

And/Or: The Problem of Qualification in International Arbitration

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ABSTRACT

The problem of qualification is one of the classic problems of conflict of laws and indeed has been characterised by leading scholars as the ‘fundamental’ problem. In short, it is about how a particular legal relation should be conceptualized or, more specifically, whether it should be qualified as a relationship of law and fact or rather as a conflict of laws. While the problem has attracted only limited attention among international arbitration scholars and practitioners, it provides an interesting perspective to conflict of laws in international arbitration.

In classic conflict of laws, the problem of qualification was associated with the question of the relationship between legal categories (contract, tort, procedure, etc.) and a connecting factor (place of performance, place of tort, forum, etc.) In international arbitration, the relationship between the arbitration proceedings and the seat of arbitration, and other relevant connecting factors, raises similar issues of qualification. Measured by the relevant connecting factors such as the seat of arbitration, the nationality or domicile of the parties, the place of performance of the contract, and the subject matter of the dispute, an international arbitration may be more or less ‘international’ – or perhaps more accurately, ‘transnational.’ The less transnational the arbitration is in terms of the relevant connecting factors, the more appropriate it arguably is to resolve any conflict of laws issues that may arise on the basis of the standards of the seat. The more transnational the arbitration is in terms of such connecting factors, the more appropriate it arguably is to resolve any conflict issues by reference to transnational standards. In other words, the transnationality of international arbitration is a sliding scale, or a difference in degree, and as such a matter of policy.

While qualification may or may not be the ‘fundamental’ problem of international arbitration, depending on one’s intellectual viewpoint, it does provide an instructive framework for developing an understanding of conflict of laws issues in international arbitration. Although true conflicts of laws remain rare, they may arise, and when they do arise, they tend to raise sensitive issues of public policy, precisely because an arbitral tribunal is not necessarily bound by the public policies of the seat.

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I. INTRODUCTION

THE PROBLEM of qualification (or ‘characterisation’ or ‘classification’ or ‘categorisation’) is considered to be one of the classic problems of conflict of laws, or private international law. It is also considered to be one of the most difficult problems in the field and indeed has been qualified by leading scholars as a ‘fundamental problem’.¹ Given the traditional links between conflict of laws and international arbitration, how does the problem of qualification arise in the context of international arbitration? Or does it – or should it be allowed to – arise at all?

The problem of qualification is said to have been ‘discovered’ independently and almost simultaneously by Franz Kahn, a German jurist, and Etienne Bartin, a French scholar, at the end of the nineteenth century.² Since then, the issue has been recognised in other jurisdictions, including in the common law world, and has given rise to voluminous legal literature, ‘much of it highly theoretical’.³ Indeed, one is tempted say that, in the course of this debate, the problem of qualification itself has become an instance of the problem of qualification, as reflected in the variety of the terms used – ‘qualification’, ‘characterisation’, ‘classification’, ‘categorisation’, even ‘interpretation’ – to conceptualise the problem.

However, since the 1960s, the issue has lost some of its appeal, in particular as a result of the conflict-of-laws ‘revolution’ in the United States, and would today be considered by few as one of the cutting edge issues in the field.⁴ Moreover, arbitration scholars and practitioners, who tend to be more pragmatic than their private international law colleagues, appear to have always approached the problem of qualification with caution. While there are authors who have ventured

¹ See e.g., Dicey, Morris and Collins on *The Conflict of Laws* (Sir Laurence Collins (ed.), 14th edn, 2006), p. 37.

² Franz Kahn, ‘Gesetzskollisionen’ in 39 *Jherings Jahrbücher für die Dogmatik des heutigen römischen Privatrechts* 1 (1891); Etienne Bartin, *De l’impossibilité d’arriver à la suppression définitive des conflits de loi* in (1897) *Journal de droit international privé* 225. For subsequent discussion, see e.g., Ernst Rabel, *Das Problem der Qualifikation* (1931); A.H. Robertson, *Characterization in the Conflict of Laws* (1940); William Beckett, ‘The Question of Classification (“Qualification”) in Private International Law’ in (1934) 15 *Brit. YB Int’l L* 46; Walter Wheeler Cook, ‘“Characterization” in the Conflict of Laws’ in (1941) 51 *Yale Lj* 191; Albert A. Ehrenzweig, ‘Characterization in the Conflict of Laws: an Unwelcome Addition to American Doctrine’ in Kurt H. Nadelman *et al.* (ed.), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* (1961), p. 395; John D. Falconbridge, ‘Characterization in the Conflict of Laws’ in (1937) 53 *LQ Rev.* 235; Ernest G. Lorenzen, ‘The Qualification, Classification, or Characterization Problem in the Conflict of Laws’ in (1941) 50 *Yale Lj* 743; Ernest G. Lorenzen, ‘The Theory of Qualifications and the Conflict of Laws’ in (1920) 20 *Colum. L Rev.* 247; Joseph Morse, ‘Characterization: Shadow or Substance’ in (1949) 49 *Colum. L Rev.* 1027; Joseph Unger, ‘The Place of Classification in Private International Law’ in (1937) 19 *The Bell Yard* 3.

³ Dicey, Morris and Collins on *The Conflict of Laws*, *supra* n. 1 at p. 38.

⁴ While the United States initially had adopted what was effectively a continental European approach to the conflict of laws, this was abandoned as a result of the choice of law ‘revolution’ that took place in the United States beginning in the 1960s. For a fundamental contribution, see e.g., Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963). The interest-based approach (to the exclusion of the ‘rules-based’ approach) was largely incorporated into the Second Restatement, in particular in relation to conflict issues. See Restatement (Second) of the Conflict of Laws (1971). For further discussion, see e.g., Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow* (2005); Symeon C. Symeonides, ‘The American Revolution and the European Evolution in Choice of Laws: Reciprocal Lessons’ in (2008) 82 *Tul. L Rev.* 1; Louise Weinberg, ‘Theory Wars in the Conflict of Laws’ in (2005) 103 *Mich. L Rev.* 1631.

to tackle the issue, they appear to have been less than successful in managing to provoke the intellectual interest of their colleagues.⁵ One could say that, from the point of view of international arbitration, the problem of qualification remains to be discovered. The question that arises is whether it should indeed be rediscovered or rather left dormant like the proverbial sleeping dog.

This article does not propose to raise the problem of qualification beyond the relatively narrow confines of the field of international arbitration, except to the extent that this appears to be necessary for the purpose of introducing the problem. Limited in this way, what is the problem of qualification all about? What does 'qualification' mean, or refer to, in the first place? What is so fundamentally problematic about it? What is its potential relevance – if any – to the law and practice of international arbitration? And finally, can it still be considered a 'fundamental' problem of conflict of laws, or indeed of international arbitration, in circumstances where the traditional rule-based approach to conflict of laws no longer dominates and has effectively been abandoned in favour of more policy-oriented (interest-based) approaches in certain jurisdictions, in particular in the United States?

II. THE PROBLEM OF QUALIFICATION IN CONFLICT OF LAWS

A standard textbook approach is to define the problem of qualification as consisting of 'determining which juridical concept or category is appropriate in any given case'.⁶ In this account, the problem of qualification is a fundamental problem in all traditional systems of conflict of laws which rely on conflict rules that are composed of two elements: juridical concepts or categories and localising elements or connecting factors.⁷ This duality is reflected in conflict rules such as 'succession to immovables is governed by the law of the *situs*', 'contract is governed by the law of the place where it was made', 'tort is governed by the law of the place where it occurred', 'procedure is governed by the *lex fori*' or, closer to the home of international arbitration, 'arbitration proceedings are governed by law of the seat (*lex arbitri*)'. Here, succession to immovables, contract, tort, procedure and arbitration proceedings are the categories, whereas the law of the *situs*, the place where the contract was made, the place where the tort occurred, *lex fori*, and the law of seat, respectively, are the connecting factors. Nussbaum summarises the doctrine in these terms:

⁵ For contributions, see e.g., Mathieu Boissésou, 'L'arbitre international et le problème de la qualification' in *Liber Amicorum Claude Reymond: Autour de l'Arbitrage* (2004), p. 29; Fabrizio Marrella, 'Choice of Law in Third-Millennium Arbitrations: the Relevance of the UNIDROIT Principles of International Commercial Contracts' in (2003) 36 *Vanderbilt J Transnat'l L* 1138 at pp. 1148–1152; Claude Reymond, 'Conflits de lois en matière de responsabilité délictuelle devant l'arbitre international' in *Travaux du Comité français de droit international privé* (1991), p. 97.

⁶ Dicey, *Morris and Collins on The Conflict of Laws*, supra n. 1 at p. 38.

⁷ The classic system is essentially derived from Friedrich Karl von Savigny, *System des heutigen römischen Rechts* (1849).

The crucial point ... is the role of qualification in the choice of laws. Choice-of-law rules consist of two elements. They link together a legal relationship (property right, contract claim, tort claim, etc.) and a connecting factor which one might call the localizer, such as the *situs* of the res, the place of performance of a contract, the place of wrongdoing ... In respect of each element, a conflict of qualifications may arise.⁸

Accordingly, the problem of qualification is related to the relationship between the relevant legal category and the connecting factor, *i.e.* the localising element that links the legal category to the relevant jurisdiction. The problem of qualification is therefore bound to arise in any conflict of laws system which employs rules that operate so as to allocate a particular legal category to a proper jurisdiction, or to a particular 'place'. The problem may arise in respect of the legal category, or in respect of the factual category (the 'place'), or indeed in respect of *both*.

When defined in these terms, it is evident that the problem of qualification is not limited to the conflict of laws, but is a reflection of a more general issue. Indeed, the problem of qualification is bound to arise in any field of law which seeks to establish rules governing the relationship of a legal category (or more broadly, a legal issue) and a factual category (or more broadly, an issue of fact). In this broad sense, the problem of qualification deals with the question of whether a particular legal category covers a particular fact, or conversely, whether a particular fact falls under a particular legal category – and indeed, whether a particular category, in itself, should be characterised (qualified) as a legal or as a factual category.⁹

From this more general (some might say 'philosophical') perspective it is therefore arguable that the issue of qualification is ultimately not a matter of conflict of laws, nor indeed purely a matter of any law. It is about making the distinction between law and fact and therefore is not limited to the field of conflict of laws. It tends to arise more frequently in the context of private international law because this is a field of law where not only the differences between different laws – domestic and foreign law, on the one hand, and international and municipal law, on the other – but also the distinction between law and fact are easily blurred. Thus, for instance, private international law doctrine tells us that under certain laws, such as English law, foreign law is said to be a matter of fact

⁸ Arthur Nussbaum, 'Book Review: Characterization in the Conflict of Laws. Harvard Studies in the Conflict of Laws, Vol. IV. By A.H. Robertson' in (1940) 40 *Colum. L Rev.* 1461.

⁹ *Ibid.* p. 1462 ('Qualification may be understood in a much broader sense ... Any subsumption of facts under legal concepts, or of legal concepts under broader categories can be called qualification or characterization'). See also, Restatement (Second) of the Conflict of Laws (1971), s. 7 ('Two aspects of characterization. Characterization is an integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law; and (2) definition or interpretation of the terms employed in the legal categories and rules of law. The factual situation must be classified to determine under what legal categories and rules of law it belongs. Likewise, the terms employed in the legal categories and rules of law must be interpreted in order that the factual situation may be placed under the appropriate categories and that the rules of law may be properly applied.').

and as such a matter of evidence,¹⁰ whereas under certain others, foreign law is said to be a matter of law.¹¹ In other words, whether a particular issue is to be considered an issue of law or an issue of fact is, precisely, a matter of qualification in the strict conceptual sense of this term: a qualification (that is, a restriction) of the meaning of the concept or category at issue.¹² If a particular issue, such as the status of foreign law before the forum, is qualified as a matter of fact rather than law, or vice versa, such a qualification necessarily delimits the meaning of the concept of foreign law. After qualification, it no longer means law *and/or* fact, but law *or* fact. By implication, given the way in which the process of qualification operates, there is a conceptual state – a state of ‘and/or’ – before qualification takes place where the distinction between law and fact does not yet exist; rather it is suspended in a sort of ‘superposition’, to borrow a term of quantum mechanics, where law and/or fact coexist in one, unqualified or suspended state. In such a state, law and fact are effectively the same, a sort of *Urbegriff* of law and/or fact.¹³ It is only the process of qualification that produces the distinction between the two concepts by qualifying, *i.e.* by limiting, the scope and meaning of the *Urbegriff* and by distinguishing law from fact, and vice versa.

This preliminary analysis suggests that qualification is fundamentally about the issue of how to distinguish between law and fact in a particular context, including in the context of conflict of laws. The issue is this: when two laws are in conflict and cannot be applied at the same time, which law should be given effect as law, and which should be treated rather as non-law, effectively as a mere fact? The distinction between law and fact in the context of conflict of laws does not exist before this determination has been made. It emerges as a result of the process of qualification, *i.e.* as a result of a conceptual delimitation of the particular conflict of laws at issue. In this sense qualification operates a bit like measurement in

¹⁰ See *e.g.*, Dicey, Morris and Collins on *The Conflict of Laws*, *supra* n. 1 at p. 255, rule 18-(1) (‘In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means’). Similarly, international law contains a conflict rule that qualifies municipal law as a ‘mere fact’ before an international court or tribunal; see *e.g.*, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (1926) PCIJ (ser. A.) No. 7, 19, Judgment on Merits, 25 May 1926 (‘From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activity of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such, but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.’). Of course, this does not prevent an international tribunal from interpreting and applying domestic law as a preliminary matter. For further discussion of this and other transnational conflict rules, see Veijo Heiskanen, ‘Forbidding *Dépeçage*: Law Governing Investment Treaty Arbitration’ in (2009) 32 *Suffolk Transnat’l L Rev.* 367 at pp. 395–406.

¹¹ See *e.g.*, Swiss Private International Law Act, 1987, art. 16(1) (‘The content of the applicable foreign law shall be established ex officio. The assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties.’).

¹² See *e.g.*, Webster’s *Encyclopedic Unabridged Dictionary of the English Language* (1989): ‘Qualification: ... modification, limitation or restriction: to endorse a plan without qualification ... an instance of this: He presented his argument with several qualifications’.

¹³ The concept of ‘*Urbegriff*’ (or ‘primordial’ or ‘original’ concept) was aptly defined by Immanuel Kant as ‘the sum-total of all possibility’. See Immanuel Kant, *Critique of Pure Reason* (Norman Kemp Smith (trans.), 1965), p. 489.

quantum physics. Just as measurement destroys the quantum state (superposition) of an elementary particle, qualification destroys the ‘quale’ state of the *Urbegriff* law and/or fact by qualifying one of its meanings and disqualifying the other.¹⁴ In other words, pushing the analogy a bit further, just as physical phenomena such as electromagnetic radiation, once measured, emerge as quanta, *i.e.* in discrete quantities of energy rather than as continuous waves, legal phenomena, once qualified, always appear as qualia, *i.e.* in terms of singular concepts rather than as a stream of disembodied information.¹⁵

The *problématique* of the classic conflict of laws has been muddled somewhat by the emergence of interest-based approaches, in particular in the United States. These approaches, which began to gain momentum in the 1960s, have challenged the role of the classic conflict rules and the importance of the problem of qualification. However, while a concerted effort has been made by proponents of these approaches to eliminate, or at least to reduce the importance of, the problem of qualification, these attempts have been less than successful. Indeed, it is arguable that the interest-based approaches to conflict of laws tend to beg – or rather, suspend – the question of qualification rather than resolve it. This is because even when a choice of law is made on the basis of weighing of competing interests rather than a pre-existing rule that links a particular legal category to a particular jurisdiction, such a weighing will by definition result in a decision to apply one law or another. In other words, while the choice of law in such a situation is made on the basis of a weighing of a variety of criteria and is therefore essentially *ad hoc* and as such should not raise qualification issues, this does not change the fact that, as a result of the choice, one of the competing laws will be categorised as law and the other as ‘non-law’ – effectively as a fact.

Consequently, such a choice-of-law decision necessarily involves a process of qualification, even if not one based on rules, which suggests that the interest-based approach is not fundamentally different from the rules-based approach. The principal difference between the two approaches is, in substance, the timing of qualification. While the rules-based approach seeks to make a conceptual distinction between law and fact in advance, on the level of the rule, the interest-based approach suspends the making of this distinction until the concrete context

¹⁴ The concept of ‘qualia’ (in singular, ‘quale’) was introduced into modern philosophy by C.I. Lewis; see C.I. Lewis, *Mind and the World Order* (1929), p. 121 (defining qualia as ‘recognizable qualitative characters of the given’). The term is used here in a broader sense to refer to the interface between information and conceptualisation, or the ‘collapse’ or decoherence of the flow of information into discrete and concrete concepts. For further discussion of the relationship of information and physical phenomena, see *e.g.*, Hans Christian von Baeyer, *Information: The New Language of Science* (2003). The quale (unqualified) state of information is reflected in certain concepts that still retain their opposite meanings; among legal concepts, perhaps the most qualified example is ‘sanction’.

¹⁵ Conceptually speaking, neither outcome is surprising and indeed both follow virtually by definition: it should be no more surprising if quantification (*i.e.* measurement) produces quanta, or measurable units, than if qualification (*i.e.* conceptualisation) produces qualia, or intelligible concepts. From this (conceptual) perspective, there is no ‘quantum weirdness’. Indeed, any other outcome of quantification and qualification (*i.e.* other than quanta or qualia), respectively, would be weird. Just as concepts do not exist before they have been formulated out of information, quanta do not exist until they have been meted out of the wave of energy. Information and energy, no less than bread, do not naturally exist in a sliced condition.

of judicial decision-making. Accordingly, since both approaches are based on the assumption that there is a fundamental conceptual distinction between law and fact, and that this distinction must eventually be made, they cannot be said to be fundamentally different from each other.¹⁶

It should not come as a surprise, therefore, that the interest-based approaches have been unable to dispose of legal categories altogether. Thus, the Restatement (Second) of the Conflict of Laws, which is much influenced by the interest-based approaches and has largely disposed of formal conflict rules for the purpose of determining the applicable law,¹⁷ continues to apply traditional legal categories such as jurisdiction and procedure for the purpose of categorising the relevant legal issues.¹⁸ Indeed, it is arguable that even an extreme interest-based approach would have difficulty in disposing of these legal categories since a choice of law can arise as an issue of substance only after preliminary issues involving jurisdiction and admissibility, on the one hand, and procedure and substance, on the other, have been resolved. No substantive choice of law issues can arise, as a practical matter, before it has been determined that the particular dispute in question falls under the court's jurisdiction, and/or that the claim is admissible. Similarly, no substantive choice of law issues can arise, as a matter of law, before it has been determined that there is indeed a conflict of laws and not merely an apparent conflict. If it turns out that one of the apparently conflicting laws is a rule of procedure whereas the other qualifies as a norm of substance, there is, legally speaking, no conflict of laws. Both of these preliminary determinations require qualification, or proper conceptualisation, of the issue at hand. Obviously such preliminary determinations, whether they concern jurisdiction or admissibility, or the categorisation of a particular law as a rule of procedure or as a norm of substance, are made in international arbitration as a matter of daily routine, although probably often without any deeper reflection on the question of whether one is engaged in a process of qualification. This does not make the issue less important – rather the contrary is arguably the case.

The policy-oriented (interest-based) approaches have certainly made a lasting contribution to conflict of laws in the sense that they have shifted the focus of conflict of laws from the application of formal conflict rules to the substance of the issue. Even accepting that there cannot be, as a matter of law, any conflict of laws unless both of the applicable laws qualify as rules of procedure or as norms of substance, respectively, there cannot be any conflict of laws *as a matter of fact* unless

¹⁶ It is hard to say, therefore, which one of the two approaches deserves more credit, *in abstracto*. While the interest-based approach increases the likelihood that the ultimate choice of law better reflects the facts of the case, the increased accuracy in judicial decision-making comes at a price, as it reduces predictability. Conversely, the rules-based approach puts a premium on predictability, leaving the courts to struggle with concrete cases in circumstances where the abstract rule that they have been instructed to apply tends to capture only a sub-set of the relevant facts and thus may produce arbitrary results.

¹⁷ See Restatement (Second) of the Conflict of Laws (1971), ss. 145 (torts) and 188 (contracts) (adopting the test of the 'most significant contact').

¹⁸ *Ibid.* ch. 3 (judicial jurisdiction). See also, *ibid.* ch. 6 (procedure), s. 122 (discussing the 'substance-procedure dichotomy').

the two laws conflict also in substance and not merely in form. In other words, it cannot be said that there is any conflict of laws until it is established, as a matter of fact (as opposed to formal law), that the conflict at hand is not a 'false' conflict but rather a 'true' conflict of laws in the sense that both of the applicable laws incorporate compelling public policies that cannot be superseded or displaced by formal conflict rules or by agreement between the parties. In the words of Brainerd Currie, for a true conflict of laws to exist, there must be a conflict as to the 'rule of decision':

Conflict of laws, as we practice it, is concerned with references to foreign law for quite different purposes. Our failure to distinguish between them is to a considerable degree responsible for our troubles. The distinction needs to be clarified and better stated, so that it can be more easily applied; and we need to know more about the class of cases in which foreign law is referred to for some purpose other than that of finding the rule of decision. For the present, however, I divided all conflict cases into (1) those in which the purpose of the reference to foreign law is to find the rule of decision, and (2) those in which the reference has some other purpose ... The central problem of conflict of laws may be defined then, as that of determining the appropriate rule of decision when the interests of two or more states are in conflict – in other words, in determining which interest shall yield.¹⁹

Consequently, if one of the laws in question is a non-mandatory ('dispositive') law from which the parties can contract out, and the other is a mandatory law which applies regardless of the terms of the contract, there is, as a matter of substance (or public policy), no conflict between the applicable laws. Similarly, if the applicable law by its terms supersedes the law that would otherwise be applicable under the relevant conflict rule, there cannot be, as a matter of substance, any conflict between such law and the law that would otherwise be applicable, but for the displacement of the applicable conflict rule.

The determination of whether the applicable law, in any particular case, incorporates public policies that cannot be displaced by conflict rules or set aside by agreement between the parties is, in itself, a matter of qualification or characterisation. It involves a determination of whether the law in question qualifies, in substance, as a matter of public policy applicable in the context, and whether, in the circumstances, the otherwise applicable law should be 'disqualified'. It may be said, therefore, that whether one prefers the traditional rule-based approach or the more modern interest-based approach to conflict of laws, the problem of qualification remains, to an extent, unavoidable. It tends to arise not only in the context of preliminary determinations, such as whether a particular preliminary issue should be characterised as an issue of jurisdiction or admissibility, or whether a particular law qualifies as a rule of procedure or as a norm of substance; it also tends to arise when determining whether there is a true conflict between rules of decision. In other words, given that legal categories such

¹⁹ Brainerd Currie, 'Notes on Methods and Objectives in Conflict of Laws' in Currie, *supra* n. 4 at pp. 178–179.

as jurisdiction and admissibility, or procedure and substance, are not defined in identical terms in all jurisdictions, and given that conceptions of whether a particular law qualifies, in terms of its substance, as a matter of public policy are likely to diverge between different jurisdictions, the problem of qualification remains part and parcel of conflict of laws, whatever one's preferred intellectual approach.

III. THE PROBLEM OF QUALIFICATION AND CONFLICT OF LAWS IN THE CONTEXT OF INTERNATIONAL ARBITRATION

(a) *The Context of International Arbitration*

The fact that the problem of qualification has never been considered a fundamental problem of international arbitration suggests that the traditional *problématique* of conflict of laws tends to play only a limited role in modern international arbitration.²⁰ This is so largely for two reasons. First, an international arbitral tribunal has a much more tenuous link with the seat (or the 'place') of arbitration than a local court has with its own forum; indeed, it is often said that an international arbitral tribunal does not have a forum.²¹ Secondly, the distinction between domestic and foreign law is not relevant to an international arbitral tribunal in the same way that it is relevant to the local court. The legal system of the seat of arbitration is not the 'domestic' jurisdiction of an international arbitral tribunal.

These two important differences between an international arbitral tribunal and a local court are interlinked. To say that an international arbitral tribunal does not have a forum is another way of saying that the relationship between the seat and the tribunal is *ad hoc* rather than inherent or systemic. An international arbitral tribunal has not been established to resolve disputes in any particular territorially defined jurisdiction, or in any particular 'place', and this applies to the seat of arbitration. It may be said that an international arbitral tribunal is substantially 'delocalised' in the sense that, even if it has a seat in a particular jurisdiction, the fact that the seat is located in one jurisdiction rather than another is often largely fortuitous, and at best a matter of convenience or practicality,

²⁰ For reasons set out *infra* nn. 40–41 and the accompanying text, although the focus of this article is on international commercial arbitration, this does not imply that there is a strict conceptual distinction between international commercial arbitration and investment arbitration. This is not to say that the conflict rules or approaches applicable in the two regimes are identical. See Heiskanen, *supra* n. 10.

²¹ See e.g., Pierre Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international séjournant en Suisse* in (1976) *Rev. Arb.* 155 at p. 159; Reymond, *supra* n. 5 at p. 99; Boissésou, *supra* n. 5 at p. 30. See also, Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' in (2003) 36 *Vanderbilt J Transnat'l L* 1313 at p. 1315 ('Two contrary findings arise from a review of the evolution of arbitration law over the last decades. On one hand, it is now commonly accepted that an arbitration is governed by national arbitration law of the place or seat of the arbitration, though not by local rules of civil procedure. On the other hand, such national law has less and less actual bearing on the arbitration proceedings.').

rather than an indication of the territorial scope of the arbitral tribunal's jurisdiction.²²

Thus, an international arbitral tribunal sitting in Geneva and composed of, say, an English chairman and Egyptian and Canadian co-arbitrators, and dealing with a contractual dispute arising between a Turkish and a Delaware company, can hardly approach its task by distinguishing between domestic and foreign law. Indeed, it may be said that the relevant laws, including the law of the seat (*lex arbitri*), are all equally 'foreign', or equally 'domestic', from the perspective of the arbitral tribunal. While the arbitration law of the seat governs the arbitral proceedings in the sense that any action for setting aside of the arbitral award is to be brought before the courts of the seat, this does not mean that the law of the seat plays a substantial role in the conduct of the arbitral proceedings, in particular in jurisdictions that have adopted the UNCITRAL Model Law on Commercial Arbitration or another, similar modern arbitration law.²³ The private arbitration rules designated by the parties invariably provide much more detailed guidance for the arbitral tribunal than the few minimum standards established in the applicable international arbitration law. Nor does the law of the seat necessarily have anything to do with the substance of the dispute, which in practice is often governed by a law other than the law of the seat. Nor does the law of the seat necessarily govern the validity of the arbitration agreement, or the capacity or authority of the parties to enter into an arbitration agreement – and this is because the seat is often chosen precisely because it has no connection with the dispute. In other words, while a local court is generally considered competent because the dispute has arisen within its jurisdiction, the seat of an arbitral tribunal is often intended to be as 'foreign' to the parties and the subject matter of the dispute as reasonably possible.

The principal consequence of these important differences between local court litigation and international commercial arbitration is that an international arbitral tribunal cannot be considered to be bound by the conflict rules of the seat of the arbitration – a conclusion generally accepted and reflected in most modern international arbitration rules.²⁴ While an international arbitral tribunal may seek

²² The controversy about whether parties to arbitration agreements would or should be able to 'delocalise' the arbitration and have the arbitration conducted without regard to the mandatory rules of law of the seat or, in any event, have the arbitral award recognised and enforced even if it had been set aside by the court of the seat of arbitration was a hot topic among arbitration scholars and practitioners in the 1980s. For discussion, see e.g., Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' in (1981) 30 *Int'l and Comp. LQ* 358; Hans Smit, 'A-National Arbitration' in (1981) 63 *Tul. L Rev.* 629; Jan Paulsson, 'Delocalization of International Commercial Arbitration: When and Why It Matters' in (1983) 32 *Int'l and Comp. LQ* 53; William W. Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration' in (1983) 32 *Int'l and Comp. LQ* 21; Jan Paulsson, 'The Extent of Independence of International Arbitration from the Law of the Situs' in J. Lew (ed.), *Contemporary Problems in International Arbitration* (1986), p. 297; William W. Park, 'Judicial Controls in the Arbitral Process' in (1989) 5 *Arb. Int'l* 230.

²³ See e.g., Swiss Private International Law Act, arts. 182–184, 190.

²⁴ See e.g., UNCITRAL Arbitration Rules, art. 33(1) ('The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers to be applicable'); Swiss Rules of International Arbitration, art. 33(1) ('The arbitral tribunal shall decide the case in accordance with the rules

guidance from the local conflict rules, it is not required to do so. It may also choose to apply a particular rule, norm or principle that it considers appropriate, without having to engage in any conflict-of-laws analysis (*voie directe*).²⁵ It is this latter development, in particular, that accounts for the relative decline in importance of the classic conflict of laws in the law and practice of international arbitration; indeed, it effectively amounts to a displacement of the rule-based approach in favour of the interest-based (or perhaps more appropriately, purely contextual)²⁶ approach to conflict of laws issues in international arbitration.²⁷ If the arbitrators may choose any conflict rule they consider appropriate and even disregard conflict of laws rules and choose the applicable law directly, without having to engage in any conflict of laws analysis, is there any real role or function left for the traditional conflict of laws methods in modern international arbitration?

It is indeed the case that conflict of laws, in its classical sense as a set of rules designed to facilitate the choice of the applicable law before a local court, is only

of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection'. See also, UNCITRAL Model Law, Art. 28(2) ('Failing any designation [of the applicable law] by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'). The traditional approach, which was reflected for instance in the resolution adopted by the Institut de droit international at its 1957 and 1959 sessions, was to apply the conflict rules of the seat of arbitration. See art. 11 ('Law Applicable to the Substance of the Difference') of the resolution on 'Arbitration in Private International Law' in 47 *Annuaire de l'Institut de Droit International* (1957), vol. II, pp. 491, 496 ('The rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference'). While the traditional approach is no longer considered as the sole available or indeed permissible approach, it continues to have its supporters; see e.g., G.C. Moss, 'International Arbitration and the Quest for the Applicable Law' in (2008) 8(3) *Global Jurist* 1. See also, J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (2007), p. 573 ('Although there is no evident link between the choice of the seat and the choice of the rules of conflict for determining the law applicable to the merits, making a presumption in this sense hazardous, this method does at least have the merit of assuring a certain degree of foreseeability with regard to the determination of the *lex causae* in the absence of a choice of law').

²⁵ See e.g., Arbitration Rules of the International Chamber of Commerce, art. 17(1) ('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. In the absence of any such agreement, the Arbitral Tribunal shall apply *the rules of law which it determines to be appropriate*') (emphasis added); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, art. 22(1) ('The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply *the law or rules of law which it considers to be most appropriate*') (emphasis added); Arbitration Rules of the American Arbitration Association, art. 28 ('The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such designation by the parties, the tribunal shall apply *such law(s) or rules of law as it determines to be applicable*') (emphasis added).

²⁶ This is because the approach does not necessarily require any weighing of 'interests' between the relevant jurisdictions; it simply requires the determination of the 'appropriate' rule of law, taking into account all the circumstances. See W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000) ('Th[e] empowerment to use the "*voie directe*" in choice of law also coincides with the tendencies of arbitral practice. The freedom of the arbitral tribunal, like that of the parties, to apply rules of law other than those of a single state provides a flexibility to meet the intentions of the parties and to respond to all the circumstances of a case.')

²⁷ It should be noted that the *voie directe* approach remains a conflict-of-laws approach in the sense that it results in a choice of law and accordingly the arbitrators must provide reasons for their (contextual) choice of law. See Horacio Grigera Naón, 'Choice-of-Law Problems in International Commercial Arbitration' in (2001) 289 *Recueil des Cours* 377.

of limited relevance in international arbitration. This is not to say that conflict of laws approaches have no relevance at all in international arbitration, or that there has been a wholesale displacement of the rule-based approach by a purely contextual approach. It is to say that, although conflicts of laws continue to arise in the context of international arbitration, they do not arise out of the distinction between domestic and foreign law, which as such has no relevance in international arbitration. Instead of having to choose between domestic and foreign law, an international arbitral tribunal is often faced with a much broader range of options – it must choose between the law(s) that the parties have either directly or indirectly designated as applicable and *any other laws that may be considered to be applicable*.

Unlike a local court, an international arbitral tribunal is faced with what may be termed a ‘transnational’ conflict of laws. Such a conflict is ‘transnational’ in the sense that it arises in terms of the law or the laws that the parties have either directly (by including a governing law clause in the contract) or indirectly (by designating a seat of arbitration and/or a set of private arbitration rules that authorise the arbitral institution or the arbitral tribunal to choose the seat of arbitration) chosen as being applicable, and any other laws, including laws of third jurisdictions, that may be applicable. Such other laws include rules of law that may be considered applicable under the appropriate conflict rule or *voie directe*, or mandatory rules of law that may be applicable to the contract regardless of the parties’ choice of law, or public laws (*lois de police*) that may apply to the contract or its performance, or they may consist of national, international or transnational public policies or, in certain instances, of public international law.

The potential for conflict between such laws in any particular case depends on how ‘international’ the arbitration process is in terms of the various relevant criteria, including the place of the arbitration, the nationality of the parties, the principal places of business of the parties, the law governing the contract, the place of performance of the contract, and the place or places where the effects of the performance of the contract are felt. In other words, there is no one standard case of international arbitration; some international arbitrations are more international (or more accurately, more ‘transnational’)²⁸ than others, depending on the diversity of the relevant criteria. There are international arbitrations where the only cross-border element may be the seat of the arbitration or, more

²⁸ The term ‘international’ implies that the arbitral tribunal is established under and derives its jurisdiction from international law, which is not the case. F.A. Mann famously argued that ‘[t]here is very strong reason to fear that [the word “transnational”] means nothing and is incapable of definition’. F.A. Mann, ‘Book Review: Resolving Transnational Disputes through International Arbitration, Sixth Sokol Colloquium, Edited by Thomas E. Carbonneau’ in (1986) 2 *Arb. Int’l* 378. Dr Mann was certainly right in that, unlike the distinctions between international law and municipal law, on the one hand, and between domestic and foreign law, on the other, the term ‘transnational’ does not have a clear-cut conceptual opposite but rather occupies a conceptual continuum where the particular phenomenon under consideration (in this case, arbitration) may be more or less transnational, depending on the context. Since it tends to muddle the conceptual distinctions between international and municipal, on the one hand, and domestic and foreign, on the other, it may indeed seem, for some, too unwieldy as the conceptual basis of international arbitration.

frequently, the nationality of one of the parties; but there are also others where the diversity of connecting factors is such that the arbitration process may be characterised as truly transnational. In such a truly transnational setting, there is a variety of laws, rules of law and/or public policies that are potentially relevant:

- local arbitration law, to the extent that it establishes mandatory rules of law for arbitrations taking place in the jurisdiction;²⁹
- other mandatory rules of law of the seat of arbitration;
- laws of the places of organisation and/or of the principal places of business of the parties;
- law governing the arbitration agreement;
- law of the place where the contract was made;
- law governing the contract;
- law of the place of performance of the contract, or of a jurisdiction where the effects of the performance of the contract are felt, and/or of the place of recognition and enforcement of the award;
- national, international and/or transnational public policy;
- public international law.

Any problems of qualification or conflicts of laws that may arise in such a transnational context cannot be approached or resolved exclusively in terms of the traditional conflict rules or approaches, which focus on the distinction between domestic and foreign law. While the conflict of laws in each of these instances may be characterised in terms of the law of the seat and the law of a jurisdiction other than the seat, such other law is not necessarily more ‘foreign’ in the context of the arbitration than the law of the seat, in particular where the sole connecting factor between the arbitration and the seat is the seat itself. Thus, for instance, while it might be tempting to argue that in case of a conflict between the mandatory law of the seat and the mandatory law of any other jurisdiction, priority should invariably be given to the law of the seat, this solution is not necessarily justified in circumstances where, again, the sole link between the seat and the arbitration is the seat itself. In such circumstances the arbitral tribunal cannot be said to be part of the ‘domestic’ system of the seat of arbitration and

²⁹ Such rules of law may be procedural or substantive, *e.g.*, to the extent that they regulate arbitrability or reserve the seat’s public policy. *See e.g.*, UNCITRAL Model Law, Art. 1(5) (‘This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law’), and Chapter V (‘Conduct of Arbitral Proceedings’), esp. Art. 19(1) (‘Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings’). *See also, ibid.* Art. 34(b)(i) (‘An arbitral tribunal may be set aside by the [competent court] if: ... the court finds that ... the subject matter of the dispute is not capable of settlement by arbitration under the law of this State’) and Art. 34(b)(ii) (‘An arbitral tribunal may be set aside by the [competent court] if: ... the court finds that ... the award is in conflict with the public policy of the State’).

therefore cannot be expected to automatically resolve the conflict in favour of the law of the seat.³⁰

This is not to suggest that no distinction can or should be made between international and domestic arbitration. It is to suggest that the ‘internationality’ (or rather ‘transnationality’) of an arbitration is a sliding scale. The more tenuous the link between the seat and the arbitration in terms of the various connecting factors (the place of negotiation and/or conclusion of the contract, the places of organisation and/or the principal places of business of the parties, the place of performance of the contract, the law governing the arbitration agreement, the law governing the contract, and the place where the effects of the performance of the contract are felt) the more ‘international’ is the arbitration. Conversely, the stronger the link between the seat and the arbitration in terms of such connecting factors, the more ‘domestic’ is the arbitration. In other words, the transnationality of an arbitration is a matter of difference in degree, depending on the presence or absence of the relevant connecting factors, rather than a strict conceptual distinction between ‘international’ and ‘domestic’ arbitration. In these circumstances, distinguishing between the two forms of arbitration is essentially a matter of policy rather than strict law.³¹ While one jurisdiction may draw the distinction between domestic and international arbitration based on one set of criteria, and another jurisdiction may draw it on the basis of another set of

³⁰ This suggestion is not particularly novel or radical as it has been endorsed even in international civil litigation. See e.g., the Rome Convention on the Law Applicable to Contractual Obligations, Art. 1(2)(a), and the EU Regulation that replaced the Convention, Regulation 593/2008/EC of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 9 (‘Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.’). See also, Swiss Private International Law Act, art. 19 (‘Taking into account of mandatory provisions of foreign law’) (‘1. If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated by this Code may be taken into account if the circumstances of the case are closely connected with that law. 2. In deciding whether such a provision must be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law.’).

³¹ In this purely formal or conceptual sense E.A. Mann certainly had a point when arguing that the term ‘international arbitration’ is a ‘misnomer’ since ‘[i]n the legal sense no international commercial arbitration exists’. This is because ‘[j]ust as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law’. E.A. Mann, ‘Lex Facit Arbitrum’ in Pieter Sanders (ed.), *International Arbitration Liber Amicorum for Martin Domke* (1967), pp. 157, 159. Mann’s controversy in the course of the 1980s with those, like Jan Paulsson, who argued in favour of delocalisation of international arbitration (or rather, the delocalisation of arbitral awards) is analogous to the controversy between conceptualists and modernists in conflict of laws. Just as the conceptualists, Mann focuses on the link between a ‘category’ (international arbitration proceedings) and a particular jurisdiction (the seat of the tribunal), whereas Paulsson, like the modernists, focuses on a ‘weighing’ of the substantive public policies of the seat and the place where recognition and enforcement of the arbitral award is sought. See Paulsson, ‘Delocalization of International Commercial Arbitration’, *supra* n. 22 (‘So the award is set aside in country A. Why does this necessarily have to mean that the award is annulled *erga omnes*? Could not country B recognize the award simply by holding that under its law the result of the arbitration is perfectly valid and the reason for annulment in country A is so peculiar to country A that the annulment is properly deemed to be limited to that country?’).

criteria, one cannot say that one jurisdiction has drawn a proper distinction and the other has acted improperly, so long as there is at least an arguable basis for making the distinction in the way it has been made.³²

However, while it is essentially a matter of legal policy as to how precisely to distinguish between international and domestic arbitration, and indeed while each jurisdiction remains free to decide whether international and domestic arbitration should be governed by separate legal regimes, it is arguable that the more transnational an arbitration is in terms of the relevant criteria, the weaker the claim that mandatory laws and public policies of the seat should automatically be given priority in the arbitration over any other applicable mandatory laws and policies.³³ Obviously, the public policy issues arising in the context of a purely domestic arbitration are different from those arising in the context of a truly transnational arbitration. The forum state arguably has a legitimate interest in ensuring that parties to purely domestic arbitrations do not abuse their right to choose the applicable law and the seat of the arbitration, for the sole purpose of seeking to avoid mandatory rules of law of their domestic jurisdiction. On the other hand, the state of the seat has only a very limited interest in regulating and interfering with a truly transnational arbitration which has no connection whatsoever with the seat of arbitration, apart from the seat itself.

In any event, the fact that a particular jurisdiction has made such a policy choice, and has drawn a distinction between domestic and international arbitration as set out in the local arbitration law, does not fully settle the matter for the arbitral tribunal. The degree of transnationality of arbitrations varies not only in terms of the distinction between ‘international’ and ‘domestic’ arbitration; it also varies between arbitrations that qualify as ‘international’ arbitrations within the meaning of the local arbitration law. What are the characterisation issues and conflicts of laws that may arise in the context of such *ex lege* ‘international’ arbitrations?

³² Thus, while important venues of international arbitration such as France and Switzerland have both distinguished in their domestic legislation between domestic and international arbitration, the relevant distinctions are not identical. *See* French Civil Code of Procedure, art. 1492 (‘An arbitration is international when it involves the interests of international trade’) and Swiss Private International Law Act, art. 176(1) (‘The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland’). *Cf.* UNCITRAL Model Law, Art. 1(3) (‘An arbitration is “international” if: (a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their place of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.’).

³³ As noted *infra*, this is recognised in Regulation 593/2008/EC and Swiss Private International Law Act, art. 19, *supra* n. 30.

(b) The Problem of Qualification in International Arbitration

The shift in the context of international arbitration from the domestic/foreign law framework to the transnational context has resulted in a corresponding shift in the context of the problem of qualification. The principal qualification issue in such a transnational context is not whether the relevant issues, categories or laws should be characterised on the basis of domestic or foreign law; the principal issue is how such qualifications should be made in a situation where the law of the seat is only one among many applicable laws, the applicability of such other laws depending on the context.

In such a transnational context, the problem of qualification may arise on two different levels. First, it may arise as a preliminary legal issue in terms of whether a challenge to the arbitral tribunal's authority over the claim should be characterised as an issue of jurisdiction or admissibility. Secondly, it may also arise in terms of whether there is any conflict of laws, both as a matter of law and as a matter of fact. As noted above, for a conflict of laws to exist, as a matter of law, both of the applicable laws must qualify as procedural rules or substantive norms, respectively, and for a conflict of laws to exist as a matter of fact, both of the applicable laws must qualify as mandatory rules of law or public policies in the broad sense that they cannot be superseded or displaced by conflict rules or by agreement between the parties.³⁴

In the traditional conflict of laws, the question of whether such qualification issues should be resolved by reference to the law of the forum or the applicable foreign law remains controversial, and there appears to be no generally accepted position. Indeed, there appear to be compelling arguments against both approaches. It has been argued that, if foreign law is to be qualified based on the law of the forum, by reference to the corresponding domestic rule or institution, the court may end up failing to apply a rule of foreign law in all cases where there is a conflict of characterisations, or applying a rule of foreign law in cases where such law (according to its own terms) should not be applied, thus effectively distorting the foreign law and ending up applying neither the foreign law nor the

³⁴ See e.g., George A. Berman, 'Introduction: Mandatory Rules of Law in International Arbitration' in (2007) 18 *Am. Rev. Int'l Arb.* 1 ('In the private international law literature, a norm or rule of law is most often described as "mandatory" when a court must apply it, even if the court, under the operation of its conflicts of laws rules, would ordinarily apply some other body of law (often referred to casually as "the otherwise applicable law"). As indicated ..., other terms – often in other languages (*lois de police* in France, for example) – capture much the same idea. On other occasions, authors define as "mandatory" those rules of law that cannot be derogated from by private parties in the exercise of their autonomy') (footnote omitted). See also, Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' in (1986) 2 *Arb. Int'l* 274 at p. 275 (noting that the issue 'has scarcely been analyzed in a serious manner' and listing 'competition laws; currency controls; environmental protection laws; measures of embargo, blockade, or boycott; or laws falling in the rather different category of legislation designed to protect parties presumed to be in an inferior bargaining position, such as wage earners or commercial agents' as examples of mandatory laws); Swiss Private International Law Act, art. 17 ('The application of provisions of foreign law shall be precluded if it would produce a result which is incompatible with Swiss public policy (*ordre public*)') and art. 18 ('This Code does not prevent the application of those mandatory provisions of Swiss law which, by reason of their particular purpose, are applicable regardless of the law designated by this Code').

law of the forum.³⁵ Similarly, it has been pointed out that if qualification is performed in accordance with the foreign law, this would mean that the forum would lose control over the application of its own conflict of laws and would no longer be the master of its own home.³⁶ The problem gets even more complicated in situations where the relevant categories in the foreign conflict of laws are not the same as those of the forum.³⁷

Preliminary qualification issues involving jurisdiction and admissibility, on the one hand, and substance and procedure, on the other, are also bound to arise in the context of international arbitration, and when they do arise, they may be complex.³⁸ In the absence of an obvious 'domestic' law to fall back on, the sole viable solution that would appear to be available to an international arbitral tribunal is to approach such issues by reference to the degree of transnationality of the arbitration. The less transnational (in other words, the more 'local') the arbitration is in terms of the relevant connecting factors, the more appropriate it would be for the arbitral tribunal to approach such issues on the basis of the applicable local standards, *i.e.* on the basis of characterisations adopted in the law of the seat. Conversely, the more transnational the arbitration is in terms of the relevant connecting factors, the more appropriate it would appear to be for the arbitral tribunal to resolve any such issues on the basis of transnational rather than local standards.

This raises two distinct questions. First, how should an international arbitral tribunal distinguish between contexts where characterisations should be made on the basis of local standards, as opposed to those where such issues should be resolved on the basis of transnational standards? And secondly, once the tribunal has determined that it should indeed refer to transnational standards, where will it find such standards?

There is no easy or obvious solution to the first question. Given that the degree of transnationality of an international arbitration is a sliding scale, there is, again, no standard case of international arbitration. Each arbitration tends to be unique in terms of the relevant connecting factors: the seat of arbitration, the nationality and/or principal place of business of the parties, the place of negotiation and conclusion of the contract, the place of performance of the contract, the place or places where the effects of the arbitration are felt, and the law governing the contract. An arbitral tribunal must exercise its best judgment when determining whether any characterisation issues that may arise should be resolved by reference to local standards (the law of the seat) or transnational standards, and take into account all the relevant circumstances. In other words, the matter is one

³⁵ Dicey, *Morris and Collins on The Conflict of Laws*, *supra* n. 1 at pp. 39–40.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ See *e.g.*, V.V. Veeder, *Towards a Possible Solution: Limitation, Interest and Assignment in London and Paris*, ICCA Congress Series No. 7 (1996), p. 268 (noting that the distinction between procedural law and substantive law 'in England and elsewhere' 'is a twilight zone where even legal angels fear to tread').

of weighing the relevant factors and determining whether the links with the seat, taken together, outweigh those with all other relevant jurisdictions.³⁹

As to the second question – where can one find the relevant transnational standards, once the arbitral tribunal has determined that the transnational links indeed outweigh the local links? – an international arbitral tribunal need not necessarily go too far. It is suggested (as has been suggested by others)⁴⁰ that this is a largely a matter of comparative law and therefore a field where there is no need to make any strict conceptual distinctions between domestic and foreign law or indeed between private and public international law. Qualification of a particular issue as a jurisdictional issue or as an issue of admissibility, on the one hand, or as an issue of procedure or as an issue of substance, on the other, is arguably a matter of legal methodology (or ‘lawyers’ law’) rather than a matter of governmental regulation, or public policy, and as such need not be, and indeed has no compelling policy reason to be, different in different jurisdictions. While there may be instances where a local legislator has expressly qualified a particular issue in particular methodological terms (for instance, as a matter of procedure rather than as a matter of substance), there should generally be no compelling public policy issues raised by such qualifications that would prevent an international arbitral tribunal from recharacterising such issues, if required for compliance with transnational legal standards.⁴¹

The problem of qualification may also arise when determining whether there is, as a matter of law and fact, any conflict of laws. There is a variety of laws that may be applicable in the context of international arbitration, and there is

³⁹ In other words, in respect of this issue a contextual approach seems more appropriate than a traditional rules-based conflict-of-laws methodology.

⁴⁰ See e.g., Jan Paulsson, ‘Jurisdiction and Admissibility’ in Gerald Aksen, Karl-Heinz Böckstiegel, Michael J. Mustill, Paolo Michele Patocchi and Anne-Marie Whitesell (eds., 2005), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, p. 616 (noting that ‘[t]his essay does not treat private and public international law as separate worlds. It deals with a generic problem without troubling itself with abstractions that are rapidly becoming obsolete, particularly in the field of investment arbitration under international treaties’).

⁴¹ If such an approach were to be adopted, there would be no basis to make any strict conceptual distinctions between international commercial arbitration and international investment arbitration *in terms of legal methodology*, i.e. in terms of the conceptual distinctions between jurisdiction and admissibility, on the one hand, and procedure and substance on the other. Indeed, while the conflicts of laws that arise in the context of investment treaty arbitration tend to concern the relationship between international law (i.e. the investment treaty and applicable customary international law) and municipal law (i.e. the law of the host state), this does not necessarily have any bearing on how the relevant legal issues should be conceptualised. Moreover, in cases where an investment dispute arises out of an investment contract rather than an investment treaty, the distinction between investment arbitration and international commercial arbitration tends to collapse because in such instances the principal substantive issues tend to arise out of the interpretation and application of the contract rather than the applicable law.

This is not to say that there are no differences; for instance, an ICSID tribunal dealing with contractual disputes must take into account the jurisdictional limitations in the ICSID Convention. Another source of differences may be the applicable law; indeed, the question of whether such ‘state contracts’ between states and foreign investors are governed by national or international law was one of the most debated issues in the field until it was settled, at least in formal terms, in Art. 42 of the ICSID Convention. For further discussion, see Heiskanen, *supra* n. 10.

therefore also a variety of conflicts of laws that may arise in such a context, including the following:

- conflicts between the law of the seat of arbitration and the law under which one or both of the parties are organised and/or the law of their principal place of business, concerning the capacity and/or authority to enter into an arbitration agreement;⁴²
- conflicts between the law of the seat and the law of the place where the contract was concluded, concerning the validity of contracts;⁴³
- conflicts between the law of the seat and the law governing the contract concerning the validity of contracts;⁴⁴
- conflicts between the law of the seat and the law governing the contract concerning the enforceability of certain terms of the contract;⁴⁵
- conflicts between the law of the seat and the law of the place of performance of the contract concerning the validity of the contract and/or the enforceability of certain terms of the contract;⁴⁶
- conflicts between the law of the seat and the law of the jurisdiction where the effects of the performance of the contract are felt concerning the validity of the contract and/or the enforceability of certain terms of the contract.⁴⁷

However, such apparent conflicts between the applicable laws may not necessarily amount to a true conflict of laws. A conflict of laws may be false in two different ways. First, it may be false in *formal* terms if the two conflicting laws,

⁴² The possibility of conflicts between the law of the forum and the otherwise applicable laws is recognised in Regulation 593/2008/EC, art. 9(1), (2) ('1. Overriding mandatory provisions are provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. 2. Nothing in this regulation shall restrict the application of the overriding mandatory provisions of the law of the forum'), and art. 21 ('The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with public policy (*ordre public*) of the forum'). See also, Swiss Private International Law Act, art. 177(2), which seeks to regulate such conflicts, to the extent that one of the parties is a state ('If one of the parties is a State or an enterprise dominated by or an organization controlled by a State, it may not invoke its own law to contest the arbitrability of a dispute or its capacity to be subject to an arbitration').

⁴³ Cf. Regulation 593/2008/EC, arts. 9(1), (2), 21, *supra* n. 42.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* See also, *ibid.* art. 3(3) ('Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement').

⁴⁷ See Regulation 593/2008/EC, arts. 9(1), (2), 21, *supra* n. 42. See also, *ibid.* art. 3(4) ('Where all other elements relevant at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement').

once applied, in fact produce the same result, and secondly, it may be false in *substantive* terms because only one of the two laws is mandatory in the broad sense of this term.⁴⁸ In other words, a true conflict of laws may arise only when there is a conflict between laws that are both mandatory in the sense that each of them incorporates public policies that cannot be displaced by the otherwise applicable law (*i.e.* the law that would be applicable under the relevant conflict rule, but for the mandatory rule) or by private contract between the parties.⁴⁹

The principal qualification issue in such a context is, therefore, whether both of the laws in question can be characterised as mandatory in the broad sense of this term. A law may be considered mandatory for two different reasons: because of its form, *i.e.* the law itself qualifies itself as being mandatory, or because of its substance in the sense that it lays down public policies that must be considered applicable to the dispute regardless of the otherwise applicable law, or the terms of the contract.⁵⁰ It is the latter characterisation that raises the more complex issues in the context of international arbitration. While the determination of whether a particular law is formally mandatory can be made on the basis of the face of the law itself, the question whether a particular law sets out mandatory public policies applicable to the dispute cannot be resolved in the abstract, or outside the concrete context. Again, since there is no one standard case of international arbitration, the degree of transnationality of each arbitration depending on the context, the more 'local' the arbitration is in terms of the relevant connecting factors, the more justifiable it would be for the arbitral tribunal to make the determination of whether the law in question is mandatory based on its substance, or sets out public policies applicable in the context, by reference to the international and national public policies applicable at the seat of arbitration.⁵¹ Conversely, the more transnational the arbitration is in terms of the relevant connecting factors, the more justifiable it would be for the arbitral tribunal to

⁴⁸ See *e.g.*, Weinberg, *supra* n. 4 at p. 6 (noting the distinction between the two types of false conflicts and crediting Currie for its discovery).

⁴⁹ There has been some debate among international arbitration scholars and practitioners as to whether mandatory laws are applicable in international commercial arbitration. There is broadly speaking a consensus that they do apply, although it is less than clear how such laws are to be chosen. See *e.g.*, Mayer, *supra* n. 34 at p. 280 ('An affirmative answer to this question [*i.e.* to the question of whether the arbitrator must apply mandatory rules of law] can hardly be doubted whenever the following three statements are true: the mandatory rule belongs to *lex contractus*, the parties have not expressly excluded its application (which is doubtless exceedingly rare in practice), and finally one of the parties has invoked it before the arbitrators'); Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' in (1997) 14(4) *J Int'l Arb.* 23 ('[A] substantial and growing percentage of cases are affected by the interference of mandatory rules of law which claim or demand to be respected or to be applied directly, irrespective of any law or rules of law chosen by the parties or determined by arbitral tribunal') (footnotes omitted). For recent contributions, see *e.g.*, the articles published in the 2007 issue of the *American Review of International Arbitration*.

⁵⁰ See *supra* n. 19 and accompanying text.

⁵¹ The law of the seat may or may not make a distinction between 'national' and 'international' public policy. National public policy refers to the same public policy that would apply to a domestic arbitral award; it is the 'internal' public policy of the seat. International public policy, on the other hand, refers to a public policy adopted in certain jurisdictions, which distinguish between public policies applicable to purely domestic arbitral awards and 'international' arbitral awards. France is a well-known example of a jurisdiction that applies a narrower concept of public policy to international arbitral awards. See French Code of Civil Procedure, arts. 1498, 1502 and 1504.

make such determinations by reference to transnational standards, *i.e.* by reference to transnational public policy.⁵²

The determination of whether a particular public policy qualifies as transnational public policy raises the question of how to distinguish between transnational public policy, on the one hand, and national or international public policy, on the other. Again, because there is no standard case of international arbitration, what qualifies as transnational public policy in one context does not necessarily amount to transnational public policy in another context – even if the relevant issues on their face appear to be the same.⁵³ By way of an example, the transnational public policy governing the regulation of competition between a German and an Italian company in the context of an arbitration that takes place in The Hague is not necessarily the same as the competition policies applicable in an arbitration between a Chilean and a Brazilian company that takes place in Buenos Aires.⁵⁴ This is because the substance of the relevant mandatory rules and public policies applicable in the context, in light of all the relevant connecting factors, is not necessarily identical.

In sum, because the determination of whether a particular public policy qualifies as transnational public policy depends on the substance of the laws in question, it will always depend on the context. Consequently, the qualification of a particular public policy as transnational public policy in a particular context does not amount to the creation or endorsement of a formal ‘category’ of transnational public policy within the meaning of the classic conflict of laws. The public policy of international arbitration is ultimately contextual.

(c) Conflict of Laws in International Arbitration

The shift in the context of international arbitration from the distinction between domestic and foreign law to the transnational context has also produced a shift in the substance of the relevant conflict of laws. The conflict issues faced by international arbitral tribunals have become more complex – and also potentially more sensitive – than they ever were in international civil litigation. This is not to suggest that conflicts between mandatory laws and/or public policies are common, or more common than, say, conflicts between the terms of the contract

⁵² For a seminal article on the concept of transnational public policy, see Pierre Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ in *ICCA New York Arbitration Congress* (1986), p. 259.

⁵³ *Ibid.* pp. 295–296 (‘The question also arises – although this may be rare in practice – whether the transnational public policy of the arbitrator should lead him, in a given case, to ignore the international public policy of a certain State, be it that of the place of arbitration or one of the States concerned in the dispute ... A general and abstract answer does not appear to have much sense, especially since the concept of public policy ... has a dynamic and evolutive character and must be considered *in concreto*, in the light of all the circumstances of the case’) (footnote omitted).

⁵⁴ In practice, differences regarding the characterisation of European competition law as a public policy have arisen even within Europe. See *e.g.*, *Eco Swiss China Time Ltd v. Benetton International NV* (Case C-126/97) (1999), [1999] All ER (D) 574 (where the European Court of Justice held that Art. 81 of the EC Treaty constituted a matter of public policy within the meaning of the New York Convention) and the decision of the Swiss Federal Tribunal in *Tensacciai v. Terra Armata*, 8 March 2006 (finding that EC competition law did not constitute public policy).

and applicable mandatory laws.⁵⁵ In order for a true conflict of laws to exist, there must be a conflict of laws both as a matter of law and as a matter of fact. Defined in this way, true conflicts of laws are a rarity in international arbitration.

However, the possibility of conflicts between mandatory rules of law, in the broad sense of this term, cannot be excluded. Given the sensitivity of the issue, it would therefore seem important that there is an understanding among international arbitration professionals as to how to approach such conflicts. In circumstances where an international arbitral tribunal has no obvious 'domestic' law to rely upon, it must approach such issues keeping in mind the degree of transnationality of the arbitration. In other words, the stronger the links between the seat and the arbitration, based on relevant criteria such as the nationality of the parties and the place of performance of the contract, and/or the place where the effects of the performance of the contract are felt, the more justified it will be for the arbitral tribunal to resolve conflicts of mandatory laws in favour of the law or the public policies of the seat. Conversely, the more tenuous the link between the seat and the arbitration, the more justified it will be for the arbitral tribunal to resolve such conflicts by reference to a transnational standard.⁵⁶ In other words, instead of automatically giving priority to the mandatory law of the seat, the tribunal should determine which of the two conflicting mandatory rules better reflects transnational public policy on the subject and designate that law as applicable in the matter.

Not every government regulation deserves to be recognised and given effect by an international arbitral tribunal, in particular if it appears to be designed to deal mainly with local policy concerns and interests. Such a regulation must incorporate or reflect a transnational standard in order to deserve recognition and application by an international arbitral tribunal, in case of a true conflict. It does not necessarily or automatically deserve recognition and application merely because the parties chose to locate the seat of the arbitration in that particular jurisdiction, or merely because it forms part of the law of the jurisdiction in which the contract was negotiated, or merely because it forms part of the law governing the contract, or merely because it forms part of the law of the jurisdiction in which the effects of the performance of the contract are felt. While these are relevant criteria and the arbitral tribunal must consider the laws of such jurisdictions, as applicable, it should not apply them blindly, but should consider the substance of all such applicable laws. The law that best reflects a standard that may be considered transnational in the context, taking into account all the relevant connecting factors, should be the one that is given effect and applied to resolve the conflict.

⁵⁵ This is a subject that is much more debated than the conflict of mandatory laws. *See supra* n. 49.

⁵⁶ This approach is also endorsed in international civil litigation, *see* Regulation 593/2008/EC, art. 9 ('Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.').

When determining, in case of conflict between mandatory rules of law (in the broad sense of this term), which of the competing mandatory rules better reflects transnational public policy, international arbitral tribunals are not seeking to create or establish any global transnational public policy. They are only concerned with the transnational public policy that is applicable in the particular context they are dealing with. To the extent that international arbitral tribunals cannot avoid making policy decisions – and in case of a conflict between two mandatory laws such a policy decision is virtually unavoidable – this does not mean that they are engaged in the elaboration of transnational public policy beyond the concrete context in which the particular policy conflict arises. In order to exercise their function, and in order to resolve the disputes before them, it is sufficient if international arbitral tribunals choose between the applicable policies, without attempting to formulate or establish any novel policies. Indeed, they could not establish such policies even if they wanted to: given the contractual basis of their jurisdiction, the legal effects of their decisions will in any event be limited to the relationship between the parties and cannot affect the rights and interests of third parties.⁵⁷

Whether international arbitral tribunals will eventually adopt a rule-based conflicts methodology or a more contextual approach, or indeed both, in any particular context to resolve the conflict does not really matter.⁵⁸ Such a choice will not compromise the system of international arbitration since there is no one standard case of international arbitration and therefore no ‘system’ of international arbitration in the first place. The degree of transnationality of each arbitration depends on the context, and it would be misconceived to say that an international arbitration taking place in Singapore between a Korean and a Chinese company involving a large construction project governed by English law is part of the same ‘system’ of international arbitration as an arbitration taking place in Chile between a Chilean and a Peruvian company involving a distribution agreement governed by the law of Chile. The two arbitrations each form their own ‘system’. What may be legitimately expected and indeed required by the parties to such arbitrations is that any conflicts of mandatory laws that may arise are settled in a manner that takes properly into account their transnational context. However, the ways in which these conflicts are resolved need not necessarily be the same in each context because the applicable mandatory laws, and consequently the applicable public policies, are not necessarily the same.⁵⁹ Therefore, such transnational standards or approaches need not be, and indeed

⁵⁷ Indeed, this is in substance what arbitrability means in practical terms: the subject matter (*ratione materiae*) jurisdiction of an international arbitral tribunal only governs the relationship between the parties and the legal effect of its decisions is limited accordingly. This is the case even when the decision is based on mandatory law or resolves a substantive conflict of laws.

⁵⁸ In other words, the proposed answer to the principal question of conflict of laws as a discipline – ‘whether we should have rules or an approach’ – is that we should have rules and/or an approach. For further discussion, see Willis Reese, ‘Choice of Law: Rules or Approach’ in (1972) 57 *Colum. L Rev.* 459.

⁵⁹ It has been rightly said that the concept of transnational public policy is vague. See Lalive, *supra* n. 52 at p. 259. Indeed, it is arguable that the concept of transnational public policy is by definition vague because its content depends on the context.

cannot be, identified *in abstracto*. They can only be identified in the concrete context.

However, even though it is not possible to categorise such transnational standards *in abstracto*, it is important that international arbitration scholars and practitioners apply their minds to the issue and are prepared to deal with it, as it is likely to present an increasingly important challenge to the function that international arbitral tribunals play in the settlement of international commercial disputes – a function for which there is currently no effective alternative.⁶⁰ International arbitration has substantially displaced local courts as fora for the settlement of international commercial disputes in many jurisdictions, but it may not be advisable to assume that this trend will continue *ad infinitum*. While international arbitral tribunals, precisely because they operate in a transnational context, are currently in a better position to deal with international commercial disputes than local courts, this is at least in part because local courts are being seen as more parochial than arbitral tribunals, and as such more likely to apply local rather than transnational standards, even when this is arguably not necessary, or indeed justified.

However, a transnational approach to conflict of laws need not be limited to international arbitration. Nothing prevents local courts from following the lead of international arbitral tribunals in shifting the context of their decision-making from the domestic/foreign law framework to the transnational context, taking into account the degree of transnationality of the dispute. For instance, nothing would prevent local courts from adopting a transnational approach, within the limits of the applicable local law, when dealing with challenges to arbitral awards or requests for recognition and enforcement of arbitral awards. The existing legal framework is certainly sufficiently flexible to accommodate such a shift. Thus, the UNCITRAL Model Law and many modern international arbitration laws set out public policy as a basis for setting aside an arbitral award, and it is also one of the bases for refusing recognition and enforcement of an arbitral award in the New York Convention. It is notable that both the UNCITRAL Model Law and the New York Convention use permissive and not mandatory language; public policy *may* be a basis for setting aside an arbitral award, or refusing recognition and enforcement, but it does not have to be.⁶¹

⁶⁰ See Jan Paulsson, 'International Arbitration is Not Arbitration' in (2008) *Stockholm Int'l Arb. Rev.* 3 (stressing that international arbitration is 'the only game in town' as there are no compulsory global commercial courts, and that accordingly, '[i]f we do not deliver justice, if we do not close the door to abuse, we should understand that sharp reactions are likely – sharp reactions which may harm a very valuable tool').

See also, Mayer, *supra* n. 34 at pp. 285–286 ('Although arbitrators are neither guardians of the public order nor invested by the State with a mission of applying its mandatory rules, they ought nevertheless to have an incentive to do so out of a sense of duty to the survival of international arbitration as an institution.').

⁶¹ See UNCITRAL Model Law, Art. 34(2)(b)(ii) ('An arbitral award *may* be set aside by the court specified in Article 6 [the competent court] only if: ... the court finds that: ... the award is in conflict with the public policy of this State') and New York Convention, Art. V(2)(b) ('Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ... [t]he recognition or enforcement of the award would be contrary to the public policy of that country.').

Consequently, even if a local court were to find that a particular arbitral award is incompatible with the forum's public policy, this does not necessarily mean that the court must set aside the award, or refuse recognition and enforcement, as the case may be. There is ample room for discretion in the language of the UNCITRAL Model Law and the New York Convention to adopt an alternative approach, and it is arguable that this regulatory flexibility should be applied by taking into account the degree of transnationality of the award. The more transnational the award is in terms of the relevant criteria, the narrower should be the concept of public policy applied by the court. In case of a truly transnational award, where the sole connecting factor between the award and the seat is the seat itself, it is arguable that the local court should interpret the concept of public policy accordingly and set aside the arbitral award, or refuse recognition and enforcement, as the case may be, only if the award is incompatible with transnational public policy.⁶²

IV. CONCLUSION

The problem of qualification may or may not be the fundamental problem of international arbitration, depending on one's intellectual approach to conflict of laws, but it does appear to provide an instructive framework for developing an understanding of the role and function of conflict of laws in international arbitration. While true conflicts of laws are and are likely to remain rare in international arbitration, they may arise, and when they do arise, they tend to raise sensitive issues of public policy, precisely because such true conflicts involve conflicts between mandatory laws, in the broad sense of this term. Since the jurisdiction of an international arbitral tribunal is based on a private contract, international arbitrators are well advised to carefully consider the context of the dispute when dealing with such conflicts.

The fundamental policy issue underlying conflict of laws in international arbitration is in substance this: how transnational is the arbitration, in terms of the relevant connecting factors, *vis-à-vis* the seat of arbitration? The more transnational the arbitration is in light of these factors, the more justified it arguably is to resolve the relevant qualification issues and conflicts of laws by reference to a transnational rather than a local standard. Just as the difference between international and domestic arbitration is a difference in degree and as such a matter of policy, the transnationality of an international arbitration remains a sliding scale, or a difference in degree, and as such a matter of policy.

⁶² Such an enlightened (and as such somewhat unrealistic) approach would involve taking a step beyond the recommendations made by the International Arbitration Committee of the International Law Association, which took the view that recognition and enforcement may be refused if the award would be against the international public policy of the forum. See *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, recommendation 1(b). On the other hand, the distinction between international public policy and transnational public policy is fluid rather than categorical, and not much would be lost if the concept of international public policy were abandoned, or equated with transnational public policy, at least in the context of truly international arbitrations. See Lalive, *supra* n. 52 at p. 311.

Consequently, it is the degree of transnationality of the arbitration that determines the dependency of an international arbitral tribunal on the public policies of the seat.

In this context, the principal function of the process of qualification is to narrow down the issues to a point where a true conflict of laws becomes inevitable. In other words, its principal function is to postpone the inevitable.