kuwait* 21 ILM 976 (1982). The interpretation and exact consequences of these various rulings, has been long a matter of controversy. It has been argued that some scholars have derived from these awards principles and rules which cannot firmly be grounded in what the arbitrators decided. See e.g. the criticism by Sornarajah of the reading by Mann of various awards (*M. Sornarajah*, 'The Myth of International Contract Law', 15 *J. World Trade Law* 187 at p. 201-206 (1981).

25 *Texaco Overseas Petroleum Co., California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, 17 ILM 1 (1978). This award has been commented on numerous occasions. See recently *J. Cantegreil*, 'The Audacity of the *Texaco/Calasiatic* Award : René-Jean Dupuy and the Internationalization of Foreign Investment Law', *EJIL* 441-458 (2011(2)).

26 The arbitrator first held that the law governing the arbitration was international law, relying mainly on the fact that applying the law of a sovereign State would constitute a violation of the sovereign immunity of Libya (*Texaco* (fn. 8) 17 ILM 1, 8-9 at §§ 11-16 (1978)).

27 The choice of law clause (clause 28) read as follows : “This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals”. As has been noted, it is peculiar to refer to this choice of law, as the theory of internationalization of State contracts rests on the assumption that such a contract is by itself

agreement, which the arbitrator deemed to be an 'economic development agreement' which by nature was subject to international law.²⁸ The application of international law did not exclude that the contract could also be governed by national law, if parties had expressly indicated their choice for such a law.²⁹ The application of national law did not, however, prevent the application of international law.³⁰

It seems that this attempt is today largely abandoned,³¹ even if the discussion still lingers in some quarters.³² This may be explained first by the fact that conflicts, which were very vivid in the 1960's and the 1970's in the field of international investment agreements, following a wave of renegotiation and nationalization of natural resources operations, particularly in the oil industry, have apparently been subdued.³³ If there is

subject to international law, without any need to consider what parties have agreed.

- 28 Mr Dupuy also relied on the fact that the concession agreement included an arbitration agreement, noting that “the inclusion of an arbitration clause leads to a reference to the rules of international law” (*Texaco* (fn. 8) 17 ILM 1, 16 at § 44 (1978)). The arbitrator also noted that “even if one considers that the choice of international arbitration proceedings cannot by itself lead to the exclusive application of international law, it is one of the elements which makes it possible to detect a certain internationalization of the contract” (*idem*).
- 29 See *e.g.* in *Texaco* (fn. 8), 17 ILM 1, 18, § 49-50 (1978) – where the arbitrator held, “in order to clarify the scope of the internationalization of the contracts” that national law could be raised to the level of the international legal order, if parties have expressly incorporated national law into their contract.
- 30 In the *Texaco* award, Prof. Dupuy noted that “the reference made by the contracts under dispute to the principles of Libyan law does not nullify the effect of internationalization of the contracts which has already resulted from their nature as economic development agreements and recourse to international arbitration for the settlement of disputes” (*Texaco* (fn. 8), 17 ILM 1, 18, § 49 (1978)).
- 31 See the radical critique by Berlin (*D. Berlin*, 'Contrats d'Etat', in *Rép. International Dalloz* (Dalloz, 1998), pp. 3-7). Berlin concludes that “*toutes les constructions théoriques permettant de faire entrer les contrats d'Etat dans la sphère du droit international, en l'absence de convention en la matière, non seulement se heurtent à des problèmes eux aussi théoriques, et non des moindres, mais ont disparu presque totalement dans la pratique arbitrale*” (p. 6, § 26).
- 32 Some commentators indeed are still convinced that there is a need to develop a specific 'international law of contracts' which would apply to selected State contracts. See *e.g.* the works of Prof. Charles Leben (*Ch. Leben*, 'La théorie du contrat d'état et l'évolution du droit international des investissements', *Collected Courses of the Hague Academy*, vol. 302, pp. 197-386 (2003) – Prof. Leben has recognized, however, that this theory is only adopted by “few scholars” (at p. 264, § 123). On the new dimension added by Leben to the theory of internationalization, in particular in comparison with the earlier works of Weil, see *I. Alvik* (fn. 17), 53-54. See in the recent literature *e.g.* *D.-E. Lakehal*, 'Quelques réflexions sur les contrats pétroliers algériens à la lumière de la théorie des contrats d'état en droit international', in *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon* (Bruylant, 2007), 507-517 – the author makes reference to a so-called “theory of State contracts under international law”, one feature of which would be that such contracts may be governed completely or partially by international law (at p. 509). See also *P. de Vareilles-Sommières* and *A. Fekini*, 'Les nouveaux contrats d'exploration et de partage de production pétrolière en Libye', *JDI* 2008, pp. 3-30 and 2009 pp. 97-136 – analyzing the contracts concluded by the Libyan National Oil Company, these authors first undertake to find out whether parties to these agreements have intended to “internationalize” their contracts (§§ 13-23). After concluding that there are not enough elements to indicate such an intention, the authors go on to analyze whether parties had the intention to submit their contracts to the *lex mercatoria* (§§ 24-29).
- 33 As Bernardini as indicated, “... the issue of the law applicable to State contracts is no longer viewed in terms of confrontation between a defenceless investor and a State whose incomplete system of law and permanent sovereign power justified the fears of a State intervention to the detriment of the investor's rights”: *P. Bernardini*, 'The Law Applied by International Arbitrators to State Contracts', in *Law of International Business and Dispute Settlement in the 21st Century – Liber Amicorum Karl-Heinz Böckstiegel* (R. Briner et al. (eds.), Carl Heymanns Verlag, Köln, 2001), 51, 66.

still much antagonism between States and private parties, these conflicts are fought using other weapons – the nuclear weapon of outright nationalization, such as those which were carried out by the USSR,³⁴ Cuba, Libya and Mexico, has been replaced by fencing foils, such as modifications to the tax regime of long term operations. At the same time, the sometimes acrimonious opposition between lawyers and scholars along the lines of a divided world, with proponents and adversaries of the 'new economic order', has also become less visible.³⁵

The change of climate does not explain the demise of the theory of 'state contracts'. This fall may also be explained by the theoretical flaws of the doctrine.³⁶ One of the major difficulties was that the theory only aimed at some of the contracts concluded by a State and a foreign company. The contracts aimed were long term agreements, mainly for investment purposes.³⁷ This left the bulk of contracts concluded by States – and mainly all contracts concluded for a shorter duration, such as *e.g.* the sale of boots to an army – in need of a proper legal regime. More importantly, it was also difficult to identify with precision which contracts benefited from the specific 'internationalization' regime – as the features outlined by the authors left some room for interpretation.³⁸ More fundamentally, one could wonder why the specific regime

34 See *e.g.* *V.V. Veeder*, 'The Lena Goldfields Arbitration. The Historical Roots of Three Ideas', 28 Intl. Comp. L. Q. 747-792 (1998).

35 The opposition could be very sharp and the language used by some scholars very radical. In its paper on 'The Myth of International Contract Law', Sornarajah wrote that the doctrinal construction whereby State contracts could be subject to international law "represents an instance of norms of international law created during colonial times to further the interests of European powers continuing to survive and justify the perpetuation of a situation of dominance by the erstwhile colonial powers" (*M. Sornarajah* (fn. 24) at p. 188).

36 Which were exposed early on. See *e.g.* *Fr. Rigaux*, 'Des dieux et des héros', *Revue critique de droit international privé* 435-459 (1978); *J. Verhoeven*, 'Droit international des contrats et droit des gens', *Revue belge de droit international*, 203-203 (1978-79). Some of the criticism voiced against the doctrinal construction was brutal. Verhoeven referred in this respect to the "*spéculations doctrinales dont la subtilité n'a souvent d'égal que la gratuité et dont l'originalité abstraite a compensé l'inapplicabilité concrète*" (*J. Verhoeven*, 'Contrats entre Etats et ressortissants d'autres Etats', in *Le contrat économique international. Stabilité et évolution* (Bruylant/Pedone, 1975), at p. 115).

37 Sometimes called 'Economic Development Agreements', see *D. Vagts*, *Transnational Legal Problems* (Foundation Press, 1986) at pp. 445-488. Weil explained that "Il n'est point besoin de préciser que ce ne sont pas tous les contrats d'Etat que l'on devra ainsi considérer comme relevant de l'ordre juridique international, mais seulement ceux d'entre eux qui s'intègrent effectivement, par des liens objectifs d'ordre juridique ou politico-économique, aux relations entre Etats, c'est-à-dire essentiellement – mais non exclusivement – les accords de développement économique ou contrats d'investissement" (*P. Weil*, 'Droit international et contrats d'Etat', in *Mélanges offerts à Paul Reuter : le droit international, unité et diversité* (Pedone, 1981), 549, at p. 580).

38 One of the most sophisticated attempt to defining the category of 'economic development agreements' may be found in the *Texaco Overseas* award. Professor Dupuy held that several elements did characterize such agreements : first that "their subject matter is particularly broad : they are not concerned only with an isolated purchase or performance, but tend to bring to developing countries investments and technical assistance, particularly in the field of research and exploitation of mineral resources, or in the construction of factories on a turnkey basis" (*Texaco* (fn. 8) 17 ILM 1, 16 at § 45(c) (1978)). Professor Dupuy also noted that these agreements "assume a real importance in the development of the country where they are performed ... The party contracting with the State was thus associated with the realization of the economic and social progress of the host country" (*idem*). Two other features were mentioned as being characteristic of such contracts ; their long duration, which "implies close cooperation between the State and the contracting party" (17 ILM 1, 16-17, § 45(c) (1978)) and the fact that such contracts attempt to

was reserved to those contracts. Certainly, the mere fact of creating a new category of contracts known under a particular phrase – 'economic development agreements' – was not sufficient to determine with precision the agreements concerned.³⁹ This is certainly so given the remarkably complex distinctions sometimes made between various types of agreements, some of which were deemed not worthy enough of the internationalization process.⁴⁰

Another flaw lied in the fact that the proponents of the theory of 'internationalization' of State contracts sometimes rested their case on objective factors, such as the fact that the contract had been concluded by a State or state entity or that it concerned large economic interests deemed vital for the local economy, while in other instances, the theory called upon the intention of the parties bound by the contract.⁴¹

A final shortcoming lied in the attempt to consider private companies as subject of international law.⁴² Although it is not challenged that private individuals and companies could derive rights from international law, the byzantine doctrinal construction whereby a State concluding a contract with a foreign company, would implicitly recognize the latter as subjects of international law, even if only for certain purposes,⁴³ has been generally (and sometimes) vigorously disavowed.⁴⁴

further an “equilibrium between the goal of the general interest sought by such relation and the profitability which is necessary for the pursuit of the task entrusted to the private enterprise” (17 ILM 1, 17, § 45 (1978)).

39 As Mann put it, “nothing is gained by what is no more than a terminological feature” : *F. A. Mann*, 'The Theoretical Approach Towards the Law Governing Contracts Between States and Private Persons', *Revue belge de droit international* 562 at p. 563 (1975). Brownlie explained that agreements involving resource exploitation are sometimes describes as 'concession agreements', but noted there was no firm reason for regarding 'concession agreements' as a term or art or, assuming they form a defined category, as being significantly different from other state contracts (*I. Brownlie* (fn. 7) at p. 546).

40 Leben for example has argued that when an investment agreement includes a stabilization clause, it automatically becomes a 'State contract', governed by international law, whereas there is no internationalization when the agreement includes a provision requiring that parties renegotiate the agreement in case of fundamental changes (fn. 32, at pp. 269, § 134). On the distinction between contracts concluded by States in their capacity as 'domestic' legal persons and in their capacity as 'international' legal persons, which constitute, according to Leben, the dividing line between 'State contracts' and other contracts concluded by a government, see *Ch. Leben*, 'L'évolution de la notion de contrat d'état', 48 *Revue de l'arbitrage* 629-646, 634-636 (2003).

41 On the different streams within the school which suggested the creation of a specific legal regime for State contracts, see Berlin (fn. 31), pp. 3-7, §§ 6-26.

42 Prof. Seidl-Hohenveldern wrote, “why should a State be prevented from recognizing its partner to such a contract as a subject of international law?” (*I. Seidl-Hohenveldern* (fn. 21) at p. 570). In other instances, the 'internationalization' proceeded without considering that the private party was indeed a subject of international law (see e.g. the *Texaco Overseas* award : professor Dupuy refrained from holding that the company was in all respects a subject of international law. According to Dupuy, “the internationalization of certain contracts entered into between a State and a private person does not tend to confer upon a private person competences comparable to those of a State but only certain capacities which enable him to act internationally in order to invoke the rights which result to him from an international contract” (*Texaco* (fn. 8) 17 ILM 1, 17 § 48 (1978)).

43 According to Seidl-Hohenveldern, “what recognition there is, is granted to the investor only as far as the execution of the agreement is concerned. The investor thus becomes merely a partial subject of international law” (*I. Seidl-Hohenveldern* (fn. 22), at p. 44-45).

44 See in particular, *W. Wengler*, 'Les accords entre Etats et entreprises étrangères sont-ils des traités de droit international?', *Revue générale de droit international public* 313-345 (1972).

Finally, there is an overarching reason which may explain why the attempts at 'internationalizing' states contracts have faltered : the advent over the last decades of a much better legal framework for the protection of foreign investment. Thanks in part to the rapidly developing web of bilateral and multilateral treaties protecting such investments, and also to the quasi automatic access to arbitration as a means to resolve disputes arising out of such investments, the need to elaborate a specific legal regime for contracts concluded by States has become far less acute.⁴⁵

What is now the starting point of the legal regime for contracts concluded by States if such grand vision has been abandoned? Although there is no consensus in legal doctrine,⁴⁶ there seems to be a movement in favor of a more measured legal framework for contracts concluded by a State. The starting point is that these contracts are governed, if not precisely by the very same conflict of laws provisions applicable to international commercial agreements, then at least by a method closely similar to the normal choice of law process.⁴⁷

In its 1979 Resolution, the International Law Institute has stated that it wished to clarify “the rules of private international law relating to” agreements between States and foreign private persons.⁴⁸ This seems to indicate that the starting point is not so much some new theory designed to extend the reach of international law to contracts concluded by States, but the application of classical rules of private international law.⁴⁹ The existence in a great deal of contracts concluded by governments, of choice

45 Prof. Leben, one of the main proponents of the 'international law of State contracts', has acknowledged, albeit reluctantly, that the rapid evolution of investment arbitration has made “*les contrats d'Etat obsolètes*” (fn. 32), at p. 373, § 344).

46 The debate has, indeed, not yet been settled. So it is that state contracts should, according to some, be governed not by international law or domestic law, but rather by 'transnational law'. This position has been advocated by *J.-F. Lalive*, 'Contrats entre Etats ou entreprises étatiques et personnes privées. Développements récents' Collected Courses of the Hague Academy, vol. 181 (1983-III), 9-284, at pp. 184-185 and pp. 234-235 and more recently by *M. Kamto*, 'La notion de contrat d'état : une contribution au débat', *Revue de l'arbitrage* 719-751, in particular 741-751 (2003). In a more recent twist of the debate, the discussion on the internationalization of State contracts has been linked with the very classic conflict between the monist and the dualist approaches to international law, see e.g. *A.F.M. Maniruzzaman*, 'State Contracts in Contemporary International Law : Monist versus Dualist Controversies', 12(2) *EJIL* 309 (2001) and the additional development by *I. Alvik* (fn. 17), 58-85.

47 As Mann put it, “For the purpose of ascertaining the legal system applicable to a State contract, we do not, as a matter of principle, follow routes which are different from those prevailing in the case of contracts between private persons. We search for the legal system which the parties expressly or impliedly selected or, ... for the proper law” (*F. A. Mann*, (fn. 39) 562 at p. 563). Mann did not only write substantially about State contracts and their legal regime. He was also involved as a practitioner in some of the most important cases involving State contracts (see *L. A. Collins*, 'F.A. Mann (1907-1991)', in *Jurists Uprooted. German-speaking Emigrés Lawyers in Twentieth-century Britain*, (K. Beatson and R. Zimmerman (eds.), OUP, 2004), (381) 390-391, outlining the role played by Mann in the dispute between BP and Libya).

The very definition of the problem as a conflict of law issue and the application of the conflict of laws methodology, may, however, be seen as an assumption which could be questioned (as shown recently by *I. Alvik* (fn. 17), 54-58).

48 Second Recital.

49 Verhoeven has noted that one should first clarify which rules of private international law apply. Those rules could indeed differ substantially. When a dispute is submitted to arbitration, this gives rise to an additional difficulty, as arbitral tribunals are not bound by specific private international

of law clauses suggest that State practice is established in the sense that such contracts are not necessarily governed by law of the State concerned and that the question which law governs such contract must be raised.⁵⁰

Private international law has, in other words, somewhat tamed the wild theory of international contracts.⁵¹ Or, as Brownlie put it, “the rules of public international law accept the normal operation of rules of private international law”.⁵²

This does not mean that international law has lost all its relevance to define the regime of contracts concluded by States. If international law is still be relevant for such contracts, this will, however, result not so much from the nature of the contract and its belonging to a specific category, but rather from the choice by parties – in other words, application of international law *ex contractu* and no longer *ex lege*. A choice by the parties of public international law does not, as was assumed,⁵³ place the contract on the international plane. It remains, however, relevant to determine the regime applicable to such contracts. In other words, much will turn on the intention of parties and not on the qualification of a contract as an 'economic development agreement'.

As a consequence, attention will also shift from the determination of which law applies to such contracts, to other techniques aimed at granting protection to the private party and avoid undue encroachment by a system of municipal law. This includes techniques that help avoid, or at least manage, some of the political risks inherent in such contracts, such as stabilization mechanisms and dispute resolution methods.

It is against this background that public international contracts may be analyzed. The attention will first focus on the determination of the law applicable to such contracts (section 1). Thereafter the focus will be on the various stabilization mechanisms used in practice (section 2). This will include both direct stabilization mechanisms and dispute resolution provisions, as these two elements are central to the legal regime of public international contracts. An attempt will be made to present both the general

law rules. (*J. Verhoeven*, (fn. 36), at pp. 130-133). In the *BP v. Libya* award, Judge Lagergren noted that the ad hoc arbitral tribunal “initially has no *lex fori* which, in the form of conflicts of law rules or otherwise, provides it with the framework of an established legal system” (*British Petroleum Exploration Company Ltd. (BP) v. Government of the Libyan Arab Republic*, 53 ILR 297, 326 (1979). Judge Lagergren further held that it would be erroneous to accept that the *lex arbitri* necessarily governs the applicable conflicts of law rules and concluded that the arbitral tribunal “is at liberty to choose the conflict of law rules that it deems applicable, having regard to all circumstances of the case” (53 ILR 297, 326).

Although this method is not free of criticism, the following observations are made on the basis of a blend of private international law systems in use in various jurisdictions.

50 In this sense, *G. A. Bermann*, 'Contracts between States and Foreign Nationals : a Reassessment', *International contracts* (H. Smit (ed.), Matthew Bender 1981), 184-185. See also the survey of practice by *K.-H. Böckstiegel*, *Arbitration and State Enterprises : A Survey on the National and International State of Law and Practice* (Kluwer, 1984), 26 ff.

51 Note that according to Prof. Schreuer, Article 42 of the ICSID Convention, which aims to determine the law applicable to investment dispute, is akin to a rule of private international law (*C. H. Schreuer*, *The ICSID Convention : a Commentary* (Cambridge University Press, 2001) at p. 555).

52 *I. Brownlie* (fn. 7) at p. 549.

53 And is still assumed by some scholars, see *Ch. Leben* (fn. 32), at p. 265, § 123.

principles and the current practice of States – even though it is difficult to draw general lessons as contracts concluded by states, which come in various formats and shapes, are not easily accessible.

* * *

Section 1. The Law Applicable to Contracts Concluded by States

In order to determine which law applies to contracts concluded by States and state entities, it is necessary to start from a review of the relevant principles (§ 1). This will involve looking mainly at the freedom which parties have to select which law applies to their agreement. It will then be possible to examine how these principles are applied in practice (§ 2).

§ 1. The Principle : Freedom of Choice and its Progeny

1.1 The Principle

A good starting point for the determination of the law applicable to contracts concluded by States is the resolution adopted in 1979 by the International Law Institute with respect to these contracts. Article 1 of this Resolution provides that contracts between a state and a foreign company “shall be subjected to the rules of law chosen by the parties or, failing such a choice, to the rules of law with which the contract has the closest link”. This is in accordance with the conflict of laws rules of most countries.⁵⁴

Hence, the intent of parties is governing. It must be noted, however, that in sharp contrast with the very firm practice in international commercial arbitration, arbitral tribunals deciding upon disputes in relation with contracts concluded by States, have refrained from considering the principle of party autonomy as a unimpeachable rule. This applies in particular for the Iran-US Claims Tribunal, which has on many occasions decided to depart from the law chosen by parties to govern their contract.⁵⁵

⁵⁴ Art. 3 Rome I Regulation; Art. 7 1994 Mexico Inter-American Convention on the Law Applicable to International Contracts. See also Art. 42 of the ICSID Convention, which, although it covers much more than contracts concluded by States, confirms the principle of party autonomy. One should presumably first determine whether these rules apply to all contracts or only to cross-border contracts. The latter option requires a definition of the international nature of contractual arrangements. It is submitted that in the vast majority of cases, one will easily distinguish cross-border contracts from purely domestic ones, so that one may dispense from crafting a definition of cross-border agreements.

⁵⁵ See for one of the earliest instances, *CMI International, Inc. v Ministry of Roads and Transportation, at al.*, award No 99-242-2 (27 Dec. 1983), 4 Iran-US C.T.R. 263 – the tribunal held that the contract was governed by the law of Idaho, which had been chosen by parties. It declined, however, to apply that law for one particular question, that of the possible deduction from the damages, of the profits made by the seller when reselling the items. The Tribunal placed great emphasis on the freedom granted by Article V of the Claims Settlement Declaration and noted that “it is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determine case by case the law relevant to the issues before it” (at p. 267). See also *Economy Forms Corp. v. The Government of the Islamic Republic of Iran et al.*, Award No. 55-165-1 (14

Arbitral tribunals deciding on investment disputes have likewise treated the choice of law made by parties as an important starting point, which did not, however prevent them from looking for other guiding principles to settle the dispute.⁵⁶ In most cases, the arbitral tribunal has found the inspiration in the principles of international law.⁵⁷

1.2 *A choice of law – but which law?*

At first sight, it may be thought that if parties to a contract have a possibility to make a choice, their choice must necessarily be expressed in favor of the law of one State. This is what is suggested by the famous dictum of the Permanent Court of International Justice in the *Serbian loans* case, where the Court stated that every contract must have a basis in a national legal order.⁵⁸

It has, however, since long been recognized that this formula, if it ever had absolute value in eyes of the Permanent Court,⁵⁹ could no longer hold today.⁶⁰

Further, a choice for local law has long been seen as insufficient to protect the private party contracting with a State. As Nygh explained, to agree that the contract shall be governed by the law of the State concerned, is to give it in effect the unilateral power to amend or abrogate its terms.⁶¹ Such a choice leaves this party in the hands of the State which could decide to alter its legislation or regulations so as to deprive the

June 1983), 3 Iran-US CTR 42 (after deciding that the contract was governed by the Uniform Commercial Code, the Tribunal referred to 'equity' to reduce the damages it awarded to the private contractor). In other instances, however, the Tribunal has dutifully applied the law chosen by parties (see e.g. *Gould Marketing Inc. v. Ministry of Defense of the Islamic Republic of Iran*, Award No. 136/49/50 (29 June 1984), 6 Iran-US C.T.R. 272. In general, J.R. Crook, 'Applicable Law In International Commercial Arbitration: The Iran-US-Claims Tribunal Experience', 83 AJIL 1989, 278, 286-299.

56 Schreuer notes that even when parties have made a choice for the law of one country, ICSID tribunals have considered that “there is at least some place for international law even in the presence of an agreement on the choice of law which does not incorporate it” (*C. H. Schreuer*, (fn. 51) at pp. 586-590 – with reference to the *Letco v. Liberia* award).

57 See the various awards discussed by *Ch. Leben* (fn. 32) at pp. 282-288, §§ 160-171. As Spiermann noted, “The principle of party autonomy is generally considered to be the bedrock of international commercial arbitration, yet in investment arbitration it often yields to the principle *pacta sunt servanda*” (*O. Spiermann*, 'Applicable Law', in *The Oxford Handbook of International Investment Law* (P. Muchlinski, F. Ortino and Ch. Schreuer (eds.), OUP 2008), at pp. 99-100.

58 *Case concerning the payment of various Serbian Loans Issued in France*, PCIJ [1929] Series A No 20/21, at p. 41 : in order to consider the subsidiary argument of the Serbian government, to the effect that the obligations entered into were governed by French law (which would have as consequence to render the gold clause null and void as far as payments are to be effected in France), the Court held that “[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country”

59 Something which may be doubted given the other observations made by the Court in the very same ruling. The Court indeed noted that “the rules may be common to several States and may even be established by international conventions or customs and, in this latter case, may possess the character of true international law” (at p. 41).

60 In its celebrated *Texaco Overseas* award, Mr Dupuy noted that “because it is a long time since the Permanent Court of International Justice delivered its judgment in the cases relating to the Serbian and Brazilian Loans, juridical analysis has been much refined in this field [...]” (*Texaco* (fn. 8), 17 ILM 12, § 29 (1978)).

61 *P. Nygh*, *Autonomy in International Contracts* (Clarendon Press, 1998), at p. 192.

private party from the benefit of the contract. Such unilateral change has occurred in the past, as may be inferred from a large body of arbitral awards dealing with the consequences of nationalization and other attempts by States to modify the contractual regime of investments.

Hence contract drafters and negotiators have attempted to find another solution, which would offer a better protection to the private contract party. The classic tools of private international law did not seem to offer a viable alternative. States were indeed understandably reluctant - save in particular circumstances, such as in financial transactions, see *infra* - to submit the contracts they conclude to the law of another sovereign, as this could be seen if not as a waiver of their sovereignty, at least as an admission that their law does not provide an adequate legal framework. Further, including a choice for the courts of another state, did not offer a sufficient protection to the private contracting party. Indeed, the courts of this State would take the law of the contract as it stands and take into account changes made to the law by legislation of the host government.⁶² Finally, the idea to consider the contract as a self-contained legal system not attached to or governed by any existing national or international law, has not gained much support. Besides the many theoretical problems the idea of a '*contrat sans loi*' would entail, it must be recognized that in most instances, the contract will not provide guidance on all possible issues. In case of dispute, the tribunal will therefore be compelled to identify another set of rules in order to find an answer. The idea that the contract will be the applicable law, has in effect proved illusory.⁶³

If one focuses on investment contracts, several alternative solutions were designed in order to insulate the contract from changes brought by the sovereign. One of the main tools – and probably the most controversial – which appeared, was to introduce a provision freezing the law chosen. This type of provision will be explored at length, together with other so-called 'stabilization' techniques, in a further section.

If one sticks to the choice of law proper, another mechanism deserves close attention. A contract could indeed be submitted to another set of rules than national law. For large, long-term contracts concluded with a State, it has indeed become common to subject the contract to something else than local law. So it is that in the oil industry, many contracts include a sophisticated choice of law provision : the starting point of this provision is that the contract is governed by the law of the State. However, this choice is qualified with an additional reference to international law.⁶⁴ In a few cases, the reference to the domestic law of the State party is even omitted, the contract being directly subject to international law or general principles.⁶⁵ In all cases, the aim of the contracting parties is to offer some additional protection to the private party against

62 Buchheit and Gutali have noted in relation with sovereign bond issues that if a sovereign issuer modifies its own law in order to impair the value or the enforceability of securities it has issued under its own law, “Such changes in local law would normally be respected by US and English courts if the debt instruments are expressly, or otherwise found to be, governed by that local law” (*L. C. Buchheit and M. Gulati*, (fn. 5) at p. 48).

63 See recently the discussion by *A. Diehl* *The Core Standard of International Investment Protection. Fair and Equitable Treatment* (Wolters Kluwer, 2012) at pp. 263-264.

64 There are several options to draft the reference to international law, which will be considered hereinafter.

65 Leben notes that “*Il est rare ... que les parties choisissent comment droit applicable le seul droit international*” (*Ch. Leben* (fn. 32), at p. 278, § 153).

undue modifications of the legal regime by the State party. The end result is to bring in international law to a relationship based primarily on a contract. The reasoning is, however, very different from the one followed by the proponents of the 'internationalization' of so-called 'State contracts', since this internationalization intervenes not so much *ex natura*, because of the nature of the contracts,⁶⁶ but rather on the basis of the intent of parties. Whatever the theoretical implications of a complex choice of law, the existence of two layers of rules chosen by parties raises questions as to the validity and the enforceability of such choice.

1.3 Validity and enforceability of complex choice of law provisions

Many contracts concluded by States and state agencies include a simple, straightforward choice for the law of the State party – or, exceptionally, for the law of another State. Such choice of law provisions, which may also be found in commercial or civil contracts concluded between private parties, do not raise specific difficulties. In some fields, such as the oil industry, where contracts are concluded for a long period and involve substantial investment on the part of the private party, practice has developed to submit the contract to a dual layered choice of law provision including a reference to international law next to the choice for the law of the State party.⁶⁷ This raises several questions which will be examined in this section.

The first question one is that of the *validity* of such a complex choice. This is a vexed question in the realm of commercial contracts. As is well known, an intense debate raged in relation to Rome Convention on whether a choice for something else than national law was allowed.⁶⁸ It was commonly accepted that the Rome Convention did not sanction a choice or application of a non-national system of law, such as the *lex mercatoria*, general principles of law,⁶⁹ or international law.⁷⁰ During the process which led to the revision of the Convention, it was suggested to allow a choice for another system than the law of a State.⁷¹ The question has been settled with the

66 See the award by Prof. Dupuy in the *Texaco* case : the contract is removed from a particular domestic legal system and “comes within the ambit of a particular and new branch of international law : the international law of contracts” (*Texaco* (fn. 8), 17 ILM 1, 13, § 32 (1978)).

67 Begie has suggested to refer to this as the 'compound choice of law clause' (*T. Begie, Applicable Law in International Investment Disputes* (Eleven International Publishing, 2005) at p. 19).

68 The issue was linked to the debate on the *lex mercatoria* and its role in international contracts. See in general, *P. Nygh* (fn. 61) at pp. 172-198.)

69 Dicey & Morris on the Conflict of Laws (Sweet & Maxwell, 2000, 13th ed.) at p. 1223, § 32-079. It was also accepted that if parties to a contract chose to submit their contract to the rules of international law, this could be taken to be an incorporation of the rules of international law, the contract being governed by the law applicable in the absence of a choice (Article 4 of the Rome Convention). It was, however, unclear, how this incorporation could work since the principles of international law are not easily incorporated in a contract (see for more details the explanations of *A. Kassis, Le nouveau droit européen des contrats internationaux* (LGDJ, 1993), 402-403, § 380).

70 *Ch. Reithmann and D. Martiny* (ed.), *Internationales Vertragsrecht*, (Otto Schmidt, 6th ed., 2004) at pp. 88-89, § 75.

71 The original proposal for the Rome I Regulation made it possible for parties to choose “the principles and rules of the substantive law of contract recognised internationally or in the Community” (Art. 3(2) original Proposal for a Regulation (Com (2005) 650 final, at p. 6). This led to a rich discussion, with *W.-H. Roth, 'Zur Wählbarkeit nichtstaatlichen Rechts'*, in *Festschrift für Erik Jayme*, (Sellier, 2004), pp. 757-772 (in favor of such a choice); *J. Kondring, 'Nichtstaatliches Recht als Vertragsstatut vor Staatlichen Gerichten – oder : Privatkodifikationen in der*

adoption of the Rome I Regulation, which clearly confirms that a choice can only be made for municipal law.⁷²

The Rome I Regulation is, however, only binding for courts of EU Member States. It further only applies to 'civil and commercial' matters.⁷³

Outside the realm of the Rome I Regulation, there is less difficulty to express a choice for something else than municipal law. Although the validity of a direct choice for international law has long been the subject of controversy,⁷⁴ modern practice seems to have accepted the principle.⁷⁵ This is the case for the Inter-American Convention signed in Mexico in 1994, whose provisions appear to make it possible to choose another law than that of a State.⁷⁶ In other jurisdictions, the possibility of such a choice has been expressly confirmed.⁷⁷ The 1979 Athens Resolution of the Institute has also confirmed the validity of a choice for “the principles common to [several

Abseistsfalle?', *IPRax* 241-245 (2007). It was not entirely clear whether the language suggested by the Commission would have allowed a direct reference by the parties to the rules of international law.

72 Recital 13 of the Preamble, however, allows parties to incorporate “by reference into their contract a non-State body of law or an international convention”. On this compromise reached between the Council and the European Parliament, see *R. Plender and M. Wilderspin*, *The European Private International Law of Obligations* (Sweet & Maxwell, 3rd ed.) at pp. 137-138, § 6-012. Therefore, if parties *e.g.* made a choice for international law, this reference to international law would probably only lead to the 'incorporation' of the rules of international law in the contract - see *e.g. F. Ferrari*, *Comment Art. 27 EGBGB in Internationales Vertragsrecht* (Beck, 2007), at p. 12, para. 19. In other words, such a choice would not prevent the application of the mandatory provisions of the national law which would be applicable to the contract absent a choice of law by the parties.

73 A question arises whether the Rome Convention could be said to apply to contracts concluded by States. Unlike the Rome II Regulation, the Rome I Regulation does not indicate that it does not apply to matters linked to States. Art. (1)(1) of the Rome II Regulation provides that it does not apply to “the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)”.

74 Especially in the 1970's. Compare the opinion of Verhoeven (*J. Verhoeven*, (fn. 36) at p. 140 - “*De lege lata*, il ne paraît guère possible de défendre de manière générale un assujettissement du 'State contract' au droit des gens” - et *F. A. Mann* ('The Proper Law of Contracts Concluded by International Persons' reproduced in: *Studies in International Law*, (Clarendon Press 1973), 201, 222-238.

75 See *e.g. H. Dang*, 'The Applicability of International Law as Governing Law of State Contracts', 17(1) *Australian Intl. L. J.* 133-158 (2010).

76 This results from a combined reading of Articles 1, 7 and 9. See in general *F. K. Juenger*, 'The Inter-American Convention on the Law Applicable to International Contracts : some Highlights and Comparisons', 42 *AJCL* 381, 392 (1994) – Prof. Juenger wrote that “the parties are free to stipulat to the general principles of international commercial law”.

77 This is *e.g.* the case in Louisiana and Oregon where parties may choose something else than state law. See *S. C. Symeonides*, 'Contracts subject to non-State norms' 54 *AJCL* 209 (2006) and *R. Michaels*, 'The Re-Statement of Non-State Law : the State, Choice of Law and the Challenge from Global Legal Pluralism' 51 *Wayne L. Rev.* 215 (2005). In Quebec, the question is still open, with different opinions on the question : compare the opinions of *J. Talpis*, 'Retour vers le futur : application en droit québécois des principes d'Unidroit au lieu d'une loi nationale' *R.J.T.* 584, pp. 617-618 (2002) (choice for Unidroit principles of for arbitration) and *G. Goldstein* and *E. Greffier*, *Droit international privé* (Blais, 1998) at pp. 484 ff. (no room for such choice). For the position under United States law, see *G. Rühl*, 'Party Autonomy in the Private International Law of Contracts. Transatlantic Convergence and Economic Efficiency', in *Conflict of Laws in a Globalized World* (E. Gottschalk, R. Michaels, G. Rühl, & J. von Hein (eds.), Cambridge University Press, 2007), pp. 153-183, at pp. 164-167.

domestic] systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law”.⁷⁸

Arbitration practice is also firmly established in this sense.⁷⁹ Reference may be made to the famous arbitrations conducted in the aftermath of the Libyan nationalization of the oil industry in the 1970's.⁸⁰ The concession agreements included a choice of law clause which referred to “the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals”. As is well known, these contracts led to several major arbitration proceedings.⁸¹ Although the arbitral tribunals did not share the same reasoning and did not reach the same conclusions,⁸² the validity of the choice of law was not called into question. In *Liamco*, the sole arbitrator held that the legal validity of the choice of law clause, which was supported by the “general principles governing the conflict of laws in private international law”, “has always been accepted by international jurists”.⁸³

In modern scholarship, the possibility of selecting international law as the law

78 Art.2 1979 Athens Resolution. Compare with Art. 2 of the 1991 Resolution adopted by the International Law Institute in Basel, which provides that parties “may agree on the application of the law of any State”.

79 Dicey & Morris mentioned that “in international arbitrations, where a government is a party to a contract, the parties may choose as the governing law the 'general principles of law' or even public international law” : Dicey & Morris on the Conflict of Laws (Sweet & Maxwell, 2000, 13th ed.) at p. 1223, § 32-079. One limitation to party autonomy seems to be that parties must choose a system which is definite and ascertainable. On this basis, a choice for equity or for an honourable code (which will not easily be accepted by a State) will meet more resistance.

80 Delaume has, however, warned not to place too much reliance on “isolated arbitral decisions rendered several decades ago in particular circumstances” (*G. R. Delaume*, 'The Proper Law of State Contracts and the *Lex Mercatoria* : a Reappraisal' 3 ICSID Rev 1988, 79 at p. 86).

81 *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic* 62 ILR 140 (1982); *British Petroleum (Libya) Ltd. v. Government of the Libyan Arab Republic* 53 ILR 297 (1979); *Texaco Overseas Petroleum Co., California Asiatic Oil co. v. Government of the Libyan Arab Republic*, 17 ILM 1 (1978)).

82 In the *Texaco* arbitration, the arbitrator held that the clause was primarily a choice of public international law. Prof. Dupuy indeed held that the principles of international should “be the standard for the application of Libyan law since it is only if Libyan law is in conformity with international that it should be applied” and concluded that “the reference which is made mainly to the principles of international law and, secondarily, to the general principles of law must have as a consequence the application of international law to the legal relations between the parties” (*Texaco* (fn. 8), 17 ILM 1, 15, § 41 (1978)).

In the *BP* arbitration, the arbitrator appears to have considered that the clause was a choice for the general principles of law. In a famous dictum, judge Lagergren held that “The governing system of law is what that clause expressly provides, viz in the absence of principles common to the law of Libya and international law, the general principles of law, including such of those principles as may have been applied by international tribunals” (*British Petroleum (Libya) Ltd. v. Government of the Libyan Arab Republic* 53 ILR 297, 329 (1979)).

In the *Liamco* arbitration, the arbitrator held that the governing law of the contract was the law of Libya with the exclusion of those rules of Libyan law which conflicted with the principles of international law : *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic* 62 ILR 140, 173-176 (1982).

83 *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic* 62 ILR 140, 171-172 (1982).

governing a contract concluded by a State is also generally accepted,⁸⁴ although some resistance may still be found.⁸⁵ The same applies to the validity as such of a combined choice, whereby the contract stipulate that the law of a State only applies insofar as it accords with public international law or the general principles of law.⁸⁶ The language used in arbitration statutes⁸⁷ and rules adopted by the major arbitration institutions⁸⁸ make allowance for this kind of choice.⁸⁹

Beyond the validity, one should also inquire about the enforceability of a complex choice of law provision. If parties decide to submit their contract, exclusively or in combination with some municipal law, to public international law, one should determine what rules of international law are relevant for the agreement. It is likely that among all sources of international law, which are listed in Art. 38 of the Statute of the ICJ, the most relevant rules are those of customary international law and the 'general principles of law recognised by civilised nations'.⁹⁰ Treaty law appears to be less suited to find an answer to disputes arising out of an agreement.⁹¹ If one considers

84 See e.g. the observations of Messrs Redfern and Hunter that “There is no reason in principle why [parties to a contract] should not select public international law as the law which is to govern their relationship” (*N. Blackaby and C. Partasides*, Redfern and Hunter on International Arbitration, (OUP, 2009), p. 207-208, §3.138). English courts have also accepted that an arbitration agreement may be subject to international law – see *Occidental Petroleum & Production Co v Republic of Ecuador* ([2005] EWCA 1116, at para. 33).

85 See e.g. *M. Sornarajah* (fn. 16) at pp. 412-413 (after having noted that even if parties choose international law to govern their contract, the host State is entitled to request the application of its mandatory rules, Mr Sornarajah indicates that “It is very unlikely that party autonomy itself can support the idea that the application of the domestic law to a foreign investment transaction can be excluded altogether by some choice of nebulous system of law”).

86 In the *Channel Tunnel* dispute (which did not involve a State), the House of Lords accepted that the choice made by parties for the principles common to French and English law was valid and enforceable. According to the House of Lords, “The parties chose an indeterminate 'law' to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that purpose outside the territories of the participants. This conspicuously neutral, 'a-national' and extra-judicial structure may well have been the first choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made” (*Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.* [1993] AC 334, 368).

87 See also s. 46 of the English Arbitration Act 1996, which requires an arbitral tribunal to determine a dispute either in accordance with the law chosen by the parties or, if the parties agree, in accordance with considerations agreed by them or determined by the tribunal. The very general reference by Article 42(1) of the ICSID Convention to the “rules of law” which may be chosen by parties, also make it possible to contemplate a choice for something different than a domestic law (see e.g. *C. H. Schreuer* (fn. 51) at pp. 565-566).

88 See Art. 21(1) of the 2012 ICC Arbitration Rules, which provides that “The parties shall be free to agree upon the *rules of law* to be applied by the arbitral tribunal to the merits of the dispute” (we underline). The explanatory comments which accompany the model choice of law clause prepared by ICSID indicate that parties are free to refer to national law, international law, a combination or national or international law or a law frozen in time or subject to certain specifications (1993 ICSID Model Clauses).

89 It may, however, be difficult to draw conclusions from court practice as courts are mostly required to intervene when an arbitral award has been issued. The refusal by a court to set aside the award may be the expression of a hands-off policy of the courts towards arbitral awards, much more than a positive confirmation that a choice for international law or common principles, is valid and enforceable.

90 As noted by *N. Blackaby and C. Partasides*, (fn. 83) at p. 208, § 3.139.

91 As noted by *P. Weil*, 'Le droit international en quête de son identité. Cours général de droit international public', Collected Courses of the Hague Academy, vol. 237, 9, 98 (1992). Compare

customary law and general principles, the determination of the relevant rules leaves some freedom to the dispute resolution body.⁹²

Another difficulty arising to an (exclusive or mixed) choice for public international law, is that this set of rules may not be an obvious breeding ground to find a solution for a contractual dispute. As has been noted, “Public international law, being primarily concerned with the relationship between States, is not particularly well equipped to deal with detailed contractual issues – such as mistake, misrepresentation, time of performance, the effect of bankruptcy or liquidation, force majeure or the measure of damages, and so forth”.⁹³ It has, however, been argued that the choice for international law could prove an effective protection even if the principles of international law are rudimentary, because what is sought is a protection against the most blatant violation of the contract, such as its total repudiation.⁹⁴

Similar difficulties are likely to appear when the contract is subject to 'general principles of law'.⁹⁵ It may indeed be difficult - and very time consuming⁹⁶ - for the dispute resolution body to find 'common principles' recognized everywhere in order to form the substantive content of the law applicable to the contract.⁹⁷ As Reinisch indicates, “In the case of dispute, judges or arbitrators are not only asked to settle the specific contentious issues between the parties, but to conduct a thorough comparative analysis of law in order to ascertain the legal principles commonly recognized in various legal systems.” And Reinisch rightly adds that “choice of law clauses of this kind require a considerable degree of trust and impose a high burden on judges and arbitrators”.⁹⁸

with the observations of Jimenez de Arechaga, who appear to believe that if a contract is governed by international law, application should be made of the treaties. Jimenez takes argument out of the fact that the application of treaties would not lead to satisfactory results in contractual disputes because “international law does not possess adequate rules governing contracts of this nature” (*E. Jimenez de Arechaga*, 'International Law in the Past Third of a Century', Collected Courses of the Hague Academy, vol. 159 (1978-I), at p. 308).

92 According to Brownlie, when the contract includes a choice for local law and such principles and rules of public international law as may be relevant, the arbitrators “have a certain discretion in selecting the precise role of public international law”. (*I. Brownlie* (fn. 7) at p. 550).

93 *N. Blackaby* and *C. Partasides* (fn. 83) at p. 208-209, § 3.140. See also the comment by Jimenez de Arechaga, who noted that “We do not believe that there is an international law of contracts” (*E. Jimenez de Arechaga*, (fn 90), at p. 308).

94 *I. Seidl-Hohenveldern* (fn. 22), at p. 42.

95 See for example, the concession agreement concluded in 1980 between the government of Abu Dhabi and Amerada Hess Petroleum, which made reference to “the principles of law normally recognized by civilized states in general including those which have been applied by International tribunals” (quoted by *A. Diehl* (fn. 63), at p. 263).

96 See *G. A. Bermann*, (fn. 50), at pp. 196-201 : Bermann attempts to find out whether there is equivalence between the French and the American approach to unilateral revision of a contract by government and concludes that “the proximity of any two legal systems on refined questions like these is clearly matter for careful examination and judgment. How much more delicate the enterprise, when it is put on the scale necessary in order to determine whether any one such set of rules embodies general principles of law recognized by civilized nations” (at p. 200).

97 Compare with the opinion of Seidl-Hohenveldern, who wrote that “Comparative law is able to deduce from the domestic laws of the States members of the international community as many general principles as may be required to solve any disputes” (*I. Seidl-Hohenveldern* (fn. 21) at p. 569 (1975)).

98 *A. Reinisch*, and *I. Marboe*, 'Contracts between States and Foreign Private Law Persons' in Max Planck Encyclopedia of Public International Law (R. Wolfrum (ed.), OUP, 2012), § 28. Messrs.

Further, it is likely that the attempt to find an answer in general or common principles will only produce very general rules, which may not be the most suitable to solve contractual disputes. As Bermann wrote, “Neither the doctrine of *pacta sunt servanda* nor the *clausula rebus sic stantibus* ... will decide the hard concrete case”.⁹⁹ Wood has also expressed his concerns in the context of financial transactions, stating that “the objection to a choice of international law or general principles accepted amongst civilised nations is that the content of these systems appears rudimentary and imprecise and therefore incapable of conferring predictability upon international financial transactions”.¹⁰⁰

The value of 'general principles' as a standard to solve contractual dispute may have substantially increased over the last decades, notably following the adoption of the Unidroit Principles – and other attempts to give more body to the law of international contracts. These Principles may indeed make it easier for courts and tribunals to find an answer to a precise question arising in the framework of a contractual dispute.¹⁰¹

In practice, it is therefore advisable to make reference to general principles or to international law in combination with a choice for a State law.¹⁰²

Further, if parties to the contract refer to several systems, the combination of these systems may prove difficult to apply.¹⁰³ This appears to have been recognized by the

Dolzer & Schreuer indicate in this respect that “Choice of law clauses may be in need of interpretation in various ways. The meaning of clauses referring to general principles of law or to the usage of trade may not be self-evident in the light of the circumstances of each case” (*R. Dolzer & Ch. Schreuer* (fn. 12), at p. 74).

99 *G. A. Bermann* (fn. 50), 200.

100 *Ph. Wood* *Conflict of laws and international finance* (Sweet & Maxwell, 2007), at p. 64, § 2-094. See also *N. Blackaby* and *C. Partasides* (fn. 83), p. 209, § 3.140 : “The problem with general principles is they are just that. They deal with such topics as the principle of good faith in treaty relations, abuse of rights, the concept of State and individual responsibility. They are excellent as generalisations but lack sufficient detail”. Verhoeven already wrote that “*La part d'arbitraire sur laquelle repose l'affirmation de 'principes généraux' ... doit faire singulièrement douter tant de la praticabilité que de l'opportunité d'une référence au droit des gens qui se réduit à une référence à des droits internes, par le biais de principes qui, comme tels, ne constituent pas un système juridique autonome*” (*J. Verhoeven* (fn. 36), at p. 141, § 12).

101 On the application of these principles to disputes involving state contracts, see *J. Crawford* and *A. Sinclair*, 'The Unidroit Principles and their Application to State Contracts', ICC Bulletin – Special Supplement Unidroit Principles 59-79, in particular at pp. 58-60 (2002). See also the brief observations of *K.-H. Böckstiegel*, 'The application of the Unidroit Principles to Contracts involving States or Intergovernmental Organizations', ICC Bulletin – Special Supplement Unidroit Principles 51-55.

102 *N. Blackaby* and *C. Partasides* (fn. 83) p. 209, § 3.140. This is also acknowledged by Prof. Leben, who indicates that “*il n'est pas souhaitable de se priver de la plénitude de règles offertes par un ordre juridique interne ... pour régler tous les problèmes entre les parties contractantes*”. According to Leben, “*Il est clair que, quels que soient les progrès du droit international des contrats en cours de formation, celui-ci n'a pas encore toute la richesse normative que l'on rencontre, d'ordinaire, dans les ordres juridiques internes*” ((fn. 32) at p. 278-279, § 153). P. Weil has noted that 'le droit international des contrats en est encore à ses premiers balbutiements' (*P. Weil* (fn. 90), at p. 98).

103 A different problem arises if an investment dispute is submitted to arbitration on the basis of an investment contract. The investor may indeed have a contract claim and a treaty claim. Although the difference between the two may not always be relevant in practice, both claims will need to be

International Law Institute Institute, which indicated that “[i]t is also desirable that in designating [the proper law of contract] the parties take into consideration the difficulties which may result from the possible application or combination of a variety of legal systems or principles”.¹⁰⁴ When the choice is made to subject the agreement to national law as well as to international law, the question may arise how these two relate to each other.¹⁰⁵ This question was considered by the arbitral tribunal in the *Agip* case. The agreement in dispute included a choice for the law of Congo “supplemented by international law”. After reviewing whether the nationalization of the assets was in conformity with the laws of Congo and concluding that the nationalization could not be upheld under these laws, in particular under Congolese contract law, the Tribunal noted that “these observations concerning Congolese law do not dispense the Tribunal from examining the nationalization from the point of view of international law”.¹⁰⁶ Turning to the meaning of the choice of law provision, the Tribunal noted that AGIP had argued that the term “supplemented” should be interpreted as implying the subordination of Congolese law to international law. The Tribunal, however, indicated that “it is enough for the Tribunal to note that the use of the term 'supplemented' at least means that there can be recourse to the principles of international law either to fill a gap in Congolese law or to supplement it if necessary”.¹⁰⁷ Although the precise impact of a choice of law provision will depend on its wording, it may be accepted that when parties make a reference to international law, the rules of international law should at least be given as much weight as those of the national law.¹⁰⁸

ascertained based on their own legal regime (see *e.g. Compania de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID case No. ARB/97/3, decision on annulment (July 3, 2002) 41 ILM 1135, 1154, para. 96).

104Art. 4 1979 Athens Resolution. Messrs. Dolzer and Schreuer note that “Any reference in a choice-of-law clause to two different legal orders or principles will, in the case of collision or diversity among them, pose the question of a hierarchy or of the selection of the legal order for the individual issue concerned” (*R. Dolzer & Ch. Schreuer* (fn. 12), at p. 74).

105This question echoes the difficulty in applying Art. 42(1) of the ICSID Convention and its twin reference, when parties have not selected the applicable law, to “... the law of the Contracting State party to the dispute [...] and such rules of international law as may be applicable”. As is well known, several views coexist on the relative weight to be given to municipal and international law on the basis of this provision. See the arguments of *E. Gaillard* and *Y. Banifameti*, 'The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention : the Role of International Law in the ICSID Choice of Law Process', 18 ICSID Rev. 375-411 (2003).

106*AGIP v. Popular Republic of the Congo* ICSID Case No. ARB/77/1, 21 ILM(726, at p. 735, § 80 (1982).

10721 ILM 726, at p. 735, § 83 (1982). The Tribunal then went on to consider whether the repudiation of the stabilization clauses was valid under international law.

108In the *Liamco* award, the arbitral tribunal considered the effects of a choice of law clause which provided that the agreement was to be governed by “the principles of law of Libya common to the principles of international law”. The arbitrator held that this choice excluded “any part of Libyan law which is in conflict with the principles of international law” (*Libyan American Oil Company v. Government of the Libyan Arab Republic relating to petroleum concessions 16, 17 and 20*, 20 ILM 1, 35 (1981); 62 ILR 140, 173 (1982)). The arbitrator dismissed the notion that there could be any conflict between Libyan law and international law, as Libyan law treated international law as “an imperative compendium forming part of the general positive law” (20 ILM 1, 37 (1981); 62 ILR 140, 175 (1982)). See also the reasoning of the majority in *Aminoil* with respect to the applicable law and the 'blending' of various sets of rules (general principles of international law and the laws of Kuwait) : *American Independent Oil Company Inc (Aminoil) v Government of the State of Kuwait* [1982] 21 ILM 976, 1000-1001, §§ 6-10 (1982). See also the observations of the English Court of Appeal in the *Svenska Petroleum* case – the contract provided that “This Agreement shall

1.4 What law in the absence of a choice of law provision?

It may happen, although this will not be very common, that a contract concluded by a State, does not include a choice of law provision.¹⁰⁹ What law governs, in such a case, the contractual issues arising in relation with the contract? It has been suggested that the contract shall be governed by the law of the State, as the law presenting the closest connection with the agreement.¹¹⁰ This was generally accepted for a long time.¹¹¹

This may, however, not be true to a general extent. Under modern conflict of laws rules, it must be examined where the center of gravity of the contract lies.¹¹² This is what the Institute has accepted in its 1979 Resolution. Article 1 of the Resolution provides that contracts between a State and a foreign party shall be subjected, in the absence of a choice by parties, “to the rules of law with which the contract has the closest link”.¹¹³ In determining where the center of gravity lies, account may be taken

be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania.” The court held that “Article 35.2 gives primacy to the law of Lithuania and that it is to the law of Lithuania that one must turn first in order to find the principles of construction that must be applied in ascertaining the meaning and effect of the Agreement. However, we find it more difficult to accept the suggestion that the rules of international business activities generally accepted in the petroleum industry (whatever they may be) can be entirely ignored since they are either the same as the law of Lithuania or contradict it and must therefore be disregarded in either event : *Svenska Petroleum Exploration AB v. Lithuania et al.*, [2005] EWHC 2435, at § 21.

109See *e.g.* the *Aminoil* case where the concession agreement which had been brought to an end by nationalization by Kuwait, did not include a choice of law : *American Independent Oil Company Inc (Aminoil) v Government of the State of Kuwait* [1982] 21 ILM 976; (1984) 66 ILR 518.

110See *e.g.* the PCIJ holding in the *Serbian Loans* case (fn. 58), at p. 42 : the Court noted that the borrower was a Sovereign State “which cannot be presumed to have made to have made the substance of its debt and the validity of its obligations accepted by it in respect thereof, subject to any law other than its own”. See also *F. Rigaux and M. Fallon*, *Droit international privé* (Larcier, 2005), at p. 863, § 14.120.

111See *e.g.* the statement by Lord Asquith of Bishopstone in the *Abu Dhabi arbitration* : noting that the contract had been made in Abu Dhabi and was to be wholly performed in Abu Dhabi, the arbitrator held that “if any municipal system were applicable it would *prima facie* be that of Abu Dhabi” (*Petroleum Development Ltd. v. Sheikh of Abu Dhabi* 18 ILR 144, 149 (1951)). The arbitrator went on to reject the possibility to apply the law of Abu Dhabi on the ground that it was very primitive and wholly unadapted to the long term agreements in dispute (at pp. 149-150). See also the holding in the *Aramco* award : after having reviewed a number of theories and arguments, the tribunal noted that the law of Saudi Arabia should be applied to the concession agreement ‘cause this State is a Party to the Agreement, as grantor, and because it is generally admitted in private international law that a sovereign State is presumed, unless the contrary is proved to have subjected its undertakings to its own legal system” (*Saudi Arabia v. Arabian American Oil Company (Aramco)* 27 ILR 117, 167 (1963)). Likewise in the *Wintershall* arbitration, the arbitral tribunal noted that the Exploration and Production Sharing Agreement concluded between various companies and the government of Qatar did not include a choice of law clause. The tribunal then indicated that “in consideration of the close links” between the EPSA and Qatar, the law of Qatar would apply (*Wintershall AG et al. v. Government of Qatar*, award of Feb. 5, 1988 and May 31, 1988, 28 ILM 795, 802 (1989).

112Modern scholarship has since long expressed its doubt about the mechanical application of the law of the State party to the agreement - see *e.g.* *J. Verhoeven* (fn. 36), at pp. 136-137.

113This is further elaborated in Article 5 of the Resolution, which provides that in the absence of any choice by the parties, “the proper law of the contract shall be derived from indications of the closest

of the fact that one of the parties to the contract is a State, although this is as such not conclusive.¹¹⁴ Under English conflict of laws principles, it has indeed been said that the fact that one of the parties to the contract was a State, was “an element of weight to be considered, but it is no more than that”.¹¹⁵

It may be more useful to consider whether the State acted *jure imperii* or only *jure gestionis* – when a government concludes a contract in the direct exercise of its governmental authority, there is indeed much to say for the idea that the contract should be governed by the law of its state.¹¹⁶ The distinction between 'private' contracts and 'official' contracts is, however, difficult to apply. When one considers the Rome Regulation, the same difficult distinction must be made as the Regulation only applies in 'civil and commercial matters'.¹¹⁷ Although the precise boundaries of these matters is not easy to describe, it may be accepted that when a State enters into a contract in its capacity as sovereign, the European rules should not come into play.¹¹⁸ If on the other hand, these rules are deemed to apply, the fact that one of the parties is a state or state entity should be discounted when determining the applicable law.¹¹⁹

Another possible distinction which could be used when determining the law applicable to a contract, pertains to the place of performance. If the contract must be performed totally or in part in the State, there is good reason to accept that the law of the State governs. The Iran-US Claims Tribunal has come to this conclusion on a number of occasions.¹²⁰ However, if the contract must be performed outside the State – e.g. a contract for supply of services or goods to an army of State A posted in State B – there is much less reason to apply the law of the State.¹²¹ So it is that in order to decide that

connection of the contract”.

114Mann wrote in this respect that “the rule that in looking for the proper law of transactions with States very great, though by no means overriding, weight has to be given to the character of the State party, is universal, supported by common sense and applicable to legislative instruments with particular force” (*F. A. Mann*, (fn. 39) at p. 564).

115*Rex v. International Trustee Company for the Protection of Bondholders* [1937] AC 500, at 557 (HL). This was a case of dollar bonds linked to the value of gold, issued in New York by the British government. The bonds were linked to the value of gold. After the American Joint Resolutions abrogated gold clauses in 1933, the court in England applied the law of New York to hold that the gold clause was unenforceable. See for other precedents in the same direction the case law referred to by *O. Lando*, 'Contracts', Intl. Enc. Comp. L., Vol. III/Ch. 24 (Mohr, 1976), p. 92, § 173.

116See e.g. *O. Lando* (fn. 113), p. 92, § 173.

117In contrast with the Rome II Regulation, the Rome I Regulation does not specifically exclude obligations arising *iure imperii* - art. 1(1) of the Rome II Regulation provides that it does not apply “to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)”.

118One may refer to the interpretation given to this phrase by the ECJ in the context of the Brussels I Regulation. See e.g. *H. Gaudemet-Tallon* 'Le règlement 'Rome I' sur la loi applicable aux obligations contractuelles', *Journal Droit européen*, 237, 238 (2010).

119As *Lando* wrote, “Apart from cases where the state acts *jure imperii*, there seems to be little reason to treat a government differently from other enterprises” : *O. Lando* (fn. 113), p. 92, § 173.

120See e.g. *Housing and Urban Services International, Inc. v. The Government of the Islamic Republic of Iran et al.*, Award No. 201-174-1 (22 Nov. 1985), 9 Iran-US CTR 313 (The Tribunal held that an architect's agreement and a joint venture agreement were governed by the law of Iran, as they had been concluded in Iran); *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Award No. 135-33-1 (13 July 1984), 6 Iran US C.T.R. 149 (finding that a contract was subject to the laws of Iran because both parties were Iranian and the contract concerned a parcel of land in Iran).

121This is what the Iran-US Claims Tribunal has done in a series of rulings : see e.g. *Economy Forms*

the contract concluded between the French government and an Israeli lawyer who was asked to intervene in proceedings pending before an Israeli court, were governed by Israeli law, the French Supreme Court noted that that contract had been concluded and performed in Israel and that the proceedings concerned assets located in that country.¹²²

Further, some tribunals have preferred to rest their decision not so much on the law of a particular State, but rather on general principles of contract law. This is particular the case for the Iran-US Claims Tribunal, whose practice appears to be established to the effect that disputes will be solved in the maximum extent without making an explicit reference to a particular national law.¹²³ Commenting on this practice, Judge Mosk noted that “... under Article V of the Claims Settlement Declaration, the Tribunal has great flexibility in its choice of law. Accordingly, the Tribunal sometimes has rejected the application of municipal law and has applied general principles of law.”¹²⁴ Other arbitral tribunals have similarly chosen to find support for their

Corp. v. The Government of the Islamic Republic of Iran et al., Award No. 55-165-1 (14 June 1983), 3 Iran-US CTR 42 (The Tribunal held that it would decide the contract claim pursuant to “the proper law of the contract” and that this law would be determined using a center of gravity test, noting that this was “the test under general principles of conflicts of law”. In effect, the Tribunal found that the contract was governed by the law of Iowa, as the goods were to be manufactured in that State and delivery and payment also had to be made in the US); *Harnischfeger Corp. v. Ministry of Roads and Transportation et al.*, Award No. 144-180-3 (13 July 1984), 7 Iran US C.T.R. 90 (finding that a contract was subject to the UCC because it had been accepted in the United States and provided for the manufacture of items in the US).

122 *Widow Szczupak v. French Ministry of Finance* (Court of Appeal of Paris, Feb. 19, 1968), *Revue critique de droit international privé* 257 (1969) – the Court held that “conclue sur le territoire de l’Etat d’Israël entre les représentants de l’Etat français sur ce territoire et un avocat d’un barreau israélien pour des prestations se rapportant à l’exercice de la profession d’avocat, et concernant des biens situés en Israël, puis exécutée dans ce pays, la convention ... est soumise à la loi israélienne” (at p. 259).

123 See e.g. *Morrison-Knudsen Pacific Ltd. v. Ministry of Roads and Transportation, et al.*, Award No. 143-35-3, (6 Aug. 1984), 7 Iran-US C.T.R. 54 : deciding a claim following a delay in performance of a contract, the Tribunal rested its decision on a “general principle of law” to the effect that “a party may recover for losses suffered as a consequence of contract breach irrespective of whether a right also exists to terminate the contract” (at p. 74). The Tribunal made reference to Treitel’s study published in the *International Encyclopedia of Comparative Law* to justify its decision, noting also that “nothing in Iranian law has been called to the Tribunal’s attention that contradicts this general legal principle”. See in the same vein, *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 65—167-3 (10 Dec. 1986), 13 Iran-US C.T.R. 199 (noting the freedom it enjoyed under Article V of the Claims Settlement Declaration, the Tribunal found it unnecessary to decide whether the contract was governed by Iranian law or US law. It held that it “is not required to apply any particular national or international legal system”); *Combustion Engineering, Inc. et al. v. The Islamic Republic of Iran, et al.*, Award No. 506-308-2 (18 Feb. 1991), 26 Iran-US C.T.R. 60 (after noting that it should look to “principles of commercial and international law”, the Tribunal referred to the “widely accepted” principle that one can prove the existence of a contract through evidence demonstrating partial performance. The Tribunal concluded that “Such a principle must be taken to constitute a general principle of law”); *Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran, et al.*, Award No. 311-74/76/81 (14 July 1987), 16 Iran-US C.T.R. 3 – the Tribunal noted that parties had made a partial choice for the laws of Iran and held that it did “not consider it appropriate that such an Agreement be governed by the law of one Party”. Accordingly, the Tribunal decided that the law applicable to the contract was “Iranian law for interpretative issues, and the general principles of commercial and international law for all other issues” - at p. 28).

124 *Harnischfeger Corp. v. Ministry of Roads and Transportation et al.*, Award No. 144-180-3 (13 July

decision in the principles codified by Unidroit. In several arbitral proceedings conducted under the ICC rules,¹²⁵ arbitral tribunals have indeed applied the Unidroit principles to contracts concluded between a State and a foreign company, which did not include any choice of law.¹²⁶

Another solution could be to attempt to preserve the application of the law of the State but subject it to some limitation. This is what the ICSID Convention does. Art. 42(1) of the ICSID Convention indeed provides that in the absence of an agreement on the applicable law, the arbitral tribunal shall apply the law of the contracting State party to the dispute (including its rules on the conflict of laws) “and such rules of international law as may be applicable”. A balance is established between the law of the State, whose honor is safeguarded, and the need to protect the contracting party against arbitrary action.¹²⁷ The use of concurrent systems of law has in the past been adopted by arbitral tribunals in disputes between States and private investors.¹²⁸

§ 2. The practice

Although the distinction between various categories of state contracts is somewhat artificial, it may be useful to review the different categories of contracts separately given the lack of uniform practice.

2.1 'Investment' agreements and other long term contractual relationships

The practice under so-called 'investment' agreements is not uniform.¹²⁹ What law

1984), 7 Iran US C.T.R. 90 – dissenting opinion of Judge Richard Mosk, at p. 140. Commenting on the practice of the Tribunal, Messrs. Brower and Brueschke noted that “the Tribunal invariably fails to give detailed explanations regarding the sources of the law it applies except where public international law is concerned. Moreover, despite the range of sources available, the Tribunal generally has not engaged in complicated conflict of laws analyses when determining the applicable law in its decisions” (*C. N. Brower and J. D. Brueschke, The Iran-United States Claims Tribunal* (Nijhoff, 1998), at p. 639).

125See the awards discussed by *M. J. Bonell*, 'The Unidroit Principles of International Commercial Contracts and the Harmonization of International Sales Law 36 R.J.T.334, at pp. 344-346 (2002). According to Bonell, “... it is particularly in the context of so-called 'State contracts' that the Unidroit Principles are frequently applied even in the absence of an express reference by the parties” (at p. 344). See more recently, *M. J. Bonell*, 'International Investment Contracts and General Contract Law : a Place for the Unidroit Principles of International Commercial Contracts', 17 *Uniform Law Rev.* 141-159 (2012).

126After noting that the contract was silent as to the applicable law, one arbitral tribunal noted that neither party was prepared to accept the other's domestic law and decided to apply “those general principles and rules of law applicable to international contractual obligations [. . .], including [. . .] the Unidroit Principles, as far as they can be considered to reflect generally accepted principles and rules ” (quoted by *M. J. Bonell*, 'The Unidroit Principles of International Commercial Contracts and the Harmonization of International Sales Law 36 R.J.T.334, at pp. 345).

127The precise meaning of Art. 42(1) has given rise to much controversy. See the literature referred to in footnote 103 above.

128See *e.g.* the *Aminoil* case where the arbitral tribunal held that the law of Kuwait applied but that account should also be taken of public international law and general principles of law, which were part of the law of Kuwait : *American Independent Oil Company Inc (Aminoil) v Government of the State of Kuwait* 21 ILM 976, 1000-1001 (1982).

129For a recent review of the various possibilities, focusing on contracts concluded in the framework

governs the agreement depends indeed among other on the bargaining power of the parties.¹³⁰ If one looks at agreements covering exploration and exploitation of natural resources, such as oil and gas, there appear to have been a gradual shift in favor of the law of the host State, with more recent contracts including an express provision in favor of this law.¹³¹ This is certainly the case for contracts concluded by so-called developed States, which have always insisted on the application of their laws.¹³²

This practice has been followed in other parts of the world, probably because it is felt that accepting a choice for another law than the State's own law puts the future of a contract in the hands of another country's legislative body, something which is considered with more than reluctance. So it is that contracts concluded recently by the Libyan National Oil Company include a choice for Libyan law.¹³³

of foreign investment projects, see *A. Diehl* (fn. 63) at pp. 257-265 – Ms Diehl distinguishes six options used in practice, ranging from the choice of the law of the host state to the choice of international law.

130In a recent case, a rather unusual choice was made for the “law of the place of the act”. This provision was included in one of the agreement concluded in 2007 between the DR Congo and several Chinese companies. The provision read as follows : “*La loi applicable est la loi du lieu de l'acte. Au cas où la loi applicable ne peut être déterminée selon le critère précédent, et afin de la déterminer, les parties se référeront aux critères usuellement utilisés dans le commerce international pour régler les différends de même nature*”. It is likely that the absence of a real choice of law reflects the fact that both parties were in fact States – the Chinese companies were indeed reportedly all State owned companies acting with the authorization of the PRC.

131Some scholars have referred in this respect to the “relocalization” of these agreements, after a period during which reference to international law and general principles was more frequent. See *A. S. El Kosheri* and *T. F. Riad*, 'The Law Governing a New Generation of Petroleum Agreements : Changes in the Arbitration Process', 1 ICSID Rev.– Foreign Investment L. J., 257-279 (1986), in particular at p. 267-277 – which purported to discover a trend rejecting attempts to eliminate the applicability of the host country's legal system. See also *A. B. Derman, A. Golding, M. Halake, W. M. Katz Jr. and P. A. Vermillion*, 'Choice of Law Provisions When Drafting Arbitration Provisions for International Oil and Gas Agreements', 2 Intl. Oil Gas and Energy Dispute Management (2006).

132See e.g. the Model Petroleum Licence Agreement of Norway (quoted by *Ch. Leben*, (fn. 32), at p. 266, note 93), which provides that the licence is subject to Norwegian legislation. The same applies for the model agreement used in Brazil, which includes a choice for Brazilian law – see *D. Szyfman*, 'Brazilian Oil & Gas Regulatory Framework' in *International Oil and Gas Transactions in Latin America* (R. Colmener and D. Enriquez (eds.), Porrua, 2011, 215, 232 (discussing the concession agreements concluded by the Brazilian National Oil Agency). See also the choice of law clause in the 1982 Participation Agreement concluded between New Zealand and Mobil Oil (which was considered in *Attorney General v. Mobil Oil NZ Ltd.*, (New Zealand High Court, July 1, 1987, 4 ICSID Reports 123) – the choice was made in favor of the laws of New Zealand and the choice for Peruvian law included in the Concession agreement granted by Peru to a US company, which was considered by an ICSID arbitral tribunal in *Aguaytia Energy LLC v. Republic of Peru* (ICSID Award Case No. Arb/06/13) – article 4 of the Concession agreement read as follows : “Applicable Governing Law. The legal framework to which the agreement hereto is compulsorily subject to is the Electric Concessions Law – Law Decree No. 25844 and its Regulations approved by Supreme Decree No. 009-93-EM with the amendments incorporated by Supreme Decree No. 02-94-EM, and the rest of Peruvian laws in force in each instance”.

133According to Article 21 of the Exploration and Production Sharing Agreement which is used by the National Oil Corporation of Libya : “ « *This agreement shall be governed by and interpreted in accordance with the laws and regulations of GSPLAJ [Great Socialist People's Libyan Arab Jamahiriya], including, without limitation, the Petroleum Law* ». See for more details, *P. de Vareilles-Sommières* and *A. Fekini* (fn. 32). In earlier contracts concluded by Libya, the choice of law provision was less protective of Libyan interests, as it provided that the concession agreement “shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law ...”. In his award in the *Texaco Overseas* case, Prof. Dupuy noted

Similar provisions are included in contracts signed by other national oil companies.¹³⁴ Likewise, a contract concluded between PGN, an Indonesian state owned company, with a tripartite Indonesian joint operation, for the design, procurement, installation, testing and pre-commissioning of an onshore gas transmission pipeline in Indonesia, was explicitly governed by Indonesian law.¹³⁵ Finally, the Model Mining Agreement developed by the IBA also includes a choice for the law of the State concerned.¹³⁶

In other fields than natural resources contract, the choice for the law of the State also appears to be the majority solution. Delaume reports that the “overwhelming majority of stipulations of applicable law in State contracts refer to some municipal law as the proper law of the contract” and adds that for construction and managements contract, turnkey contracts or licensing agreements regarding transfer of technology, the choice falls on the law of the State party.¹³⁷

In some countries, there is no room for a choice of another law than the law of the State. Many jurisdictions indeed insist that contracts concluded by the government or governmental agencies be exclusively governed by local law.¹³⁸ So it is that under the

in respect of the reference to the 'principles of law of Libya' that “the parties thereby wanted to demonstrate that they intended the Arbitral Tribunal to base itself on the spirit of Libyan law as expressed in the fundamental principles of that law, rather than by its rules which may be contingent and variable since these rules depended, in the last instance, on the unilateral will – even arbitrariness – of one of the contracting parties” (*Texaco* (fn. 8), 17 ILM 18, § 49 (1978)). In another arbitration which followed the nationalization of Libyan oil operations, BP argued that the choice of law clause, which made reference to the principles of law of Libya common to the principles of international law, should be construed to the effect that international law alone was applicable. Judge Lagergren rejected this interpretation, holding that under the choice made by parties, resort should also be had to the general principles of law - *BP Exploration Company (Libya) Ltd v. Libya* 53 ILR 297, 327-328 (1979).

134See e.g. the oil contracts signed with Algeria, or rather its oil company *Sonatrach*. Article 58(3) of the Act No 05-07 of 28 April 2005 provides that Algerian law applies in case of disputes. This is read to exclude any possibility of a choice of law clause in exploration and production agreements signed between the national oil agency (ALNAFT), the national oil company (Sonatrach) and the foreign investor. See for more details, *M. Trari-Tani*, 'Arbitrage international et contrats publics en Algérie – l'exemple des contrats de recherche et d'exploitation des hydrocarbures', in *Contrats publics et arbitrage international*, (M. Audit (ed.), Bruylant, 2011), (171), 180-182; *D.-E. Lakehal*, (fn. 32) at p. 512 and *M. Trari-Tani*, 'The new legal framework for prospecting, research and exploitation of hydrocarbons in Algeria', *Intl. Bus. L. J.* 53-67 (2008) (according to Ms Trari-Tani, the 2005 Act must be considered to be 'internationally mandatory' – at pp. 65-66, § 54). Even before the adoption of the 2005 Act, the practice of Algerian state companies was to include a choice for Algerian law, see *G. Blanc*, *Le contrat international d'équipement industriel. L'exemple algérien*, (Université des sciences sociales de Grenoble, 1980), pp. 185-188.

135This contract was first contemplated in ICC arbitration proceedings (ICC Case No 16122) and later in a ruling of the Singapore Court of Appeal : *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* (2011) SGCA 33. The Contract concluded in 2006 between PGN and the Consortium was based on the 1999 FIDIC Conditions of Contract for Works of Civil Engineering Construction.

136Section 35.0 of the Model Mining Development Agreement reads: “This Agreement shall be governed by and construed in accordance with the laws of the State, including international treaties and bilateral investment treaties to which the State is a party (collectively, “Applicable Law”).”

137*G.R. Delaume*, 'The Proper Law of State Contracts and the *Lex Mercatoria* : A Reappraisal', 3 *ICSID Rev.*, 79, at p. 82 (1988).

138See e.g. for concession agreements, the various national reports published in *International Project Finance and PPP's. A Legal Guide to Key Growth Markets* (J. Delmon and V. Rigby Delmon (eds.),

laws of Dubai, a contract concluded by the government or a governmental agency may not include a choice for “any laws or rules other than the laws, rules, and regulations prevailing in the Emirate of Dubai and any text to the contrary shall be considered as invalid and not binding.”¹³⁹

When this is not imposed by the law, it may result from a well entrenched refusal by governmental agencies to consider the application of foreign law.¹⁴⁰

Although it probably represents the majority solution,¹⁴¹ the choice for own law is by no means a universally accepted practice. In some instances, parties to the contract decide that the contract will be governed by another law than that of the State concerned.¹⁴² So it is that the contract concluded between a Swiss company and a Slovak state-owned network operator, which granted the Swiss company the right to transmit electricity on a transmission line which it partly financed, included a choice for Austrian law.¹⁴³

Another option, which is frequently used in the oil industry, is to submit the contract to local law but to supplement this choice with a reference to another legal regime.¹⁴⁴ The most common example is that of a reference to international law.¹⁴⁵ In an

Kluwer, 2012), in particular the report for Brazil (at p. 46); for China (at pp. 44-45), Russia (at p. 75), United Arab Emirates at p. 48) and Vietnam (at pp. 71-72).

139 Art. 36 of the Law No. 6 of 1997 On Contracts of Government Departments in Dubai Emirate provides that “No contract where Dubai Government or any of its departments is a party shall contain a provision for arbitration outside Dubai Courts or to any laws or rules other than the laws, rules, and regulations prevailing in the Emirate of Dubai and any text to the contrary shall be considered as invalid and not binding. As an exemption where public interest requires, the Government or any of its departments, establishments and authorities may be exempted from conforming to said provision”. Article 37 of the same law goes on to provide that no contract may stipulate adherence to the FIDIC Conditions of Contract.

140 This is apparently the case in Nigeria, with the local authorities refusing to accept a choice for another law : Report for Nigeria in International Project Finance and PPP's. A Legal Guide to Key Growth Markets (fn. 135), at p. 32-33.

141 In the oil industry, the majority of agreements are governed by the law of the State – see *Ch. Leben*, (fn. 32) at p. 270, § 135.

142 Schreuer reports that as far as investment contracts are concerned, the choice for the law of a third state is “rare” (*C. H. Schreuer* (fn. 51) at p. 561).

143 The contract has given rise to litigation between Slovakia and the European Commission on the compatibility of Slovakia's obligation under EU law to ensure non-discriminatory access to its energy network and the need to afford investments protection under a BIT concluded with Switzerland. See ECJ, 15 Sept. 2011, *European Commission v Slovak Republic*, case C-264/09, not yet published in ECR.

144 In some older agreements, the choice of law provision included a reference not to international law but rather to 'good faith' or other general principles. This was the case in the agreement concluded between the National Iranian Oil Company and a Canadian company, which was considered in the *Sapphire* arbitration : in addition to a reference to the laws of Iran, the choice of law provision also stipulated that parties undertook to carry out their obligations “in accordance with the principles of good faith and good will and to respect the spirit as well as the letter of the agreement” (*Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, Award of March 15, 1963 (35 ILR 136, 140 (1967))).

145 Sometimes, the external reference system is found not in international law but rather in the general principles of law common to several legal systems. In a contract concluded more than fifty years ago by the National Iranian Oil Company, the following provision was included : “In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which

agreement signed in the 1970's between the State of Congo and AGIP, an Italian company, parties agreed that their contract would be governed by the laws of Congo “supplemented by international law”.¹⁴⁶ In many contracts, the choice for local law is supplemented not directly by a reference to 'international law', but rather to the 'principles of international law'. This has been a favored method for a long time in the oil industry. Many production sharing agreements still include today a provision subjecting the contract to both local law and “the principles of international law and the decisions of international tribunals and international treaties to which [the State] is a party”.¹⁴⁷ Another method which is sometimes used is to keep the reference to the law of the host State, but to stabilize it or otherwise attempt to prevent changes being made to this law.¹⁴⁸

There are many variations to this type of choice of law provisions, depending first on which external regime is chosen and second on the relationship between local law and the external reference regime. As far as the external regime is concerned, practice learns that contract drafters make reference to 'international law', the 'principles of international law',¹⁴⁹ the 'rules of international law' or, in a distant past, to the 'principles of law recognised by civilised nations in general'. Sometimes, an additional reference is included to the 'decisions of international tribunals'.¹⁵⁰ In a few cases, the drafters make a more limited reference to a specific source of international law, such as the international treaties.¹⁵¹ Another possibility used by contract drafters

the other parties to this Agreement are incorporated ...” - the contract provision was quoted by *F. Mann*, 'The Proper Law of Contracts by International Persons', *B.Y.I.L.*, 1959, (34), at 51, reproduced in *Studies in International Law*, at p. 233. This clause was considered and applied in the *Sapphire* arbitration : *Sapphire International Petroleum Ltd v. National Iranian Oil Co.* 35 ILR 136., 170-176 (1967). According to El Koshery, this type of provision is no more than a “historical souvenir” - *A. S. El Koshery and T. F. Riad*, 'The Law Governing a New Generation of Petroleum Agreements : Changes in the Arbitration Process', 1 ICSID Rev.– Foreign Investment L. J., 257-269 (1986).

146The agreement (dated 2 January 1974) was considered in *AGIP v. Popular Republic of the Congo* ICSID Award Nov. 30, 1979, Case No. ARB/77/1, 21 ILM 726 (1982), 1 ICSID Reports 313.

147As is for example done in art. 29(1) of the Model Production Sharing Contract of Turkmenistan (1997).

148See hereinafter (section 2) on the various stabilization mechanisms. A good example may be found in a 1981 contract concluded by Guinea, which provided that “The term 'law' in the present Agreement refers to Guinean law. However, Guinean law will be applicable only insofar as it is not incompatible with the terms of the present Agreement, and where it is not more restrictive than the law in force at the date of entry into force of the present Agreement” (this provision was considered in *Atlantic Triton v. Guinea*, ICSID Award, April 21, 1986, 3 ICSID Reports 23).

149Or 'generally accepted principles of international law'.

150As was done in the choice of law provision included in oil contracts concluded some fifty years ago by the Iranian National Oil Company – which provided that failing an answer in the laws of Iran, application should be made of the “... principles of law recognised by civilised nations in general, including such of those principles as may have been applied by international tribunals”. See more recently in the same vein the provision included in an agreement concluded in 1990 between Texaco and Pakistan, which read as follows : “This Agreement shall be governed and interpreted in accordance with and shall be given effect under the laws of Pakistan to the extent that such laws and interpretations are consistent with generally accepted standards of International Law including principles as may have been applied by international tribunals” (as quoted by *A. Diehl* (fn. 63), at p. 265).

151See the choice of law provision included in a concession agreement concluded by Kyrgyzstan, quoted by *Ch. Leben* (fn. 32), at p. 272-273.

is to make reference to 'specific usages of the petroleum industry'.¹⁵²

When such a combination is used, contract drafters have different options to deal with the hierarchy of the various regimes they select. Frequently, the reference to international law aims to avoid the application of local idiosyncracies which could affect the law of the State party to the contract. This is obvious in the case of the concession agreements concluded by Libya some decades ago. As will be remembered, these agreements provided that the concession “shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law ...”.¹⁵³

Often, the stabilizing role of international law is expressed even more openly, by providing that to the extent that the law of the contracting State is not consistent with international law, the latter shall prevail.¹⁵⁴ In other contracts, the reference to international law or general principles is only used as a fall back solution for situation in which no solution may be found in the law of the State party.¹⁵⁵ In yet other agreements, no indication is given as to the relationship between the law of the State party and international law to which reference is made.¹⁵⁶ In the *Agip* case, the wording used in the agreement was ambiguous, as the choice for the law of Congo was said to be “supplemented” by principles of international law. After having examined the legality of the nationalization decree under Congolese law, the arbitral tribunal noted that it should also consider the impact of international law. *Agip* had argued that the language use by parties meant that Congolese law should be subordinated to international law. The tribunal noted in this respect that “Whatever the merits of this argument it suffices for the Tribunal to note that the use of the word 'supplemented' signifies at the very least that recourse to principles of international law can be made either to fill a lacuna in Congolese law or to make any necessary addition to it”.¹⁵⁷ In some cases, an attempt is made to mitigate the application of the law of the State party to the agreement by linking it to general principles of another municipal law.¹⁵⁸

152See e.g. the following choice of law clause : “This Agreement shall be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania.” (taken from a contract between a Swedish company and a Lithuanian state-owned company, with the government of Lithuania also co-signing the agreement, which was considered in *Svenska Petroleum Exploration AB v. Lithuania et al.*, [2005] EWHC 2435).

153This provision was considered in the three arbitration proceedings already referred to.

154This is the language used since the 2002 revision by the Model Joint Operating Agreement developed by the AIPN (see article 18).

155In the Libyan concession agreements, the choice of law provision included the following language : “...and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals”. A contract recently concluded by China provided that it would be governed by the laws of the PRC and that “Failing the relevant provisions of the Law of PRC, principles of applicable laws widely used in petroleum resource countries acceptable to the parties shall be applicable” (reproduced by *Ch. Leben* (fn. 32) at pp. 273-274, § 143).

156See e.g. section 29.1 of the 2007 Model Production Agreement of Turkmenistan, which provides that “This Agreement shall be governed by, interpreted and construed in accordance with the laws of Turkmenistan and, as applicable, the principles of international law and the decisions of international tribunals and international treaties to which Turkmenistan is a Party”.

157*AGIP v. Popular Republic of the Congo* ICSID Award Nov. 30, 1979, 1 ICSID Reports 313, 323.

158See e.g. the following language found in a contract concluded between Algeria and the French

In very rare cases, parties may choose to submit their contract exclusively to public international law.¹⁵⁹

2.2 Civil and commercial agreements

When one examines the practice of commercial agreements concluded by States, it becomes apparent that what law is chosen by parties depends on their respective bargaining power and negotiation skills. When the negotiations are demand and not supply driven, it may be that a State or state entity insists on the exclusive application of its law.¹⁶⁰ On the other hand, a large software company may obtain that the licence it grants to a State, is subject to the laws of its state of incorporation, which has served as the basis for the drafting of the licence. In some cases, parties will submit the contract to the law of a third State, presumably because this appears to be a neutral set of rules.¹⁶¹ Beyond the respective strength of both parties, other factors which may influence the choice of law are the existence of an adequate regulatory framework in the law of the State and the confidence of the parties, and in particular of the private contracting party, in the legal system of its partner.

It is difficult to gather precise information about other agreements concluded by a State. One could take the example of rental agreements concluded by a State with a foreign owner, *e.g.* in order to procure office space for an embassy or a consulate. It is far from excluded that such contracts are concluded without any express provision regarding the applicable law.¹⁶² If a choice is made, it could be that the law of the

Republic regarding the setting up of a 'cooperative association for the purpose of joint exploration and production of hydrocarbons in Algeria' (reproduced in 4 ILM 809 (1965)) : 'The international arbitration tribunal shall make awards on the basis of the law applicable under the terms of the Sahara Petroleum Code and, if necessary, under the terms of this Agreement. If necessary, the Sahara Petroleum Code shall be interpreted in the light of French administrative law and, in particular, due consideration shall be given to the French Council of State. If the above documents are silent or unclear on the point at issue, the tribunal may be guided by general principles of law' (art. 46(4)).

159There are only a few examples known of contracts including a direct and exclusive choice for international law – see *Ch. Leben* (fn. 32) at p. 270, § 136. See already for this observation, *J. Verhoeven* (fn. 36) at p. 141, § 12. Schreuer notes that a choice expressed solely for international law is “not advisable”, as the “contacts of the investment activity to various technical provisions of the host State's law would make such a formula impractical” (*C. H. Schreuer* (fn. 51) at pp. 563-564).

160See *e.g.* the contract at the basis of the dispute settled by the Iran US Claims Tribunal in *T.C.S.B. Inc. v. The Islamic Republic of Iran*, Award No 114-140-2 (16 March 1984), 5 Iran-US C.T.R. 160 : the contract was subject to Iranian law. See also the contract concluded in 2007 between Belgium and a large pharmaceutical company for the procurement of large scale influenza vaccination : section 16.13 of the agreement provided that “*La présente Convention est régie par le droit belge, étant entendu que tout Traité en est expressément exclu. Les Parties excluent expressément la Convention des Nations Unies sur le Contrat de Vente International de Biens*”.

161See *e.g. R.J Reynolds Tobacco Co. v. The Government of Iran, et al.*, Award No. 145-35-3 (6 Aug. 1984) 7 Iran US C.T.R. 181 – the contract was subject to Swiss law.

162In a decision issued in 1973, the French Court of Cassation had to rule on a dispute between Spain and a French Hotel (Georges V) which had rented some business space to the Spanish Kingdom for

place of the real estate is chosen. In addition, in many countries, such agreements are subject to important restrictions as to the applicable law.¹⁶³ A state authority could also conclude contracts for supply and provision of services with a foreign company. When this is done through a tender mechanism, questions could arise as to the application of the public procurement rules of the State.¹⁶⁴ The expectation is that the resulting contract will be expressly subject to the law of the State since it has the benefit of drafting the contract.

As far as individual labor contracts, and most importantly those concluded by embassies and other representations of foreign States, is it quite difficult to determine what is the standard practice. Under French law, the ministry of foreign affairs has the possibility to subject employment contracts of staff recruited abroad, to local law.¹⁶⁵ This possibility must be used “when the needs of the mission so justify”. This suggests that as a rule, staff members are bound by employment contracts governed by French law.¹⁶⁶ It appears, however, from court decisions that some of the employment contracts concluded by French authorities include a reference to foreign law.¹⁶⁷ If there is a dispute between embassy staff and the authorities of the country of origin, it is not uncommon that the dispute is brought before the courts of the host country. It would be interesting to research the case law in this respect to determine whether the contracts concluded by embassies indeed do include a choice of law provision.¹⁶⁸ From the perspective of the host state, it would probably go too far to

a duration of 18 years. The rental agreement did not include a choice of law but included a reference to some French statutes applicable to business leases (French Court of Cassation, January 17 1973, published in 77 *Revue générale de droit international public* 907 (1973)).

163Under Russian law for example, any agreement relating to immovables (not limited to land) must be governed by Russian law. See art. 1205 and 1206 Russian Civil Code. It is probably in recognition of the strength of the law of the place where the real estate is located that France adopted a specific provision (in its Code on Assets of the State) to the effect that the French administration may decide not to apply the provisions of French law “when they are irreconcilable with the law of the State where the asset is located [...]” (art. L-1221(1) French '*Code général de la propriété des personnes publiques*').

164See e.g. in France the decision of the Council of State in the *Colas Djibouti* case (July 4, 2008, case No. 316028) – the highest French administrative court held that the provisions of French law regarding public procurement were not applicable as the call for tender had been placed in Djibouti by the French embassy and the contract was to be signed and performed outside France.

165According to Art. 34-V of the Act of 12 April 2000 (on the rights of citizens in their relations with public service), “*Lorsque les nécessités du service le justifient, les services de l'Etat à l'étranger peuvent, dans le respect des conventions internationales du travail, faire appel à des personnels contractuels recrutés sur place, sur des contrats de travail soumis au droit local, pour exercer des fonctions concourant au fonctionnement desdits services*”.

166See in general the explanations of M. Audit, 'Les contrats de travail conclus par l'Administration à l'étranger', *Revue critique de droit international privé* 39-69 (2002).

167See the case of *Ministry of Interior v Gire*, (Administrative Court of Paris Dec. 7, 2000, RFDE 505 (2001) – in relation to the recruiting of a staff member by the French embassy in Senegal. The court found that the decision of the embassy included a reference to the Labor Code of Senegal.

168See e.g. in Germany the decision of the Bundesarbeitsgericht of Nov. 20, 1997 (IPRspr. 1997, No 58 at p. 106) – in relation with an employee of the US embassy in Germany, the question arose whether a choice of law could be inferred from the various provisions of the Foreign Service National Handbook. The court concluded that the Handbook did include a choice for German law and that even if such a choice could not be read in the Handbook, the mandatory protective provisions of German law applied. Consider also the decision of the Bundesarbeitsgericht of Feb. 15, 2005 (IPRspr. 2005, No 90, p. 214) (dispute following the termination of an employment contract by the US embassy in Germany, the court comes to the conclusion that the contract did not

require that staff member of foreign embassies be employed under a contract governed by local law.¹⁶⁹

2.3 *Loan agreements and other financial arrangements*

State practice in loan agreements and other financial contracts is more easily ascertainable than for other categories of agreements. The information available reveals that contrary to what applies in other fields, and most notably for investment contracts, States have much less reluctance to agree to a choice of a foreign law to govern the financial contract they enter into.¹⁷⁰ In older loan agreements concluded by States, a choice was often expressed for the law of the lender's country.¹⁷¹ Older bond issues often did not include an express choice of law provision.¹⁷² In other circumstances, the choice was made not for the lender's law but rather for the law of the market.¹⁷³

include a choice of law). In Belgium, see Labour Appeal Court of Brussels, May 19, 2007, *Journal des Tribunaux du Travail* 451 (2007) (dispute following the dismissal of an employee by the embassy of Saudi Arabia, the court notes that the employment contract does not include a choice of law and comes to the conclusion that Belgian law applies).

169 Consider, however, the practice in Belgium where identification cards are only issued to domestic staff employed by embassy personnel provided the relationship is documented in a written contract and the contract is in conformity with Belgian law. This falls short of requiring that the contract is expressly governed by Belgian law. See the circular letters of the Belgian Minister of Foreign Affairs No 195 of March 19, 2003 and No. 1415 of June 7, 1999.

170 As noted by *Ph. Wood*, 'Selected Aspects of International Loan Documentation and Rescheduling', in *Sovereign Borrowers. Guidelines on Legal Negotiations with Commercial Lenders* (Lars Kalderen and Qamar S. Siddiqi (eds.), Butterworths 1984, 123, at pp. 126-127. Wood notes that "most countries are willing to contract under an external system of law. They do not regard it as some sort of derogation of sovereignty". Wood adds that in a few cases, the non-acceptance by a sovereign borrower of an external governing law has jeopardized the syndication of the loans. The situation used to be different, however, in some parts of the world. In South America, many countries indeed resisted the notion that a loan agreement they concluded could be subject to foreign law. This resistance has been gradually overcome, starting with a loan agreement concluded in 1983 by Columbia, which was subject to English law (see e.g. *V. Carrillo-Batalla Lucas*, 'Conflict of Laws in International Lending Transactions – Governing Law and Choice of Forum', in *The External Debt* (D. Carreau et al. (eds.), Martinus Nijhoff, 1995), 409, 423-430) and *A. C. Cates* and *S. Isern-Feliu*, 'Governing Law and Jurisdiction Clauses in Eurolean Agreements', *Int'l. Fin. L. Rev.*, 28, at p. 31 (July 1983).

171 *D. Sommers, A. Broches & G. R. Delaume*, 'Conflict Avoidance in International Loans and Monetary Agreements', *Law & Contemporary Problems* 463-482, at p. 466, 467 472 (1956) and *G. R. Delaume*, 'ICSID and the Transnational Financial Community', 1 *ICSID Rev.* 237, 243 (1986) – according to Delaume, "consistent with well established contractual practice, the law normally stipulated as governing the loan relationship is the law of the lender's country. Only on relatively rare occasions have the parties agreed to submit their relations to the law of a third country, such as that of an important financial center. So far is known, no attempt has been made to 'internationalize' the loan relationship. Unlike economic development agreements, which contain, with varying degree of precision, references to international law or to the general principles of law, the loan documents remain rooted in municipal law". See also *G. van Hecke* (fn. 13) at p 68. Over the practice of State loans before the second world war, see *J.F.M. Bosch*, *De staatschulden in het internationaal recht* (Martinus Nijhoff, 1929), at pp. 8-13).

172 *G. van Hecke* (fn. 13) at p 68.

173 At one point, the practice developed to include a dual choice of law : the contract would be primarily governed by English law or the laws of New York, but would also include the following proviso : "provided that in any suit, action or proceeding with respect to this Agreement brought by any Bank in the courts of the [State borrower], this Agreement shall be governed by and construed in accordance with the law of [the State borrower]". This dual choice of law was an attempt to

Today, most loan agreements concluded between banks and States are expressly governed by the law of one of the major financial centers¹⁷⁴ – typically English law or the law of New York.¹⁷⁵ A loan agreement concluded in 1974 between Egypt and a company incorporated in Hong Kong was expressly governed by English law.¹⁷⁶ The large medium-term floating rate syndicated eurocurrency loans which were at the source of many restructuring in the 1980's¹⁷⁷ also included a choice for either English or New York law.¹⁷⁸ The ISDA Master Agreement includes a choice for English law or the laws of the State of New York. To take another example, some securities issued by Argentina in 1998 - so-called Floating Rate Accrual Notes - were issued based on documentation including a choice for the law of New York.¹⁷⁹ As Reinisch has noted, this “reflects the important role of international financial markets for the financing and re-financing of large loans”.¹⁸⁰ Taken together with the immunity waiver typically included in such contracts (*infra*), this confirms that such contracts are not different from contracts concluded between private operators.¹⁸¹ When a loan agreement includes a choice for another law than that of London or New York, the choice will in most cases be expressed for the law of one of the parties.¹⁸²

alleviate the burden of proving New York law or English law if proceedings were brought before the courts of the State borrower (see the hesitation of *A. C. Gooch* and *L. B. Klein*, 'Annotated Sample Loan Agreement', in *International Borrowing. Negotiating and Structuring International Debt Transactions* (D. D. Bradlow (ed.), 2nd ed., Martinus Nijhoff/ILI, 1986), 309 at 355-356).

174See in general *A. C. Cates* and *S. Isern Felui*, 'Governing Law and Jurisdiction Clauses in Euroloan Agreements', *Intl. Financial Law Rev.* 28 ff (1983). According to Heleniak, lenders will in any case insist that the credit agreement be governed by the law of a jurisdiction other than that of the foreign state, in order to “reduce the risk of capricious change in that state's law to the detriment of lenders. And Heleniak to note that “The law finally chosen tends to depend much on the lawyers the banker brought with him to the negotiations. Frequently, a New York or English lawyer will tend to bring his own law with him” : *D. W. Helleniak*, 'Sovereign Risks', in *Current Issues of International Financial Law* (D. G. Pierce ed., Butterworths 1985) 85, at 87. Gruson adds that banks have resisted request by foreign sovereign borrowers that the law of their jurisdiction govern the loan agreement because “after the bank has disbursed the loan, it is in a weak position, because it has performed its part of the bargain and has rights only under the agreement” (*M. Gruson*, 'Controlling Choice of Law', in *Sovereign Lending : Managing Legal Risks* (M. Gruson & R. Reisner (eds.), Euromoney, 1984) at 51).

175A. Reinisch & I. Marboe (fn. 96), § 27.

176This loan agreement, which was considered in the famous *SPP v. Egypt* case, supplemented the parties' primary agreement. It provided that “This Agreement shall be governed by and construed in all respects in accordance with the laws of England” (*SPP v. Egypt (merits)*, ICISD Award, May 20, 1992, 3 ICSID Reports 242 (the tribunal considered the loan agreement in particular at § 229 when discussing the interest rate to be applied to the computation of interests).

177S. Hal, *International Finance : Law and Regulation* (Sweet & Maxwell, 2008), 690-691, §19.066 ff.

178R. M. Auerback, 'Governing Law in International Finance Transactions', in *International Banking Operations and Practices : Current Developments* (J.J. Norton (ed.), Graham & Trotman/Martinus Nijhoff, 1994), 169, 173 – Auerback underlines that the choice of law reflects “technical competence and, above all, drafting skills” which are very much necessary in the environment of Eurocurrency lending.

179This appears from *NML Capital Ltd. v. Argentina*, US Court of Appeals, 2nd Circ., Sept. 23, 2010.

180A. Reinisch & I. Marboe (fn. 96), § 27.

181Compare with *Ch Leben* (fn. 32) at p. 251 : according to Prof. Leben, if a loan agreement includes a choice of law clause, a stabilization clause and a arbitration clause, the contract might be regarded as an “international contract” not governed by the law of a State but rather by general principles of law or international principles.

182As was the case for the loan agreement at the center of the famous *Noga/Russia* dispute, which included a choice for Swiss law. See for one of the numerous decisions in this long battle, Paris

When one considers sovereign bonds, which emerged as the prime source of sovereign debt after the crisis of the 1980's,¹⁸³ the practice is not unanimous. There is a strong attraction exercised by English law and the law of New York, which dominate the sovereign bond market. Some countries have, however, been able to issue bonds governed by their own law – it appears for example that the vast majority of debt issued by Greece is governed by Greek law.¹⁸⁴

* * *

Section 2. Stabilization mechanisms

If parties choose to subject their agreement to the law of the State bound by the agreement, there is a risk that a modification of its legal regime by the State may negatively impact the contract. In the *Sapphire* arbitration, it was rightly noted in this respect that as the foreign company was bringing financial and technical assistance to Iran, involving considerable investment, it could be expected to be protected against “any legislative change which might alter the character of the contract”. The tribunal noted, however, that “this would not be guaranteed to them by the outright application of Iranian law, which it is within the power of the Iranian State to change”.¹⁸⁵

This explains why many agreements include a choice for another set of rules than the law of the State party to the agreement. Several possibilities exist, which have already been explored. It has, however, rapidly become clear that the choice of law provision has a limited impact as stabilizing factor. Practice has therefore developed other means of stabilizing the relationship. These mechanisms will be explored, together with renegotiation clauses which have attracted much attention in practice recently (§1).

Stabilization mechanisms may focus on the substance of the relationship between parties. One should, however, also take into account the stabilizing effect of arrangements made by parties in relation to dispute (§2). The last section of this survey will therefore cover arrangements made by parties for dispute resolution, which may also help to curtail the State's sovereign powers.

§ 1. Contractual Restrictions on Sovereign Privileges

Court of Appeal August 10, 2000 (Journal droit international, 116 (2001)).

183As a result of the Latin American debt crisis of the 1980's and the ensuing Brady plan, “bonds issued on the capital market replaced loans from commercial banks as the main form of private capital flows to emerging market economies” : see *Jill E. Fisch & Caroline M. Gentile*, 'Vultures or Vanguard?': The Role of Litigation in Sovereign Debt Restructuring', 53 *Emory L. J.* (1047), 1072-1073 (2004).

184According to Messrs. Buchheit and Gulati, “The salient feature of Greece's bond debt is that approximately 90% of the total is governed by Greek law. Only about €25 billion of the bond debt was issued under the law of another jurisdiction, and most of that was under English law.” : *L. C. Buchheit and M. Gulati* (fn. 5) 46.

185*Sapphire International Petroleum Ltd. v. National Iranian Oil Company* 35 *ILR* 136, 171 (1967).

Among the many devices included in contracts entered into by States, this survey will focus on three important mechanisms which help to curtail the important prerogatives enjoyed by States. In the first place, an attempt will be made to present stabilization mechanisms. The uncertainty surrounding the enforceability of such device has led in practice to the advent of renegotiation clauses. Finally, another contractual device will be presented, which is at the intersection of substance and procedure, i.e. waiver of sovereign immunity.

Whatever the name given by parties to their arrangement, it is obvious that such clauses are only useful in long term contracts of some magnitude. Investment agreements are a prime field where such clauses have been developed. On the contrary, one shot commercial agreements and other employment contracts concluded by States, are not a prime breeding ground for such arrangements.¹⁸⁶

1.1. *Classic stabilization mechanisms*

In long term contracts the use of so-called 'stabilization' clauses has become common, in particular in contracts concerning the exploration and exploitation of mineral resources such as oil and gas.¹⁸⁷ This may be explained by the concern of private investors of ensuring that the long term project in which large investment is made, will be insulated from changes in the legal environment. Although such clauses are often used,¹⁸⁸ many governments remain reluctant to accept such undertakings,¹⁸⁹ which have even been considered the remnant of a past colonial era.

¹⁸⁶In financial agreements concluded by States, the choice for another law than the law of the State is considered to constitute sufficient "insulation" protecting the contract from legal changes in the borrower's country (see *e.g. Ph. Wood* (fn. 167) at pp. 124-125).

¹⁸⁷See in general, *K. Nka Emeka*, 'Anchoring Stabilization Clauses in International Petroleum Contracts', 42(4) *Intl. Lawyer* 1317-1338 (2008); *W. Peter*, 'Les clauses de stabilisation dans les contrats d'Etat', *Intl. Bus. L. J.* 875-891 (1997); *P. D. Cameron*, 'Stability of Contract in the International Energy Industry', 27(3) *J. Energy & Natural Resources law* 305-332 (2009); *N. David*, 'Les clauses de stabilité dans les contrats pétroliers. Questions d'un praticien', *J.D.I.* 79-107 (1986); *J.-M. Loncle* and *D. Philibert-Pollez*, 'Stabilization Clauses in Investment Contracts', *Intl. Business L.J.* 267-282 (2009) and *B. Montembault*, 'The Stabilisation of State Contracts Using the Example of Oil Contracts – a Return of the Gods of Olympia', *Intl. Bus. L. J.* 593-643 (2003).

¹⁸⁸Waelde and Ndi have noted that while during much of the 1980's, stabilization clauses were reported to have lost their importance, these contractual mechanisms attracted renewed attention starting in the 1990's with the opening of the former state controlled economies of Eastern Europe and other parts of the world : *T. W. Waelde* and *G. Ndi*, 'Stabilizing International Investment Commitments : International Law Versus Contract Interpretation', 31 *Texas J. Intl. L.* 215, at p. 216-217 (1996). In some countries, use of stabilization clauses is expressly provided by the legislation relating to natural resources agreements. Article 18(m) of the 1996 Petroleum Code of Ivory Coast recite for example that «The petroleum contract in particular must set [...] the legal conditions concerning the applicable law, the stability of conditions, the cases of force majeure and the regulation of disagreements...».

¹⁸⁹The recent contracts concluded by the Libyan Oil Company do not include any stabilization clause, as noted by *P. de Vareilles-Sommières* and *A. Fekini* (fn. 32) at § 18. Not surprisingly, stabilization clauses are absent of the contracts concluded by oil rich, developed nations such as Norway and the United Kingdom. In other countries, the absence of stabilization clause may be explained by the relative strength of the national oil company, the stable political climate and the limited geological risk (such as in Saudi Arabia).

At its most basic form, a stabilization includes a choice for the law of one State – usually the state party to the contract – and an undertaking by parties that this law will be applied as it stands on the day the contract becomes effective.¹⁹⁰ As the Iran-US Claims Tribunal noted, a stabilization clause “in the usual meaning of the term ... normally refers to contract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the contract of any future alteration of this system”.¹⁹¹ Experience has shown that stabilization clauses may be very general, and concern the whole legal regime, or be tailored and focus on specific aspects. So it is that stabilization clauses may cover only specific matters, such as the tax and custom regulations. Sometimes, parties aim at a very specific issue, such as the legal capacity of the host State.¹⁹² The drafting could also adopt various perspectives : in some cases, the clause will provide that laws adopted after the contract becomes effective, will not apply to the relationship between parties. In another drafting, parties could agree that if the State adopts a new law which conflicts with rules in force when the agreement was concluded, these rules will have priority. Sometimes, the freezing of the national law will go hand in hand with a reference to international law, both elements reinforcing each other.¹⁹³

Beyond the mere stabilization *stricto sensu*, which aims to make the contract immune against what has been deemed to be the 'legislative risk', i.e. the modification of national laws and regulations with a direct impact on the contractual framework, practice has also developed so-called 'intangibility clause' (*clause d'intangibilité*).¹⁹⁴ These contract provisions aim not so much to freeze the legal framework, but rather to prevent the State from exercising its public authority as a state. A State could indeed rely on its public authority to unilaterally modify the contract as such (e.g. increasing the royalties to be paid by the private contract party) or, even more radically, by terminating the contract or depriving the contract party from the benefit of the project – by expropriation or nationalization. A contract provision stating e.g. that the contract

190E.g. the following provision, found in a 'Master Agreement' concluded between Ghana and a company called Volta Aluminium Comp. Ltd. (agreement dated Feb. 8, 1962): “Except as otherwise provided herein, this Agreement and the Scheduled Documents shall be construed and have effect in accordance with the law of Ghana as it exists at the 22nd day of January, one thousand nine hundred and sixty-two ...”.

191*Amoco International Finance Corp. v. Iran*, Award No. 310-56-3 (14 July 1987) 15 Iran-US C.T.R. 189, 239, § 166. These provisions are called '*Versteinerungsklausel*' by German scholars.

192In an agreement signed by Jamaica, the choice of law provision included a reference to the laws of Jamaica, with the following caveat : “... excluding also any law or rule which could throw doubt upon the authority or ability of the Government to enter into the Principal Agreement and this Agreement” (this agreement was considered in *Kaiser Bauxite v. Jamaica*, ICSID Award of July 6, 1975, 1 ICSID Reports 301).

193See e.g. the following provision found in the 1969 Agreement between Jamaica and Kaiser Bauxite : “... In determining any dispute submitted to arbitration ..., the Arbitration Tribunal shall apply the law of Jamaica and such rules of international law as may be applicable excluding however any enactments passed or brought into force in Jamaica subsequent to the date of this agreement which may modify or affect the rights of the parties under the Principal Agreement ... “ (this agreement was considered in *Kaiser Bauxite v. Jamaica*, ICSID Award of July 6, 1975, 1 ICSID Reports 301).

194The distinction has been pioneered by *P. Weil*, 'Les clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique', in *La communauté internationale. Mélanges offerts à Ch. Rousseau* (Pedone, 1974) 301-344. Such clauses are called '*Unberührbarkeitsklausel*' by German scholars.

“shall not be annulled, amended or modified in any respect, except by the mutual consent in writing of the parties thereto”¹⁹⁵ attempts to cover this type of modification.¹⁹⁶ More sophisticated contract language has become common, which tend to focus not so much on potential modification of the contract as such, but rather on the adverse effect any intervention by the State could have on the position of the private investor.¹⁹⁷

The distinction between these two types of clauses is not always clear.¹⁹⁸ Parties to the contract may include only a stabilization clause or go for a larger protection and touch upon both stabilization and intangibility. Some contract provisions appear to cover both aspects at once.¹⁹⁹ As in other matters, contract drafting is not always free from ambiguity.²⁰⁰ It may be more useful to accept that such clauses exist on a wide spectrum, from the narrow freezing clause to more elaborate versions which could be likened to force majeure clauses.²⁰¹

195Language taken by Faruque from a Production Sharing Contract between Indonesia and a private company (*A. Faruque*, 'Validity and Efficacy of Stabilisation Clauses. Legal Protection vs. Functional Value', 23(4) *J. Int. Arb.*, 317-336 at p. 319 (2006)).

196See another example : “The Republic further guarantees that no action, ordinance or other measure whatever by it or by any State service, authority, Municipality, Community or other agency will be taken and applied to the effect of jeopardizing, restricting or aggravating in any way or form contractor's rights and obligations under this Agreement” (provision taken from a Togolese petroleum concession contract concluded in the 1970's).

197E.g. “The State guarantees to the Contractor, for the duration of the Contract, the stability of the financial and economic conditions insofar as these conditions result from the Contract and from the regulations in force on the Effective Date. The Obligations resulting from the Contract shall not be aggravated and the general and overall equilibrium of the Contract shall not be affected in an important and lasting manner for the entire period of validity thereof” (taken from a production sharing agreement concluded by Gabon). Or the following language taken from the Mozambique PSC Model (2001) : «The Government shall not revoke or amend the Authorization granted to ENH to explore for and produce Petroleum from the contract Area without taking effective measures to ensure that such revocation or amendment does not affect the rights granted to the Contractor hereunder» (Art. 30.7(d)) and «The Government will not without the agreement of the contractor exercise its legislative authority to amend or modify the provisions of this Agreement and will not take or permit any of its political subdivisions, agencies and instrumentalities to take any administrative or other action to prevent or hinder the contractor from enjoying the rights accorded to it hereunder» (Art. 30.7(e)).

198It has been suggested to distinguish between clauses with a very wide range, encompassing all possible change in the applicable law of the host state, and clauses with a more limited range, which only concern specific legislation, such as labour law, tax law or administrative law (*A. Faruque* (fn. 192) at p. 318).

199See e.g. the following provision appearing in a contract concluded by Ghana : “The Government undertakes that no general or special legislation or administrative measure or act whatsoever of or emanating from Ghana or any Ghanaian authority shall annul, amend, revoke or modify the provisions or, or prevent or hinder the due and effective performance of the terms of the Scheduled Contracts or any of them [...]”.

200Some of the clauses are very ambiguous. Consider the following language taken from a contract which was considered in a dispute submitted to the Iran-US Claims Tribunal : “This Agreement shall be interpreted in accordance with the laws of Iran. The rights and obligations of the Parties shall be governed by and according to the provisions of this Agreement. The termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties” (the Tribunal noted that this provision was “remarkably – and perhaps intentionally – ambiguous” : *Mobil Oil Iran Inc., et al. v. Government of the Islamic Republic of Iran, et al.*, Award No. 311-74/76/81 (14 July 1987), 16 Iran-US C.T.R. 3, at p. 20).

201It has in fact been suggested to do away with stabilization clauses and attempt to cope with the problem of legislative change through a *force majeure* provision, which would allow to organize the

Whether narrow or large, stabilization mechanisms raise intriguing questions related both to their validity and enforceability.²⁰²

If one first turns to the validity of such clauses,²⁰³ questions arise, not all of which can be answered firmly. It is accepted that pure stabilization clauses are not effective under the Rome I Regulation.²⁰⁴ Under the Regulation, if the law of the State concerned is the governing law of the contract, then any subsequent change in the governing law will normally have to be given effect.²⁰⁵

The question, however, goes well beyond the Rome I Regulation. If one looks at international scholarship and practice, there is no firm consensus yet on the question. A stronger position may be taken for 'pure' stabilization mechanisms than intangibility provisions. As to the first ones, there are indeed indications that this type of provision is not, as such, invalid. Article 3 of the 1979 Resolution adopted by the Institute provides that the parties to a contract may “agree that domestic law provisions referred to in the contract shall be considered as being those in force at the time of conclusion of the contract”. There is, however, not a well developed practice of courts which has tried and tested such clauses.²⁰⁶

effects of the event on the contract : *M. Fontaine and F. de Ly*, Drafting International Contracts – An Analysis of Contract Clauses (Transnational Publishing, 2006) at p. 412. The effect is that the regime in case of change is that contractually agreed between parties for *force majeure* events. The drafting should ensure that proper care is given to the definition of the event triggering the force majeure clause. One possible drafting reads as follows : “For purposes of this Clause ... a material adverse governmental action shall occur if (I) the Government or any Relevant Authority takes action of any nature whatsoever, including the introduction or application of any law, decree or regulation, whether prior to or after the Date of the Concession Contract, or fails to carry out its obligations as prescribed by law, the principal effect of which is directly or indirectly borne by the Concession Company or by the Concession Company and other toll road concessionaires and only incidentally by other Persons...”.

202 Not to mention the possible consequence of stabilization clauses in the debate on the 'internationalization' of contracts concluded by States. The existence of such clause has indeed frequently been used in arbitral practice as an indication of the fact that the contract was 'internationalized' and thus removed from the strict framework of municipal law (see *e.g.* in the Texaco award – *Texaco* (fn. 8), 17 ILM 17, § 45 (1978). According to Leben, when a contract includes a stabilization clause, “*ce n'est pas le droit de l'Etat qui est applicable, mais un ensemble de règles concordant avec le droit de l'Etat à la date de la stabilisation, ensemble incorporé dans le contrat. Celui-ci est bien alors dans une situation d'extériorité par rapport à l'ordre juridique de l'Etat contractant et c'est donc l'Etat, personne de droit international, qui contracte avec l'investisseur. Il s'agit par conséquent, d'un contrat d'Etat au sens strict, contrat rattaché à l'ordre juridique international*” ((fn. 32) at p. 266, § 129).

203 From a classic private international law perspective, the validity of such contract provision must be ascertained on the basis of the *lex causae* – see *Ch. Reithmann and D. Martiny*, (fn. 69) at pp. 109, § 110.

204 A similar position was adopted under the 1980 Rome Convention, see Dicey & Morris on the Conflict of Laws (Sweet & Maxwell, 2000, 13th ed.) at p. 1223, § 32-080.

205 According to Dicey, Morris & Collins (Dicey, Morris & Collins on the Conflict of Laws (Sweet & Maxwell, 2006, 14th ed.) at p. 1568, § 32-082) and *Ch. Reithmann and D. Martiny* (ed.) (fn. 69) at pp. 110, § 111. In its Resolution adopted in 1991 (Basel Session), the International Law Institute indicated that a freezing clause included in a contract between private parties would only have as effect that “ the provisions of that law shall be applied as substantive provisions incorporated in the contract”.

206 If the question is put to a national court, it is far from excluded that such court would come to the conclusion that a stabilization clause is not valid as a matter of domestic law, *e.g.* because of

The matter is more difficult for intangibility mechanisms. It has sometimes been suggested that such clauses are invalid under international law, because they would contravene the principle of permanent sovereignty over natural resources.²⁰⁷ The argument is not convincing : even assuming that the principle of permanent sovereignty has assumed the character of a *jus cogens* rule,²⁰⁸ this does not seem to impair the State's freedom to limit its own action by a contract it freely chooses to enter into.²⁰⁹ Likewise, the idea that stabilization mechanisms should not be enforced as they limit a State's legislative or sovereign power, falls short of convincing. Such mechanisms are indeed only limited renunciations by States, not a full waiver. Further, it is difficult to see why a State could not voluntarily agree to limit, for a certain duration, the impact its actions could have on a private contract. As stabilization mechanisms are not imposed by outside forces, but self-imposed, temporary limitations on the sovereignty of the host State, this reduces the weight of the sovereignty argument. A less radical version of the argument is that the restriction imposed by a stabilization clause does not deprive the State of the power to put an end or amend the agreement, but would only need to be taken into account when deciding whether to grant the investor some compensation.²¹⁰ The radical questioning of the

constitutional constraints on the possibility for the State to renounce the use of its sovereign power to legislate. See the explanations of *T. W. Waelde* and *G. Ndi* (fn. 185), at p. 238-240 (1996). Sornarajah has argued that it “may not be possible, as a matter of constitutional theory, for a state to bind itself by a contract made with a private party, particularly a foreign party, to fetter its legislative power. It is trite law that a legislature is not bound by its own legislation and has the power to change it. That being so, it cannot be bound by a provision in a simple contract” (*M. Sornarajah* (fn. 16) at pp. 407-408).

207See most notably *e.g. M. Sornarajah* (fn. 24) at pp. 210-211 : referring to the principle of permanent sovereignty of States over natural resources, as enshrined in the various resolutions adopted by the General Assembly of the UN, Mr Sornarajah wrote that “... a state cannot validly agree not to change the terms of the agreement on the exploitation of natural resources or to submit disputes to a foreign arbitral tribunal”..

208See however, for the potential impact of other *ius cogens* rules such as the prohibition of forced labor or certain fundamental principles protecting the environment, *A. Giardina*, 'Clauses de stabilisation et clauses d'arbitrage : vers l'assouplissement de leur effet obligatoire?', *Revue de l'arbitrage* 646, 652-655 (2003).

209It is on this basis that the arbitral tribunal refused to consider in *Aminoil* that the various stabilization clauses included in the Concessions Deeds were invalid. After giving proper consideration to the Kuwaiti Constitution and the principle of sovereignty over natural resources, the tribunal concluded that these elements did not prevent a State from granting stabilization by contract (*American Independent Oil Company Inc (Aminoil) v Government of the State of Kuwait* 21 ILM 976, 2012, § 90 (1982)). Looking specifically at the UN Resolutions on natural resources, the Tribunal held that “Even if some of their provisions can be regarded as codifying rules that reflect international practice, it would not be possible from this to deduce the existence of a rule of international law prohibiting a State from undertaking not to proceed to a nationalisation during a limited period of time”. And the Tribunal added that “it may indeed well be eminently useful that 'host' States should, if they so desire, be able to pledge themselves not to nationalise given foreign undertakings within a limited period” (21 ILM 976, 1022, § 90).

210 See *e.g. E. Jimenez de Arechaga* (fn. 90), at pp. 307-308 (according to Jimenez de Arechaga, stabilization clauses do not deprive the host State of the power to put an end to the contract, because this would run contrary to the fundamental concept and purpose of the permanent sovereignty of the State over its natural resources. Such clauses may however, be considered when deciding upon the compensation : a violation of such clause could “give rise to a special right of compensation; the amount of indemnity would have to be much higher than in normal cases since the existence of such a clause constitutes a most pertinent circumstance which must be taken into account in determining the appropriate compensation”).

validity of stabilization and intangibility agreements which was typical of scholarship in the 1980's, has today been replaced by narrower criticism voiced against these mechanisms by civil society, mainly based on fundamental rights.²¹¹

Arbitral practice seems in any case to be overwhelmingly in favor of the validity of stabilization mechanisms.²¹² Although some tribunals may have been reluctant to enforce such mechanisms to their full extent, there has been no significant instance where such agreement has been found invalid.²¹³ In the *Texaco Award*, the arbitrator noted that “There is no doubt that in the exercise of its sovereignty, a State has the power to make international commitments [...]”²¹⁴ and later added that “There is no value to dwell at any great length on the existence and value of the principle under which a State may within the framework of its sovereignty, undertake international commitments with respect to a private party. This rule results from the discretionary competence of the State in this area”.²¹⁵ In *Agip*, the tribunal likewise showed great deference towards several stabilization clauses protecting the Italian investor against changes brought to the Congolese legislation which would alter the company set up locally by the investor.²¹⁶ In *Aminoil*, the Tribunal, which was not particularly sympathetic to stabilization clause and adopted a very narrow construction of the provision at hand, nevertheless noted that “No doubt contractual limitation on the State's right to nationalize are juridically possible”.²¹⁷ More recently, an ICSID tribunal had to deal with the claim by an investor who argued that Peru had breached an undertaking granting it stability throughout the first ten years of a major investment in exploitation of natural resources.²¹⁸ The case turned on the question whether the stabilization undertaking granted the investor a substantive right of non-

211See e.g. 'Stabilization Clauses and Human Rights' (a report by the International Finance Corporation and the UN Special Representative to the Secretary General on Business and Human Rights - May 2009) – in which the question is raised whether stabilization clauses may create obstacles to applying new social and environmental legislation to investment projects in the host state.

212Schreuer notes that despite some debate, “the overwhelming weight of opinion is that these clauses are binding and must be upheld by arbitral tribunals” (*C. H. Schreuer* (fn. 51) at p. 591-592).

213It has been said, however, that arbitral practice does not offer a sufficient basis to support any firm conclusion as most arbitral awards concern older disputes which do not reflect current practice – see *M. Sornarajah* (fn. 24) at pp. 200-206 and *M. Sornarajah* (fn. 16) at pp. 417-429.

214*Texaco* (fn. 8), 17 ILM 22, § 64 (1978)

215*Texaco* (fn. 8), 17 ILM 23, § 66 (1978). In *Aramco*, the arbitral tribunal found that “By reasons of its very sovereignty within its territorial domain, the State possesses the legal powers to grant rights [by] which it forbids itself to withdraw before the end of the concession, with the reservation of the Clauses of the Concession Agreement relating to its revocation. Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights” (*Saudi Arabia v. Arabian American Oil Company (Aramco)* 27 ILR 117, 168 (1963)).

216*Agip v. Congo*, ICSID Award, 1 ICSID Reports 321-322, § 86-88. See also *Letco v. Liberia*, ICSID Award, March 31, 1986, 2 ICSID Reports 346, 368 (“This clause, commonly referred to as a 'Stabilization Clause', is commonly found in long-term development contracts and ... is meant to avoid the arbitrary actions of the contracting government. This clause must be respected, especially in this type of agreement. Otherwise, the contracting government may easily avoid its contractual obligations by legislation”).

217*American Indep. Oil Company (Aminoil) v. State of Kuwait* 21(5) ILM 976 at p. 1023, § 95 (1982). The tribunal added, however, that the clause at hand did not cover the case of nationalization.

218*Aguaytia Energy LLC v. Republic of Peru* (ICSID Award Case No. Arb/06/13).

discrimination.²¹⁹ It is noteworthy that at no point during the proceedings the validity of the stabilization undertaking was called in question.²²⁰ The Tribunal noted that “stability undertakings, such as those entered into by [Peru] in the Agreement ... are of undoubted importance for investors. There is no need here to dwell on the importance for investors, obviously including the Claimant, of the stability guarantees given in the field of taxes, foreign currency, free remittance of profits and capital and exchange rates”.²²¹

It is one thing to treat stabilization clauses as valid. Quite another thing is to inquire about the *enforceability* of stabilization mechanisms.²²² Various elements must be taken into account, which, when taken together, appear to limit the enforceability of such mechanisms. In the first place, account should be taken of the identity of the parties bound by the mechanism. Whereas stabilization clauses included in older agreements were undertaken by States, more recent contractual practice has moved towards stabilization commitments negotiated and undertaken by state companies rather than by states,²²³ as most states have created a national oil company or agency entrusted with the exploitation of oil resources.²²⁴ When one looks at a classic stabilization mechanism, this has consequence on the design of the clause. If the agreement is concluded not by the State, but by a state entity, or by a private company, it does not help very much to provide that the State will not modify the relevant legal

219The investor claimed that Peru had offered a significantly more advantageous investment model to other investors even though the contract had guaranteed it that its investment would be treated at least as well as any other investor operating in the same economic sector.

220The stabilization undertaking was quite elaborate. It was granted to the investor on the basis of specific legislation authorizing Peruvian authorities to grant stabilization guarantees to private investor – i.e. the 'Legislative Decree 662 Approving the Juridical Stability System for Foreign Investment'. The effect of this regime is that specific legal regimes are frozen for a specific period of time. According to the law, the stabilized laws will remain applicable beyond their actual term of effectiveness, regardless of whether such laws are subsequently modified or repealed, or whether any amendments are more or less favorable to the affected investors. Among the guarantees offered to the investor, there was an undertaking in relation to the applicable tax regime, which was drafted as follows : “Pursuant to the Agreement and throughout its effectiveness, the STATE undertakes to guarantee juridical stability for AGUAYTIA in connection with the investment ... under the terms set forth below: 1. Stability of the tax system applicable to the Income Tax (VAT) as provided for in item a), article 10, of Legislative Decree 662, effective as of the date of execution hereof....”.

221ICSID Award Case No. Arb/06/13, pp. 53-54, § 95. The Tribunal also added that “Also, the “stability of the right to non-discrimination” itself is of obvious importance for a foreign investor. It freezes the laws, rules and regulations applicable to it, as they were in existence at the time the Agreement was concluded. This means that no new law may be passed which would state that certain rules regarding non-discrimination would no longer apply to the Claimant. It especially guaranteed the constitutional right to equality before the law”. See for a comment, *L. Cotula*, 'Pushing the Boundaries vs. Striking a Balance : the Scope and Interpretation of Stabilization Clauses in the Light of the Duke v. Peru Award', 11(1) *J. World Investment and Trade* 27-43 (2010). See also the short reference to stabilization clauses in the *CMS Gas Transmission Co v Argentina Republic* award (ICSID Case No/ ARN/01/8, 2005), para. 151 and 302-303.

222See in general *P. D. Cameron*, *International energy investment law : the pursuit of stability* (OUP, 2010), at pp. 59-101.

223In the meantime, practice had also changed as to the nature of the agreement and the old concession agreements were replaced by Exploration and Production Agreements and also Production Sharing Agreements.

224For an overview of the situation in Latin America, see *L. E. Cuervo*, 'Latin American Petroleum Contracts in the Era of Globalization', in *International Oil and Gas Transactions in Latin America* (R. Colmener and D. Enriquez (eds.), Porrua, 2011, 3-32.

framework, even if the state company is fully controlled by the State.²²⁵ In order to cope with this, stabilization clauses have been refined. Instead of preventing the State from modifying its laws, current contract practice seeks to provide a solution for allocating between parties the financial consequences of the legal and political risk.²²⁶ This is consonant with the move towards renegotiation provisions (see hereinafter section 1.2 on renegotiation provisions).

Further, the drafting of the clause may create some difficulty. This may be illustrated by reference to the clause which was discussed in the *Amoco* case. Section 30(2) of the contract concluded between an American company and the Iranian national oil company provided that “The provision of any current laws and regulations which may be wholly or partly inconsistent with this Agreement shall, to the extent of any such inconsistency, be of no effect in respect of the provisions of this Agreement”. In what has been said to be a “microscopic linguistic test”,²²⁷ the Tribunal held that this provision only applied “to the provisions of any current laws and regulations”, and did not protect against future alterations of the legal framework.²²⁸ In addition, if a State commits to freeze the law chosen by parties, it may be wondered whether this commitment applies generally or is limited to those legal rules directly relevant for the contract. The law chosen by parties to govern their agreement, is indeed only relevant for those issues which may be deemed to be contractual.²²⁹ Such issues as the tax regime, the labor provisions or the regulations of land use, are wholly unimpaired by the law chosen, since these questions do not fall within the purview of the parties' choice. It may therefore be that the stabilizing effect of a freezing clause, if not properly drafted, is rather limited.

If one sets aside difficulties linked to the drafting, there are some more fundamental questions arising in connection with the enforceability of stabilization agreements. The key question is indeed whether a State which has accepted such a stabilization mechanism, is bound not to change its laws. It appears to be accepted that effect of such clauses is not to tie up the State so as to prevent it from modifying its legislation. Rather, the stabilization clause, which aims to limit the legislative competence of the State or to limit the possibility for the state to exercise its public authority, thereby impacting the contractual framework, cannot prevent the State from exercising its public authority. The net effect of such clauses is indeed not so much to prevent a State from acting, but to make sure that any subsequent legislation adopted by the

225See, again, the *Amoco* award, in which the Tribunal came to the conclusion that the language of the contract did not impose an obligation on the Republic of Iran, as it was not a party to the agreement - *Amoco International Finance Corp. v. Iran et al.*, Award No. 310-56-3 (14 July 1987) 15 Iran-US C.T.R. 189, at pp. 240-241, §§ 171-173. See recently the argument in that sense by *D.-E. Lakehal* (fn. 32) at p. 511.

226A clause could provide that if there is an increase in the tax obligations of the foreign company, lump sum damages will be afforded to the company. An alternative is to provide that the company will benefit from a tax exemption.

227A. F. M. Maniruzzaman, 'Some Reflections on Stabilisation Techniques in International Petroleum, Gas and Mineral Agreements', [2005] *Intl. Energy L. & Taxation Rev.* 96, at p. 98.

228*Amoco International Finance Corp. v. Iran*, Award No. 310-56-3 (14 July 1987) 15 Iran-US C.T.R. 189, 239 at para. 166. In light of this ruling Maniruzzaman advises to cover in a stabilization clause “both present and future changes in law against which the guarantee is intended” (*A. F. M. Maniruzzaman*, 'Drafting Stabilisation Clauses in International Energy Contracts : Some Pitfalls for the Unwary', *Oil, Gas & Energy Law Int.*, 2007, vol. 5-2).

229See e.g. the list in Art. 12 of the Rome I Regulation.

State, will not be applicable to the contract. From the perspective of the sanctity of contract, there is a difference between the two positions.

This is what Tribunal stated in the *Agip* arbitration. According to the tribunal, “stabilisation clauses, which were freely entered into by the Government, do not affect the principle of its sovereign legislative and regulatory powers since it retains both with respect to those, whether nationals or foreigners, with whom the Government has not entered into such undertakings [...]”.²³⁰ Rather, the Tribunal noted that such “changes in the legislative and regulatory arrangements stipulated in the agreement simply cannot be invoked against the other contracting party”.²³¹ It would therefore be deceitful to imagine that a State could be prevented from modifying its laws or administrative regulations because it has agreed to a stabilization clause.²³² As Verhoeven indicated, “*quel que soit le système juridique, légal ou conventionnel applicable, l'autorité brutale de l'Etat 'souverain' est un fait qu'il est vain de prétendre circonscrire légalement, dans l'état présent de structuration du milieu international*”.²³³

This may explain why most stabilization clauses in fact do not prevent the State from modifying its laws. The clauses included in contracts rather aim to ensure that future modifications will not impact the content of the relationship between the State and the company. In other words, the State does not waive its sovereign right to legislate. It only guarantees that future changes to the legislation will not apply to the contract at hand and will not be enforceable vis-à-vis the contracting party. In practice, the clause has the effect of incorporating the law chosen in the contract as an “immutable code of law”.²³⁴ The law chosen will therefore not change, whatever amendments are made by the State to its law after the contract has been concluded. The problem is, however, that a State may – although this is a radical move – introduce a law which avoids such

230 *AGIP v. Popular Republic of the Congo* ICSID Case No. ARB/77/1, 21 ILM 726 (1982), at p. 735-736, § 86.

231 *AGIP v. Popular Republic of the Congo* ICSID Case No. ARB/77/1, 21 ILM 726, at p. 735-736, § 86 (1982). In this case, the Government of Congo had accepted in an agreement signed with the Italian company AGIP, not to apply certain laws and decrees which would reduce or alter the status as a limited liability company under private law of a company initially owned by AGIP, who had been forced to sell 50 % of its shares to the government. Another provision of the agreement concluded between AGIP and the government provided that if changes were made in the law concerning companies, “appropriate measures will be taken to ensure that such changes do not affect the structure and composition of the organs of the Company”. In 1975, the government adopted a decree nationalizing the company and ordering the transfer of all shares to a state owned company. See also the holding of Prof. Dupuy in the *Texaco* case : Prof. Dupuy held that the stabilization clause underwritten by Libya “does not affect in principle the legislative and regulatory sovereignty of Libya. Libya reserves all its prerogatives to issue laws and regulations in the field of petroleum activities in respect of national or foreign persons with which it has not undertaken such a commitment” (*Texaco* (fn. 8), 17 ILM 24, § 71 (1978)). The only impact of the clause according to Dupuy, was that it “only makes such acts invalid as far as the contracting parties are concerned – with respect to whom this commitment has been undertaken – during the period of applicability of the Deeds of Concession” (idem).

232 According to Jimenez de Arechaga, stabilization clauses do not achieve the purpose of stabilization which is pursued “because international law does not forbid a nationalization, nor the resulting cancellation of the contract, provided appropriate compensation is paid” (*E. Jimenez de Arechaga* (fn. 90), at pp. 308).

233 *J. Verhoeven* (fn. 36), at p. 139, § 11.

234 *N. Blackaby and C. Partasides* (fn. 93) at p. 201, § 3.116.

freezing clause.²³⁵

What about intangibility clauses? Do they prevent the State from nationalizing the operations? The views differ notably on this issue. In the *Texaco* case, Prof. Dupuy held that the nationalization by Libya was a breach of the intangibility clause and hence constituted an illegal act under international law.²³⁶ However, in another arbitration which arose out of the same nationalization by the Libyan government, the arbitrator did not regard the intangibility clause as an obstacle to the nationalization by the government.²³⁷ Likewise, in the *Aminoil* arbitration, the tribunal held that the intangibility clause did not prevent the nationalization by Kuwait.²³⁸ After holding that such clauses limiting the State's right to nationalize are in principle valid, the Tribunal added that "... what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for [...] and it is to be expected that it should only cover a relatively limited period".²³⁹ This seems to indicate that the fettering of the legislative sovereignty of a State could in other words only be tolerated if it was limited to a reasonable period of time. If there is still some uncertainty as to the precise effects of an intangibility agreement under international

235 Presumably, this law would be internationally mandatory. See in general *T.C. Hartley*, 'Mandatory Rules in International Contracts : the Common Law Approach', Collected courses of the Hague Academy, vol. 266, 337 ff. (1997).

236 Clause 16 of the Deed of Concession provided that "The Government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by this concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent". After examining the status under international law of the right of States to nationalize (*Texaco* (fn. 8), 17 ILM 21-22, §§ 58-61 (1978)). Prof. Dupuy reviewed the impact on this right of the commitment made by Libya in an 'internationalized' contract which had been 'stabilized' and concluded that "in respect of the international law of contracts, a nationalization cannot prevail over an internationalized contract containing stabilization clauses, entered into between a State and a foreign private company" (*Texaco* (fn. 8), 17 ILM 25, § 73 (1978)). The award has been criticized on numerous grounds, among which the decision to grant the *restitutio in integrum* (on this issue, see *J. Verhoeven* (fn. 36) pp. 226-228, §§ 19-22).

237 *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic* 62 ILR 140, 182-196 (1982). It is noteworthy that in his arbitral award, the arbitrator did not consider the stabilization clause when reviewing the "legal qualifications and implications of Liamco's nationalizations" (62 ILR 140, 193-196; 20 ILM 1, 58-61 (1981)). It is not clear whether Liamco had based its case on the stabilization clause. In *BP Exploration Co (Libya) v Libyan Arab Republic*, the sole arbitrator did not elaborate on the stabilization clause, holding that the actions of Libya constituted "a fundamental breach of the BP Concession as they amount to a total repudiation of the agreement and the obligations of the Respondent thereunder" (53 ILR 297, 329 (1979)).

238 The clause read as follows : "The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interests of both parties to make certain alterations, deletions or additions to this Agreement".

239 *American Indep. Oil Company (Aminoil) v. State of Kuwait* 21(5) ILM 976 at p. 1023, § 95 (1982). The tribunal went on to find that the stabilization clause agreed by parties, did not cover the case of nationalization since that situation had not been expressly mentioned in the clause. According to the tribunal, such a stipulation could not be presumed to be included in the contract. This holding has been severely criticized, not the least by Sir Fitzmaurice in his dissenting opinion. According to Sir Fitzmaurice, the stabilization clause rendered the expropriate unlawful (separate opinion, 21(5) ILM 976 pp. 1049-1052, paras. 19-30). Mann has written in respect of the majority's decision that "We have long known, of course, that there is nothing for which lawyers cannot find words, but there can be few instances of a more blatant distortion of plain language" ('The Aminoil Arbitration', reproduced in *Further Studies in International Law* (Clarendon Press 1990), at p. 258).

arbitration practice, it seems that arbitral tribunals will exercise some restraint when considering these arrangements.

Stabilization clause may be more efficient when coupled with arbitration agreement, which attempts to ensure that disputes will not be submitted to the courts of the State concerned. Certainly, if the contract provides that disputes must be submitted to these courts, “there is little likelihood that the stabilisation clause will have any effect”.²⁴⁰ But even if a choice is made arbitration, questions remain about the practical effect of stabilization agreements. At most, it seems that the effect of such clauses will not be to prevent the sovereign state from interfering with the contract, but rather to “mitigate the sovereign/political risks”.²⁴¹ Likewise, the strength of a stabilization clause may be reinforced if it is linked to a choice for international law or the general principles of international law, rather than to some municipal law.²⁴² However, this begs the question of whether there is a foundation in international law granting specific protection to stabilization clauses.²⁴³

To sum up, stabilization clauses, whatever their drafting, seem to have a rather limited effect.²⁴⁴ As has been said, “it cannot be contended in the light of recent arbitral case law and the majority of juristic views that there is any totally effective way to prevent the host state from interfering with stabilisation clauses for a very long time, no matter how carefully such clauses are drafted and crafted”.²⁴⁵ There are nonetheless two main effects of the clause. One effect of such clauses is their promotional virtue : a State committing to stabilization or intangible clauses, creates an encouragement for foreign investment. It may well be that at the end of the day, such clauses afford the investor little effective protection. It remains that a State stands to gain by agreeing to such clauses, which appear to limit its sovereign power. As has been underlined, “the presence of a stabilisation clause in a petroleum contract can act as a psychological boost to give confidence to investors at the initial stage of the investment”.²⁴⁶ This could also explain why some States have included similar language in their investment laws.²⁴⁷

Further, the main effect of such stabilization clause may well be not so much to protect the foreign company against any intervention by the State, but to ensure that if such change occurs, proper compensation will be granted. This view was also adopted

240A. *F. M. Maniruzzaman* (fn. 224) at p. 100. This is in particular so if the contract is governed by the law of the host State.

241A. *F. M. Maniruzzaman* (fn. 224) at p. 100.

242On the link between the stabilization clause and the choice of law, see Faruque, at pp. 332-334.

243A view which is challenged, see *e.g. M. Sornarajah* (fn. 16), at pp. 409-410.

244For a recent overview, see *A. Crockett*, 'Stabilisation Clauses and Sustainable Development : Drafting for the Future', in *Evolution in investment treaty law and arbitration* (C. Brown et al. (eds.), Cambridge University Press, 2011), 516-538. Alvik has also concluded that “practice relating to stabilisation clauses exhibits a tendency more or less evidently responding to the concerns underlying the principle of permanent sovereignty, conceived as a minimum requirement of inalienability” : *I. Alvik* (fn. 17), 258.

245A. *F. M. Maniruzzaman* (fn. 224) at p. 100. One commentator went further and referred to the 'myth' of stabilization clauses : *S. H. Chatterjee*, 'The Stabilisation Clause Myth in Investment Agreements', *Journ. Int. Arb.* 97-112 (1988).

246A. *Faruque* (fn. 192) at p. 323.

247See *e.g.* Article 17(2) of the Federal Law of Russia concerning production sharing agreement (Federal Law 225-FZ, as amended).

by the arbitral tribunal in *Aminoil* : after having refused to consider that the stabilization clause included in the agreements prohibited arbitration, the tribunal noted that “these provisions are far from having lost all their value and efficacy on that account since, by impliedly requiring that nationalization shall not have any confiscatory character, they re-inforce the necessity of for a proper indemnification as a condition of it”²⁴⁸ The question then arises whether additional compensation will be granted in case of nationalization because there has been a breach of a stabilization clause. It has been contented that the presence of a stabilization clause could give rise to a “special right”²⁴⁹ to compensation or even form the basis of granting additional compensation to the investor.²⁵⁰ Arbitral practice appears, however, to be uncertain as to this effect of stabilization agreements. While in the *Texaco* case, the stabilization agreement may have been one of the reasons which encouraged the arbitrator to grant the *restitutio in integrum*,²⁵¹ the presence of a stabilization mechanism did not prove decisive in other cases.²⁵²

1.2 Renegotiation and adaptation clauses

In light of the limited impact of intangible and stabilization clauses, practice has shifted from a pure prohibition imposed on the government from enacting subsequent legislation or modifying the agreement, to a more subtle drafting : the contract attempts to mitigate the adverse impact of the State's action on the economic balance of the contract. This is apparent in the following contract provision:

“If after the effective date, existing laws and regulations are amended or annulled or new laws and regulations are introduced in Vietnam [...] in any case adversely affecting the economic rights or benefits expected by the contractor from this contract [...] the parties shall meet and consult promptly with each other and make such changes to this contract as are necessary both to maintain

248 *American Indep. Oil Company (Aminoil) v. State of Kuwait* 21(5) ILM 976 at p. 1023, § 96 (1982).

249 *E. Jimenez de Arechaga* (fn. 90) at p. 307.

250 *E.g. O. Schachter*, 'International Law in Theory and Practice. General Course in Public International Law', 178 Collected Courses of the Hague Academy, 9, at p. 314 (1982) - “If the State is found to have violated the contract by legislative changes contravening the stabilization provisions, the foreign firm would probably be entitled to higher indemnity because of that clause”. Jimenez wrote that the existence of a stabilization clause would lead to granting an amount of indemnity “much higher than in normal cases since the existence of such a clause constitutes a most pertinent circumstance which must be taken into account in determining the appropriate compensation” : *E. Jimenez de Arechaga* (n. 90) at p. 307.

251 The award does not appear to contain any reference to the stabilization clause in the section discussing the opportunity to grant the *restitutio in integrum* (*Texaco* (fn. 8), 17 ILM 36-37, §§ 110-112 (1978)).

252 *In Liamco v Libya*, the tribunal does not appear to have considered the existence of a stabilization mechanisms as one of the factor leading to the award of “equitable compensation” (see 62 ILR 145, 200-216). In *Aminoil*, the tribunal considered that the existence of a stabilization mechanism was one of the factors justifying the taking into account of the legitimate expectations of the investors (21 ILM 976, 1037, at § 159 (1982) – the tribunal held that “whereas the contract of concession did not prohibit nationalisation, the stabilization clauses inserted in it [...] were nevertheless not devoid of all consequences, for they prohibited any measure that would have had a confiscatory character. These clauses created for the concessionaire a legitimate expectation that must be taken into account. In this context, they dissipate all doubts as to the strength of the respect due to the contractual equilibrium”.

the Contractor's rights, benefits and interests hereunder and to ensure that any revenues, incomes or profits [...] derive or to be derived under this contract [...] shall not in any way be diminished as a result of such changes".²⁵³

These clauses – also called 'economic equilibrium clauses – do not attempt to limit in any way the possibility for the State to modify its laws or otherwise interfere in long term contracts. Rather, the purpose of these clauses is to ensure that whatever modification is made by the State will not deprive the private party of the original economic balance which the contract was based on.²⁵⁴ The 'economic stabilization clause' or renegotiation clause aim at the future and not the past : they seek to remedy a change which has occurred by focusing on modification of the contract to take into account the change, rather than to prevent the change from occurring.

As with other stabilization clauses, there is considerable variety of renegotiation or adaptation clauses used in practice.²⁵⁵ Some of the older clauses only aimed at a single element and did not provide much details on the process of renegotiation.²⁵⁶ Modern adaptation clauses are much more sophisticated. They generally include more details on issues such as the triggering event – when should negotiations took place -, the content of the obligation to negotiate²⁵⁷ and, most importantly, the consequences of a failure by parties to reach an agreement.²⁵⁸ One possible answer to the latter issue is to refer parties to the dispute resolution method selected in the agreement, and most commonly arbitration, when they fail to reach an agreement on the renegotiation.²⁵⁹ One key aspect of the drafting process is to specify whether the clause aims to guarantee that the private investor is entitled to a restoration of the original contractual equilibrium or if the investor should accommodate a change which takes into account the public interests pursued by the state party.

In fact, even without such clause, it is not uncommon that long term agreements are renegotiated even though the contract does not include specific clauses providing for renegotiation or adaptation.²⁶⁰ In this context, the question will arise whether one

253 Vietnam Model Production Sharing Contract 2004, art. 17.1.

254 In this sense, a renegotiation clause will in general not be included next to a stabilization clause.

However, the two provisions could coexist, provided adequate care is taken in the drafting thereof.

255 See the overview provided by Z.A. Al Qurashi, 'Renegotiation of International Petroleum Agreements' 22(4) J. International Arbitration 261-300 (2005).

256 The renegotiation clause included in the agreement between Kuwait and Aminoil is a good example. It only aimed to allow Kuwait to request an increase in the benefits it received from Aminoil, following changes made to other concession agreements which granted Kuwait such increased benefits. Several rounds of negotiations took place between Kuwait and Aminoil on the basis of this provision, which led to several substantial modifications of the contract provisions – see the detailed account in *American Indep. Oil Company (Aminoil) v. State of Kuwait* 21(5) ILM 976, 991-998 (1982).

257 As well as the obligations of the parties regarding further performance of the contract during the negotiations.

258 On all these issues, see in general the observations (not limited to state contracts) of P. Accaoui *Lorfin*, *La renégociation des contrats internationaux* (Bruylant, 2011).

259 This is a different position than when the arbitrator is seized of a dispute concerning the proper application of the renegotiation mechanism – e.g. when one of the parties argues that the conditions set in the contract to trigger the obligation to renegotiate are met and the other party challenges this assertion.

260 See e.g. the case of the *Paiton I* power plant where renegotiation took place with the Indonesian authorities in the wake of the crisis which led to the end of the Suharto regime – as reported by S.

party could find in domestic or international law some support for the claim that the contract must be renegotiated. In most cases, the issue of adaptation will arise when the contract is still being performed. In some cases, the adaptation could even take place after the contract has been terminated. In both cases, one of the key issues arising in this respect is the role the arbitral tribunal could possibly play in the renegotiation process.²⁶¹

1.3 Waiver of immunity

Stabilization clauses are not the only mechanism which may be used to provide additional comfort to the private partner teaming up with a State. There is another very important instrument which is widely used in practice to reach the same goal : a contract provision whereby the State agrees to waive the sovereign immunity.²⁶²

Such waivers are very frequent in international loan agreements and bond issues, where they have become standard fixture.²⁶³ As explained by Wood, the practice in financial agreements where a State or state entity is party, is that the documentation includes an elaborate waiver of immunity, which covers both the immunity from jurisdiction and immunity from enforcement.²⁶⁴ Strictly speaking, a waiver of immunity may not be necessary in financial transactions, as States may not enjoy sovereign immunity in respect of these transactions.²⁶⁵ The practice is, however, well established.²⁶⁶ The ISDA master agreement includes a full waiver of sovereign

Kröll, 'The Renegotiation and Adaptation of Investment Contracts', in *Arbitrating Foreign Investment Disputes* (N. Horn (ed.), Kluwer, 2004), 425-470, at pp. 427-428.

261And more specifically whether the arbitrator is entitled to 'rewrite' the contract. See e.g. *P. Bernardini*, 'The Renegotiation of the Investment Contract', 13(2) *ICSID Rev.* 411, 420-425 (1998).

262In general, *G. R. Delaume*, 'Contractual Waivers of Immunity : Some Practical Considerations', 5 *ICSID Rev.* 322 (1990).

263See e.g. *Libra Bank Ltd. v. Banco Nacional de Costa Rica S.A.*, 676 F.2d 47, 49 (2d Cir. 1982) (the court found that Banco Nacional, which was an instrumentality of the government of Costa Rica, had waived "any right or immunity from legal proceedings including suit judgment and execution on grounds of sovereignty which it or its property may now or hereafter enjoy"); *EM Ltd. v. The Republic of Argentina*, 382 F.2d 291 (2004) (the Second Circuit held that Argentina had waived its sovereign immunity in the documentation of the bond issue in dispute). This practice has been confirmed notably by *J. A. Guria-Trevino*, in 'Negotiations with Transnational Banks : A Sovereign Borrower's Perspective', reproduced in *International Borrowing. Negotiating and Structuring International Debt Transactions* (D. D. Bradlow (ed.), 2nd ed., Martinus Nijhoff/ILI, 1986), 389 at 395.

264*Ph. Wood* (fn. 98) at p. 573, § 24-038.

265In the United Kingdom, section 3(3)(b) of the 1978 *State Immunities Act* provides that « (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation » constitute a « commercial transaction » for which a State does not enjoy immunity. In the United States, the FSIA provides an exception to the sovereign immunity for 'commercial activity' undertaken by the foreign State (section 1605 (a) (2)). In order to conclude that the issuance of debt instruments by a State was analogous to a private commercial transaction, the Supreme Court decided in *Republic of Argentina v. Weltover* (504 U.S. 607) that "...when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA...". Justice Scalia explained that "there is ... nothing distinctive about the state's assumption of debt (other than perhaps its purpose) that would cause it always to be classified as *jure imperii*..." (504 U.S. at 617).

266In order to accommodate the diversity of opinions on the extent of sovereign immunity, the waiver

immunity.²⁶⁷ This may reflect the perception by lenders that the lack of uniformity of immunity rules and the significant variations which may affect such rules warrant an express contractual protection.²⁶⁸ Some States will, however, not accept a waiver for attachment prior to judgment or in aid of execution.²⁶⁹

In other contexts, the State is less likely to accept a waiver of immunity. This is the case for concession contracts.²⁷⁰ In yet other contracts, the existence of a waiver depends on the bargaining power of the parties. When a waiver of immunity is included, it may be drafted indirectly, with language indicating that the object and the purpose of the contract constitute 'commercial and private acts'.²⁷¹ This comports with the practice in many jurisdiction to exclude any claim for immunity by a sovereign when the dispute concerns commercial or other private transactions.

The validity of a waiver of immunity is not challenged. It is recognized both by national legislation²⁷² and by international instruments.²⁷³ The discussion focuses not so much on validity as such, but rather on the existence, scope and effect of the waiver.²⁷⁴ The determination of such scope and effect may lead to difficulties, as the boundaries of sovereign immunity and the restrictions that may limit a State's ability to waive immunity vary from State to State. To take the example of central bank assets, if the position is *prima facie* identical in New York and England, whose laws

is very often stated to be "to the fullest extent permitted by applicable law".

267Section 13(d) of the 2002 Master Agreement provides that "Each party irrevocably waives, to the extent permitted by applicable law, with respect to itself and its revenues and assets (irrespective of their use or intended use) all immunity on the grounds of sovereignty or other similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of injunction or order for specific performance or recovery of property, (iv) attachment of its assets (whether before or after judgment) and (v) execution or enforcement of any judgment to which it or its revenues might otherwise be entitled in any Proceedings in the courts of any jurisdiction and irrevocably agrees, to the extent permitted by applicable law, that it will not claim any such immunity in an Proceedings".

268This is the explanation given by *G. R. Delaume*, 'Sovereign immunity and public debt', *Festschrift in Honor of Sir J. Gold*, WERNER F. EBKE and J. J. NORTON (eds.), *Recht & Wirtschaft* 1990, 21, at p. 31.

269This was for example the position in Mexico : *J. A. Guria-Trevino*, in 'Negotiations with Transnational Banks : A Sovereign Borrower's Perspective', reproduced in *International Borrowing. Negotiating and Structuring International Debt Transactions* (D. D. Bradlow (ed.), 2nd ed., Martinus Nijhoff/ILLI, 1986), 389 at 395.

270*Ph. Wood*, *Project Finance, Securitisation, Subordinated Debt* (Sweet & Maxwell, 2007) at p. 21.

271See *e.g.* the waiver included in the contract which was considered by the English courts in *Sabah Shipyard Pakistan Ltd. v Islamic Republic of Pakistan* [2002] EWCA Civ 1643 – section 2.6 of the contract concluded by a Pakistani company (wholly owned by a Malaysian company) and various companies owned by Pakistan, for which Pakistan had acted as a Guarantor provided that "The Guarantor hereby irrevocably and unconditionally agrees that the execution, delivery, and performance by it of this Guarantee constitute private and commercial acts."

272There is no discussion in most jurisdictions on the validity of a waiver of immunity by a sovereign state. See section 1605(a)(1) of the FSIA, which provides an exception to sovereign immunity when "the foreign state has waived its immunity either explicitly or by implication." For other references to waiver in the FSIA, see sections 1610(a)-(c), § 1610(d) and § 1611(b)(1).

273See *e.g.* Art. 2 and 3 (immunity of jurisdiction) and Art. 23 (immunity of enforcement) of the 1972 European Convention on State Immunity (Basel) and Art. 7 (waiver of immunity from jurisdiction) and Artt. 18 and 19 (immunity from enforcement) UN 2004 Convention on Jurisdictional Immunities of States and Their Property.

274Another discussion relates to the question which entity within a State has competence to agree to a waiver of immunity. See in this respect section 2(7) of the English State Immunity Act of 1978.

grant such assets a wide immunity,²⁷⁵ there is a clear difference between the two jurisdictions in that it is not clear under the laws of New York to which extent a foreign central bank may agree to a waiver of immunity, whereas the question has been answered positively in England.²⁷⁶ A difference may also exist as to what type of state property may be attached. This explains why contract practice has adopted very sophisticated drafting,²⁷⁷ including not only a basic waiver of immunity of jurisdiction and of enforcement, but also excluding some assets from any measure or earmarking them for loan service purposes.²⁷⁸

When the contract includes a waiver, the question arises how to construe it.²⁷⁹ Some courts have taken quite a relaxed attitude towards such waiver, construing them without undue restraint.²⁸⁰ Other courts have adopted a more conservative approach.²⁸¹

Practice has shown that discussion on the exact effects of a waiver is not rare. In one

275In the US, section 1611(b)(1) FSIA. In the UK, section 14(4) SIA.

276On this issue, consider *E. T. Patrikis*, 'Immunity of Central Bank Assets under US Law', in *Sovereign Lending, Managing Legal Risk* (M. Gruson & R. Reisner (eds.), Euromoney, 1984), 89-101, at p. 97-99.

277In most cases, the provision will also include a waiver of immunity from prejudgment proceedings, relief and attachment (such as *Mareva* injunctions and other prejudgment injunctions or attachments) and also a provision appointing an agent for service of process.

278In some cases, the waiver will explicitly exclude some assets – see *e.g.* the waiver by Argentina in some bond issues in the early 2000 : the waiver expressly mentioned that it did not apply to central bank reserves, public domain assets and assets needed for the enforcement of the budget (as apparent from the quotation by the French Supreme Court, 28 Sept. 2011, *NML Capital Ltd. v. Republic of Argentina*). See in the same *dispute NML Capital Limited v. Republic of Argentina*, [2011] UKSC 31 (Supreme Court, judgment of 6 July 2011). In loan agreements, a variation of waiver under the form of a warranty such as : « The borrower is subject to civil and commercial law with respect to its obligations under this Agreement. The execution, delivery and performance of this Agreement by the borrower constitute private and commercial acts, rather than governmental or public acts. The Borrower and its property do not enjoy any right of immunity from suit, set-off or attachment or execution on judgment in respect of the obligations of the borrower under this Agreement. The waiver contained in this Agreement by the borrower of any such right of immunity is irrevocably binding on the borrower” (Language offered by *Ph. Wood* (fn. 98) at p. 574, § 24-040).

279This question is often caused by the laconic drafting of the waiver. As Meessen wrote, “To do so is not an easy task. As lawyers well know, the time of negotiating an investment contract with a sovereign state is not the time to discuss the most humiliating aspects of a worst case scenario. It is like discussing the terms of the divorce on the day of the wedding. In a word, waivers, if explicitly made at all, tend to be less than specific” (*K. Meesen*, 'State Immunity in the Arbitral Process', in *Arbitrating Foreign Investment Disputes* (N. Horn (ed.), Kluwer, 2004), 387-397, at p. 392.

280So it is that a court in the United States held that to be “explicit” as required by the FSIA, a waiver of sovereign immunity inserted by Argentina in the documentation of German bonds it had issued, need not contain a reference to the United States or a specific jurisdiction in the US, as Argentina had argued. A waiver of immunity in “any court” was sufficient according to the Court : *Capital Ventures Intl. v. Republic of Argentina*, 552 F.3d 289 (2d Cir. Jan. 13, 2009). See also *Libra Bank Ltd. v. Banco Nacional de Costa Rica* 676 F.2d 47 (2d Cir. 1982) – where the court held that the State which had accepted a waiver drafted in the most comprehensive way, also had waive its immunity from pre-judgment attachment. See also *Sabah Shipyard Pakistan) Ltd. v Islamic Republic of Pakistan* [2002] EWCA Civ 1643 – the court held that the waiver included in a contract signed by Pakistan also applied to proceedings brought by a company which sought an injunction restraining Pakistan from bringing proceedings in Pakistan, while the agreement called for the courts of England to have jurisdiction.

281See the discussion by *F. Knoepfler*, 'L'immunité d'exécution contre les Etats', *Revue de l'arbitrage* 1017, 1028-1038 (2003).

the numerous proceedings brought by creditors following Argentina's default, a discussion arose in relation to the effects of the waiver by Argentina of its sovereign immunity in bond documentation. The question arose whether this waiver also applied to assets held by the Argentinian social security system in New York as part of a fund to meet pension obligations.²⁸²

There might also be a discussion on the question whether the waiver only pertains to the immunity from adjudication or also concerns the immunity from execution. In most jurisdictions, waiver of immunity from execution requires a separate waiver from immunity from adjudication.²⁸³ Questions may also arise when the waiver is included in one agreement linked to several other agreements which do not include a waiver.²⁸⁴

When the contract does not include a specific waiver by the State, this does not mean that the State will be able to rely on its sovereign immunity. Other contract provisions or the behavior of the State could be interpreted to mean that the State has indeed waived its immunity. This is the case for example when the State has agreed that disputes would be settled by arbitration. A difficult issue concerns the question whether entry into an arbitration agreement by a State may be interpreted as consent to a waiver.²⁸⁵ In some jurisdictions, the presence of an arbitration clause will be taken to mean that the State has at least waived its immunity from jurisdiction.²⁸⁶ French and

282In first instance, a district court first allowed the creditor to attach the assets, holding that the waiver by Argentina of its sovereign immunity in bond documentation also applied in this case (*Aurelius Capital Partners. LP v. The Republic of Argentina*, 07-CIV-2715 (TPG) (S.D.N.Y. 2008)). The Second Circuit reversed and vacated the attachment, holding that the funds were immune under the FSIA, without resolving the parties' dispute about whether the Social Security Administration was a separate agency or instrumentality of Argentina (see *Aurelius Capital Partner, LP v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009), cert. denied 130 S. Ct. 1691 (2010)). In general on the question whether a waiver should be given by the State itself or by the agency, *H. Fox*, *The Law of State Immunity* (OUP, 2002), at p. 265.

283*H. Fox*, *The Law of State Immunity* (OUP, 2002), at p. 265. The position is, however, different under Swiss law.

284See e.g. *Proyecfin de Venezuela S.A. v. Banco Industrial de Venezuela S.A.*, 760 F.2d 390 (2d Cir. 1985) : an initial loan contract concluded by Proyecfin with a consortium of banks included a waiver of immunity. The borrower then concluded another contract with BIV, a state owned bank supervising the use of the money, which provided that the provisions of the loan agreement were incorporated by reference into the contract. The Court held that the waiver applied to this supervisory contract by incorporation.

285See e.g. Art. 17 of the 2004 UN Convention, which provides that "If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to: (a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides."

286This is the case in France, where courts have accepted that the presence of an arbitration agreement means that the State could no longer rely on its immunity of jurisdiction before the court seized of a request to support the arbitration process, nor before the court dealing with a request to enforce an arbitral award – see e.g. *CFI Paris*, 10 January 1996, *Revue de l'arbitrage* 427 (2002). The position is similar in England, see *Svenska Petroleum Explorations AB v. Lithuania et al.*, [2006] 1 All ER 731, §§ 111-123 – decided on the basis of Section 9(1) of the State Immunity Act 1978 which provides "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom

American court have gone one step further and held that if a State has committed to arbitration under institutional rules such as the ICC Arbitration Rules, this should be held as constituting an implicit waiver of sovereign immunity, as the rules impose obligations on the party to honor an arbitral award.²⁸⁷ In other jurisdictions, courts have not been prepared to accept such an implicit waiver.²⁸⁸

* * *

§ 2 Contractual Arrangements on Dispute Resolution

What contractual arrangements are made for dispute resolution by parties concluding a contract when one of the parties is a State or a State agency? Practice is far from uniform. Depending on the nature and the importance of the agreement, three main options may be distinguished which will be discussed in turn. Another option will not be discussed, i.e. the choice not to include in the contract any specific provision regarding dispute resolution.²⁸⁹

2.1 Choice for courts of the contracting State

When a contract is concluded with a State, parties may choose to refer future disputes to the courts of the contracting State. Although it is difficult to generalize, it is believed that many 'one shot' contracts concluded by States include a choice for the State's courts.²⁹⁰ In some countries, this may even be mandatory under local administrative regulations. In supply or off-take contracts, the practice is also oriented

which relate to the arbitration."

287In France, see *Sté Creighton Ltd. v. Ministry of Finance of Qatar et al.*, Court of Cassation, July 6, 2000, *Revue de l'arbitrage* 114 (2001) (and the follow up case by the Paris Court of Appeal of Dec. 12, 2001, *Revue de l'arbitrage* 147 (2003), deciding on remand after the Supreme Court had quashed an earlier decision), where the Supreme Court held that "... l'acceptation du caractère obligatoire de la sentence qui résulte de celle de la convention d'arbitrage opérant, au vu du principe de bonne foi et sauf clause contraire, une renonciation à l'immunité d'exécution"). In the United States, see *Walker International Holdings Ltd. v. République du Congo*, 395 F.3 229 (5th Cir.). For the position under English law, see H. FOX, *The Law of State Immunity*, (OUP, 2002) at p. 267, with reference to the attempts by Liamco to enforce arbitral awards obtained following the cancellation of oil concessions by Libya.

288For a discussion of English and German case law, see S. EL SAWAH, *Les immunités des Etats et des organisations internationales. Immunités et procès équitable* (Larcier, 2012) at pp. 196-198, § 480 ff. The question was recently touched upon in a case decided in Hong Kong, where a distressed debt fund sought to enforce an ICC award against assets of an African State, arguing that the acceptance by the State of an ICC arbitration clause, meant that the State had waived its immunity from enforcement. See *FG Hemisphere Associates LLC v. Democratic Republic of Congo et al.*, [2009] 1 HKLRD 410 (Court of First Instance) and [2010] 2 HKLRD 66 (Court of Appeal). See in general, *A. Sinclair and D. Stranger-Jones*, 'Execution of Judgments or Awards against the Assets of States Entities', *Disp. Res. Intl.*, 105 ff. (2010).

289Although this is difficult to demonstrate, it is likely that smaller contracts, concluded on a one off basis, often lack a proper dispute resolution provision.

290See e.g. the contract the basis of the dispute settled by the Iran US Claims Tribunal in *T.C.S.B. Inc. v. The Islamic Republic of Iran*, Award No 114-140-2 (16 March 1984), 5 Iran-US C.T.R. 160 : the contract included a clause vesting exclusive jurisdiction in Iranian courts.

towards choice for the courts of the State.

In large, investment contracts, the choice for the courts of the host State is definitively not the favored option for the investor. Sometimes, this option cannot, however, be avoided. It is indeed not uncommon to see that the authorities of a State will insist on the submission of disputes to their courts.²⁹¹

2.2 *Choice for courts of a third State*

It may not be natural for a State to accept to submit to the jurisdiction of the courts of another State. This is nevertheless what happens at least in those fields where the State must cede before the request of its contracting partner.

Financial transactions concluded by States offer a good example of this practice. As is well known, most of these transactions will include a choice for the courts of a major financial center, such as New York or London.²⁹² The ISDA Master Agreement for example provides that disputes will be submitted to English or New York courts. Even before the practice became institutionalized through ISDA, it was already common for international loans to include a choice for the courts of a neutral country. When the courts of England or of another common law country were selected, this could be done by having the sovereign borrower appoint an agent in that country.²⁹³ As with other types of international loans, choice of court clauses to be found in sovereign borrowing are often non-exclusive, leaving the lender with the choice of where to bring proceedings.²⁹⁴

Outside the field of financial agreements, a choice for the courts of another State is sometimes made by parties to a State contract, although it is difficult to determine with precision how frequent the practice is. One may refer to the choice for English courts which was included in a contract for the design, construction and maintenance of electric generation facilities concluded between a company incorporated in Pakistan, but wholly owned by a Malaysian parent, and various companies owned by Pakistan.²⁹⁵

2.3 *Arbitration agreement*

Arbitration is probably the dispute resolution method chosen in the largest number of

291See *e.g.* the oil contracts signed by the Algerian national oil company *D.-E. Lakehal* (fn. 32) at p. 513.

292According to Gooch and Klein, the courts of New York or English courts “are most frequently chose, because those jurisdictions have an institutional interest in continuing to be perceived as providing a fair forum to borrowers and lenders”. These authors add that these courts “are the home jurisdictions of major borrowers as well as lenders, which works to ensure an even-handed legislative and judicial approach to problems”. As final justification, these authors note that “the relevant substantive law in these jurisdictions is well developed, and the courts have a good record for fair treatment of litigants” : *A. C. Gooch and L. B. Klein* (fn. 170) at p. 357.

293As reported by *Ph. Wood* (fn. 167) at pp. 127-128.

294As reported by *Ph. Wood* (fn. 167) at pp. 139-140. Some States resist this type of non-exclusive agreements, see *e.g.* for Mexico, *J. A. Guria-Trevino* (fn. 266) at p. 395.

international contracts concluded by States. This dispute resolution method coincides with the interest of both the State and the private party, who each would like to resist submitting disputes to the courts of the other. Arbitration has also received the most attention in relation to State contracts, in part due to a few large cases where disputes were indeed submitted to arbitration.

Many contracts signed by states or state entities include a choice for arbitration. Arbitration is for example often chosen as dispute resolution method in government concessions and construction contracts.²⁹⁶ In the oil industry, arbitration also appeared to be the favored dispute resolution method.²⁹⁷ So it is that a contract concluded between State of Israel and the Iran Oil Company which was considered by the French Supreme Court in 2005 included a choice for arbitration.²⁹⁸ International financial institutions also frequently opt for arbitration in the contracts concluded with States and state entities.²⁹⁹ The standard clause in the General Conditions for Loans of the IBRD provides for example that “any controversy between the parties to the Loan Agreement or to the parties to the Guarantee Agreement [...] shall be submitted to arbitration by an Arbitral Tribunal [...]”.³⁰⁰ In transactions with commercial banks and other non-institutional lenders, arbitration is, on the contrary, not favored as dispute resolution method.³⁰¹ This is, however, not due to specific features of sovereign borrowing but rather to the strong reluctance of the financial sector towards arbitration.

Often, the choice for arbitration is accompanied by an obligation for parties to attempt first to find a settlement.³⁰²

295See *Sabah Shipyard Pakistan) Ltd. v Islamic Republic of Pakistan* [2002] EWCA Civ 1643 - the proceeding arose following the introduction by Pakistan of proceedings before a court in Pakistan, in violation of the choice of court clause; the court in England was asked to issue antisuit injunction restraining Pakistan from doing so.

296See e.g. art. 23 of the the Exploration and Production Sharing Agreement which is used by the Libyan National Oil Corporation, which includes a choice for ICC arbitration. See also *Ph. Wood* (fn. 267) at p. 15, § 2-010.

297Cuervo has reported that the vast majority of oil and gas contracts concluded in South American include an arbitration agreement : *L. E. Cuervo* (fn. 221) at pp. 12-13.

298See *eg State of Israel v National Iran Oil Company* (French Supreme Cour, Fev. 01, 2005, case No. 01-13;742/02-15.237) – in that case, the Supreme Court considered a contract concluded in 1968 between the State of Israel and the Iranian National Oil Company relating to oil transactions. The agreement included an arbitration clause which provided that if the two arbitrators designated by the parties could not agree on the resolution of the dispute or on the choice of a third arbitrator, the President of the ICC would be asked to proceed with the appointment of the chair.

299See the overview of the practice of the main financial institutions in *G. Domenico Spota*, 'Arbitration and the Contracts of International Institutions', in *Contrats publics et arbitrage international* (M. Audit (ed.), Bruylant, 2011), (99), 103-108 – Spota explains, however, that the EIB has chosen another path, preferring to submit disputes either to the courts of a Member State or directly to the ECJ, and this although the statute of the EIB provides that the Bank may “provide for arbitration in any contract” (art. 27 EIB Statute).

300Section 8.04, General Conditions dated July 1, 2005, as amended through February 12, 2008. See the comments by *J. Head*, 'Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks', 90 Am. J. Intl. L. 214 ff. (1996).

301As reported by *Ph. Wood*, (fn. 167), at pp. 127-128.

302See section 16.13 of the contract concluded in 2007 between Contract Belgium and a large pharmaceutical company, which provided that “*Les parties s'efforceront de résoudre toute difficulté ou tout différend pouvant survenir entre elles par un dialogue mené de bonne foi dans la*

In recent years, the impact of arbitration on dispute between States and private companies has been greatly encouraged by the multiplication of BIT. As is well known, this has given rise to what is now commonly referred to as arbitration without privity.³⁰³ Arbitration proceedings may indeed be initiated by a company or individual against a State even if parties are not bound by a contract including an arbitration agreement. The foundation for the arbitration is to be found in a generic offer made in bilateral investment treaties - and also in regional and multilateral treaties - to refer disputes to arbitration. ICSID is one of the favorite arbitration forum in this respect. The consequences of this development are well-known, as is the impact of the distinction between so-called 'contract claims' and 'treaty claims'.³⁰⁴

When one looks at the practice, there does not seem to be a favored method of arbitration. A good number of contracts concluded by States, include a choice for traditional arbitration institutions, such as the ICC,³⁰⁵ which may rely on a long experience in administering arbitration involving states.³⁰⁶ Ad hoc arbitration is also a favorite of States when concluding contracts.³⁰⁷ Before the ICSID was created, most of the important arbitral proceedings involving state contracts were handled through ad hoc arbitration.³⁰⁸ Sometimes, the State will insist that the seat of the arbitration is located on its territory.³⁰⁹

Today it is no longer challenged that when a State or State entity accepts to submit to arbitration, such a choice is valid, save for possible limitations imposed by national laws.³¹⁰ This is in sharp contrast with the attitude take some decades ago, when it was

perspective d'une solution amiable." (followed by an ICC arbitration clause).

303Following the phrase coined by *J. Paulsson*, 'Arbitration Without Privity' ICSID Rev 232-257 (1995).

304See in general, *B. M. Cremades* and *D. J.A. Cairns*, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes', in *Arbitrating Foreign Investment Disputes* (N. Horn (ed.), Kluwer, 2004), 325-351.

305This is *e.g.* the case for concession contracts concluded by the Brazilian National Oil Agency – see the comments of *D. Szyfman* (fn. 129) at p. 232 (indicating that the agreements include a choice for ICC arbitration, with Rio de Janeiro as place of arbitration).

306See *S. Greenberg*, 'ICC Arbitration & Public Contracts: The ICC Court's experience of arbitrations involving states and state entities', in *Contrats publics et arbitrage international*, (Bruylant, 2011 M. AUDIT (ed.) 3-23. See *e.g.* ICC case No. 7710 (1995), published in *Journal de droit international* 1004 (1993).

307And international organizations. See section 16 of the United Nations General Conditions for Contracts for Purchase of Goods, which provide that failing amicable settlements, disputes shall be referred by either Party to arbitration in accordance with the Uncitral Arbitration Rules. The UN General Conditions for Contract includes a similar provision.

308See *e.g.* the various arbitration proceedings which considered the fate of the Libyan oil concessions, to which reference has already been made.

309For the practice under concession contracts in project finance, see *Ph. Wood* (fn. 267) at p. 21.

310The presence of an arbitration agreement in a contract concluded by a State is no longer taken as a sign that parties to the contract have implicitly accepted the application of international law to their contract or that the contract is 'internationalized'. See, however, the observations of *P. de Vareilles-Sommières* and *A. Fekini*, (fn. 32) pp. 3-30 – according to these authors, the choice in the Exploration and Exploitation contracts signed by the Libyan Oil Company demonstrates that parties have intended to submit their agreement to the 'lex mercatoria' (at §§ 28-29). *De Vareille-Sommières* recognizes, however, that the *lex mercatoria* may only complement the agreement and not contradict the law chosen by parties (at §§ 31 ff.).

suggested that a State could validly decide to ignore and escape an arbitration agreement which it had signed.³¹¹

There remains, however, some resistance to arbitration.³¹² This is in particular the case for contracts concluded with so-called 'developing states', which are sometimes still wary of international arbitration, which is seen as a circumvention of the state authority. Although the resistance has slowly disappeared and ebbed away,³¹³ it remains quite strong in some countries where recourse to arbitration is not allowed for government contracts.³¹⁴

When arbitration is allowed, the resistance may translate in guerrilla tactics. Experience has shown that this resistance may lead States to try to wrestle out of arbitration which they may have accepted, once a dispute arises.³¹⁵ This translates among other tactics by reliance on the plea of sovereign immunity as a technique to avoid the duty to submit to arbitration.³¹⁶ Some State have also refused to appear before the arbitral tribunal, expressing their dissatisfaction with the arbitral process through their non-appearance.³¹⁷ It is sometimes also argued that in contrast with the position adopted for commercial contracts, an arbitration agreement does not survive the termination of the contract when the contract is unilaterally terminated by a state through the adoption of legislation.³¹⁸

Many questions may arise when a State is involved in arbitration proceedings.³¹⁹ Questions arising in this context are for example whether a claimant which has signed

311See for an account of the attempts by States to avoid arbitration agreements and the arguments made to that effect, *P. Lalive*, 'L'influence des clauses arbitrales', *Revue belge de droit international* at pp. 572-573 (1975). On the position today, see the various contributions published in *Contrats publics et arbitrage international* (M. Audit (ed.), Bruylant, 2011, 234 p.).

312As is well known, until the 1970's many States in South America and Africa fiercely resisted arbitration and insisted on local jurisdiction for investment disputes.

313Algeria is a good example : while the 1986 Act prohibited arbitration in the field of oil contracts, the Act of 2005 allows arbitration to settle disputes which could arise between the national oil agency (ALNAFT) and a private company. The involvement of a national oil company (Sonatrach) has, however, given rise to some difficulties (see *M. Trari-Tani*, 'The new legal framework for prospecting, research and exploitation of hydrocarbons in Algeria', *Intl. Bus. L. J.* (53-67), at p. 65 (2008).

314This is apparently the case in Dubai (see Art. 36 of the Law No. 6 of 1997 on Contracts of Government Departments in Dubai Emirate which provides that "No contract where Dubai Government or any of its departments is a party shall contain a provision for arbitration outside Dubai Courts...") and in Russia (where the statute governing concession agreements does not provide for the possibility to refer concession disputes to international arbitration – domestic arbitration is, however, allowed – see the Report for Russia in *International Project Finance and PPP's. A Legal Guide to Key Growth Markets* (fn. 135) at pp. 89-90 and 95. In general on arbitration of contracts concluded by States in arab countries, see the explanations of *N. Najjar*, *L'arbitrage dans les pays arabes face aux exigences du commerce international* (LGDJ, 2004), pp. 182-191.

315See e.g. A. and R. *Mezghani*, 'Souveraineté de l'Etat et participation à l'arbitrage', *Rev. arb.*, 1985, 518 ff.

316See e.g. *Elf Aquitaine Iran v. NIOC*, arbitral award, *Revue de l'arbitrage* 401 (1984).

317As was e.g. the case for the famous three arbitrations which followed the nationalization of the Libyan oil operations.

318See *M. Sornarajah* (fn. 16) at pp. 414 (who accepts that the position may be different in case of an arbitration agreement referring disputes to ICSID).

319See in general *State Entities in International Arbitration* (E. Gaillard (ed.), IAI Series on International Arbitration No 4, Juris Publishing, 2008).

a contract with a state company, may also direct its arbitration request towards the State. This question has been extensively discussed following the *Westland*³²⁰ and *Pyramides* cases.³²¹ It appears that the ICC looks with some stringency at the question whether a state which has not signed an arbitration agreement, may nonetheless be included in arbitration proceedings.³²²

Another question arising in relation to arbitration of state contracts is that of the possibility to settle disputes arising in relation with several distinct contracts concluded by a State, before a single arbitral tribunal. This question is of great importance when a State concludes several contracts with different parties with a view to a major project, such as the construction of a motorway or of a power plant. It is likely that in this situation, the parties concerned enter into various contracts- such as a construction agreement, a joint venture agreement, etc. If a dispute arises, the State would like to file a single arbitration request for all questions arising under the different contracts. Whether or not this may be consolidated in a single set of proceedings, is a question which also arises when no State or public entity is concerned. It is far from certain that this question must be addressed using different standards because one of the parties is a State or a state controlled entity.³²³

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Concluding observations

The issue of the law applicable to public contracts represents only one perspective on the process of internationalization of such contracts. In many ways, this perspective is biased as it starts from the assumption that the contract presents a cross-border dimension, thereby leaving aside the more subtle ways in which public contracts, be they domestic or not, could be influenced by international processes.

The overview of theoretical foundations and of current practices in relation to the legal framework applicable to international public contracts could, however, prove useful in general for public contracts. First, the survey shows that the delimitation of cross-border and domestic agreements is a difficult one to draw, and in many respects

320See e.g. P. Lalive 'Arbitration with foreign states or state-controlled entities : some practical questions' in Contemporary Problems in International Arbitration (Julian Lew (ed.), Nijhoff 1987), 289-296; Ph. Leboulanger, 'Groupes d'Etat(s) et arbitrage' Revue de l'arbitrage 415 ff. (1989).

321In which the question arose whether the claimant could file its request not only against the party with which it had contracted (the public company Egoth), but also against Egypt – which was only party to another contract and argued that it had not signed the arbitration agreement and should therefore be left outside the arbitration proceedings. See Paris, 12 July 1984 Revue de l'arbitrage 75 (1986) (setting aside the award issued on 11 March 1983 (ILM 776 (1983)), by which the arbitrators had accepted that Egypt was bound by the arbitration agreement) and Cassation, 6 January 1987 Revue de l'arbitrage 469 (1987).

322According to E. Silva-Romero 'ICC Arbitration and State Contracts', ICC Bulletin – Special Issue, 34-60, at pp. 47-48 (2002) – who notes that the ICC « will undertake a more rigorous *prima facie* analysis of whether or not an arbitration agreement might exist with respect to « the public law entity » (at p. 48).

323Silva-Romero has, however, argued that the ICC could adopt a “stricter practice when faced with a group of state contracts...” (E. Silva-Romero (fn 318), at p. 50).

an artificial one. While some contracts may from the start be characterized by a strong international import, the international nature of other contracts could be revealed through other, more discrete means. It is therefore important not to overemphasize the distinction between the two categories.

Second, the survey reveals the tension between the ever more sophisticated contractual techniques, which aim to bring legal certainty and enhance the position of the private party, and the public objectives pursued by the authorities involved. This tension, which has in particular been apparent in the discussion of stabilization techniques, is not a new one, nor is it likely to go away soon. It is one of those perennial difficulties contract drafters should learn to cope with.

Finally, the overview has learned that beyond the common features uniting public contracts, there is plenty of room for diversity. When attempting to carve out new solutions, one should therefore be careful not lose sight of the differences which may stand in the way of a unified solution.

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