

# **Legal capacity, arbitration and private international law**

*By Giuditta Cordero Moss*

**To be published in :**

K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides, (red.),

*Convergence and Divergence in private International Law, Liber Amicorum Kurt Siehr,*

Utrecht 2010

## **1. Introduction**

Two recent court decisions, one of the Swedish Court of Appeal and one of the English High Court, have established the ineffectiveness of international arbitral awards on the basis that the arbitration agreement was not binding on one of the parties in accordance with the law applicable to that party.

These decisions are a reminder that the law chosen by the parties to govern the contract does not cover all aspects of the legal relationship between the parties, and that other laws may become applicable in spite of the parties' choice. The general attitude among practitioners seems often to be, on the contrary, to rely fully and solely on the law chosen by the parties and to disregard any other laws – on the basis that an international arbitral tribunal will be obliged to follow the will of the parties. Decisions like those analysed here, therefore, come often as a surprise although they do nothing else but properly giving effect to the applicable sources of law.

The decisions are based on two different approaches, both showing how the law of each of the parties may have an impact on the effectiveness of the arbitration agreement and of the award – and this irrespective of the law that was chosen by the parties to govern the contract.

The impact of each of the parties' law is not a peculiarity of peripheral, sovereignty-focused states: both England and Sweden are highly recognised venues for international arbitration. Moreover, the relevance of each party's own law is confirmed by the two most fundamental international sources in respect of arbitration, i.e. the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) and the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Both instruments support each of the approaches followed by the Swedish and the English court. This paper shortly presents the decisions, comments the approaches and argues that the effectiveness of arbitration as a means of resolution of international disputes would benefit if arbitration laws and arbitration rules specified which country's conflict rules an arbitral tribunal shall apply.

## **2. The Swedish decision: the incapacity route**

The Swedish decision set aside an arbitral award rendered in the frame of the Stockholm Chamber of Commerce. The Court of Appeal affirmed, among other things, that the law of Ukraine is applicable to the question of the legal capacity of the Ukrainian party, notwithstanding that the contract contained a governing law clause choosing Swedish law.<sup>1</sup> The decision is based on the old Swedish Arbitration Act. The new Arbitration Act from 1999, however, does not present changes that would lead the court to take a different position regarding the specific question of the law applicable to the capacity of a party to enter into the arbitration agreement and the invalidity of the award if such law had been violated.<sup>2</sup>

---

<sup>1</sup> State of Ukraine v Norsk Hydro ASA, Svea Hovrätt, 17 December 2007, T 3108-06, see ITA Monthly Report, Kluwerarbitration, May 2008, Volume VI, Issue 5.

<sup>2</sup> The legal incapacity to enter into the arbitration agreement is a ground for invalidity of the award according to article 34(1) of the 1999 Swedish Arbitration Act, see the preparatory works: SOU 1994:81 p. 77 and prop. 1998/99:35 p. 48, as well as L. Heuman, S. Jarvin, *The Swedish Arbitration Act of 1999, five years on: a critical review of strengths and weaknesses*, 2006, pp. 237 f. In the new act, the invalidity is no longer "absolute", which

The factual circumstances of the case are quite complicated and it is not relevant here to refer them in full. The essence is that a Shareholders Agreement, containing also an arbitration clause, was signed by two officers of the Ukrainian defendant who put their name beside the line for signature, which was left empty for the signature of the defendant's Chairman. The Chairman never signed, and the defendant contested that the agreement had become binding on it. The Shareholders Agreement contained a choice of law clause that determined Swedish law as the governing law. The Court affirmed repeatedly that Ukrainian law is applicable to the question of the capacity of a person to sign an agreement with binding effects for a Ukrainian entity. The Court examined the authority of the two officers under Ukrainian law and concluded that one of them had the authority to bind the defendant, whereas the other one did not. The Court examined then what formal requirements Ukrainian law has for the effectiveness of the signatures put under the agreement, and it concluded that, under Ukrainian law, the Shareholders Agreement would have required two signatures, whereas the arbitration agreement contained in the arbitration clause could become binding with only one signature. Thanks to the doctrine of severability, this could have been sufficient to consider the arbitration agreement binding on the defendant, as a matter of Ukrainian law. However, the Court examined the location of the signatures beside the signature line and established, on the basis of witness evidence, that the two signatures were not meant as binding signatures, but as visa put on the document by the administration for the benefit of the Chairman, who would thus know that the document is ready for being executed. The Court found that, as a matter of Ukrainian law and practice, such visa do not correspond to the execution of a contract, and a proper signature is necessary. The Chairman never signed the agreement, and therefore the Court found that the arbitration agreement never came into effect for the defendant. According to article 20(1) of the old Swedish Arbitration Act, the award rendered

---

means that it must be raised by the interested party as a defence within a certain term: see prop 1998/99:35 p. 138 f.

on the basis of that arbitration agreement was declared null by the Court of Appeal. Had the decision been taken according to the new Swedish Arbitration Act, the award would have been set aside on the basis of article 34(1).<sup>3</sup>

The Svea Court of Appeal, thus, considered first the legal capacity to enter into an agreement with binding effects for the represented party, and affirmed that it is governed by the law applicable to that party – irrespective of what law the parties agreed on to govern the contract. The Court proceeded to investigate whether the signatories made use of the authority to bind the principal – which investigation also was based on the law and practice prevailing in the jurisdiction of the party in question, and not on the law governing the contract.

For the sake of completeness, it should be mentioned that the Svea Court of Appeal decision was presented to the Supreme Court for appeal, but the Swedish Supreme Court denied leave to appeal.<sup>4</sup> Thus, the Svea decision is final, and the Court of Appeal's position that the legal capacity of a party is governed by the law applicable to that party is indirectly confirmed by the Supreme Court.

### **3. The English decision: the invalidity route**

The English High Court seems to have taken a different approach. The Court refused to enforce an award rendered in the frame of the International Chamber of Commerce in Paris on

---

<sup>3</sup> Assuming that the defence had been raised within the term. In the specific case, the defence had been raised well after the term had lapsed. Under the old arbitration act, incapacity to enter into the arbitration agreement was considered as an absolute ground for nullity, i.e. the award became null automatically, and the nullity could not be affected by the lapse of time.

<sup>4</sup> Decision dated 2 June 2008, case no T 339-08

the ground that the arbitration agreement was not valid.<sup>5</sup> The party resisting enforcement of the award was the Government of Pakistan, which successfully argued that it was not bound by the arbitration agreement. The contract, including the arbitration clause, had been signed by a trust established by the Pakistani Government as a separate legal entity. The Government had participated in the negotiations of the contract, but had not signed it. The Court found that, according to section 103(2)(b) of the English Arbitration Act, enforcement of an award may be refused if the arbitration agreement was not valid under the law to which the parties had subjected it or, failing any indication thereon, under the law of the country where the award was made.

The Court found that this section on invalidity of the arbitration agreement applies also to the issue whether someone was a party to the agreement. After having established that the parties had not chosen a governing law specifically for the arbitration agreement, the Court proceeded to apply French law, it being the law of the place where the award was rendered. The Court specified that it had to apply French substantive law, and not its conflict of laws rules. However, the Court found that French substantive law has a large approach to what elements must be taken into consideration when evaluating whether there was a common intention by the parties to be bound by the agreement. Among these elements are issues of foreign law, and the Court proceeded therefore to examine Pakistani law, as the law of the party the intention of which was to be established. The Pakistani Constitution contained various restrictions to the possibility to enter into agreements binding on the state, i.a. that the agreement must be made in the name of the president and with his authority. The Court found that it was not necessary to ascertain whether this rule was mandatory or not, because its very existence was sufficient to convince the Court that there had been no subjective intent to bind the state.

---

<sup>5</sup> *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm)

The High Court took, thus, the opposite route in respect of the Svea Court: it did not approach the matter from the point of view of the legal capacity and the law applicable to the capacity; it approached it from the point of view of the validity of the agreement under the law governing that agreement. The rules on legal capacity of Pakistani law were taken into consideration as elements that permitted to assess the intent to be bound, which was relevant to establish the validity of the arbitration agreement under the law governing it. Irrespective of the differences in approach, both decisions end up refusing to give effect to an international arbitral award on the ground that the losing party was deemed, under the law of that party, not to be bound by the arbitration agreement.

## **4. An international basis for both routes**

It must be pointed out that both the Swedish and the English approach find a basis in international instruments on arbitration. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which successfully creates a uniform law on the enforcement of awards in the about 150 countries that have ratified it (including Sweden and England), says in article V(1)(a) of the Convention that one of the grounds for refusing recognition or enforcement of an award is that one of the parties of the arbitration agreement was under some incapacity under its own law, or that the arbitration agreement was invalid under the law that the parties subjected it to, or failing a choice made by the parties, under the law of the place where the award was rendered.

Moreover, the UNCITRAL Model Law, adopted in about 50 countries, has used this article of the New York Convention as a basis for its own rules on annulment of awards and on the possibility to refuse recognition or enforcement, respectively articles 34(2)(a)(i) and

36(1)(a)(i). It must be pointed out that neither Sweden nor England have adopted the Model Law. However, both countries used the Model Law as a reference when they reformed their respective arbitration laws. As a result, the grounds for invalidity that are being examined here are common both to annulment and to enforcement of awards in the countries that adopted the Model Law, as well as in Sweden and England.

The decisions presented here, therefore, are not only representative for the respective jurisdiction in which they were rendered, and correspond to rules that are in force in a large number of states.

## **5. The routes compared**

The different approaches taken by the Swedish and by the English courts led to the same result in the cases presented here, but have different characteristics.

While the approach taken by the Swedish court is quite objective and predictable, the route followed by the English court leaves more room for discretion.

The Swedish court based its decision on the classical private international law approach: it defined a particular area, in this case the matter of the legal capacity, and it determined that that particular area is subject not to the party autonomy, but to a special choice of law rule.

Not only the Swedish court decision, but also the UNCITRAL Model Law and the New York Convention, as seen above, follow this approach and determine a special conflict rule for the area of the legal capacity: the law of the party. Which connecting factor the conflict rule is based on, is not specified in the international instruments – this is left to the private international law of the court.

The English court based its decision on its evaluation of the intent of the parties to be bound by the arbitration agreement – the law of the parties was part of the background on which the court assessed this intent.

The intent of the parties is not necessarily always established under the law applicable to that party. Under private international law, questions of formation of contract, including also the establishment of the intent to be bound, are often considered to be a question of the law governing the contract.

In the case decided by the English High Court, the law applicable to the contract was French law, and French law was interpreted to permit investigating the law of the parties, as a factual background to establish the subjective intention of the parties. Other laws may not invite similar investigations, and thus restrict the means to be taken into consideration to the history of the negotiations, the language of the contract and the parameters of the law applicable to the contract.

Hence, there is a significant uncertainty when taking the invalidity route chosen by the High Court: will the law applicable to the contract permit the judge to extend its investigations to the parties' own law when it establishes the parties' intent to be bound? Moreover, there is a high degree of discretion in respect of the conclusions that judges may draw from the investigation of the parties' law. As seen in the above, the English High Court did not deem it necessary to verify whether the rules in the Pakistani Constitution regarding the entry into contracts for the state were mandatory or not: their mere existence was considered to be a sufficient ground to question the intention of the Pakistani Government to be bound. Had the matter been whether the party signing on behalf of the Government was under an incapacity or not, it would have been essential to establish whether the rules were mandatory or not. Thus, the approach followed by the English court has a double layer of flexibility: firstly, rather than relying on an objective conflict rule for the legal capacity - that invariably



determines the law of the parties as applicable, it relies on the law of the contract - that may or may not permit to consider also the law of the parties. Secondly, to the extent that the law of the contract permits considering the law of the parties, this law is not going to be applied but is used as a background for interpretation of the intention of that party - therefore, its effects may go beyond the direct application of the rules. Had Pakistani law been applied, rather than being used as a background to interpretation, it would have been necessary for the rules to be mandatory, in order to have incapacity of the signatory as an effect. Because the rules were considered for their value as factual background to the conduct of the Pakistani party, their mandatory character became less relevant.

A further layer of flexibility lies in the possibility to choose the law governing the contract - which is present in the approach followed by the English Court, but not in the approach followed by the Swedish Court, the UNCITRAL Model Law or the New York Convention. The last mentioned Swedish court and international instruments follow the traditional private international law approach: legal capacity is not an area of the law that is subject to party autonomy, and the courts will apply the law designated by the applicable conflict rule, irrespective of any choice of law that the parties may have made for the contract.

The High Court, on the contrary, looked at the law governing the contract, which implies that it was prepared to accept any choice of law made by parties. Because the contract in question was the arbitration agreement, however, the choice of law made by the parties for the main agreement was not relevant: due to the severability of the arbitration agreement from the rest of the relationship between the parties, the choice of law made by the parties for their contract does not extend to the arbitration agreement.<sup>6</sup> This does not mean that the parties may not choose the law applicable to their arbitration agreement; however, they have to make this choice explicitly for the arbitration agreement. Generally, however, contracts do not contain a

---

<sup>6</sup> For example, the 1980 Rome Convention on the Law Applicable to Contractual Obligations, as well as its successor, the EU Regulation 593/2008 ("Rome I"), excludes arbitration agreements from its scope of application.

specific choice of law for the arbitration agreement; when the parties have not subjected the arbitration agreement to a chosen law, the arbitration agreement will be governed by the law of the place where the arbitral tribunal has its seat. Both the UNCITRAL Model law (art. 34(2)(a)(i) and 36 (1)(a)(i)) and the New York Convention (art. V(1)(a)) make reference to the law of the country where the award was made (i.e., where the tribunal had its seat) as the law that determines the validity of the arbitration agreement in case the parties have not subjected it to a specific law.

The approach followed by the English High Court, in sum, requires a long list of steps, each containing a certain flexibility: first it is necessary to find out which law governs the arbitration agreement (either the law specifically chosen by the parties, or the law of the place of arbitration), then it must be investigated on the basis of what criteria that law establishes whether the contract is valid or not (whether or not the law of the parties is deemed relevant to establish the intention of the parties to be bound), then it must be ascertained how the law of the parties affects the interpretation of their intent (whereby the mandatory character of the relevant rules is not necessarily important).

The private international law approach has a shorter list of steps and gives little or no room for discretion; however, this does not necessarily mean that the solution is uniform in all cases, as will be seen immediately below.

## **6. Which law is a party's law?**

There is no uniform conflict rule to identify which law governs the legal capacity of the party to a contract. In states of Common Law, the legal capacity is sometimes considered a question of contract, and may therefore be governed by the law that governs the contract.<sup>7</sup> More

---

<sup>7</sup>See for the US Restatement, Second, Conflict of Laws, § 198 and E. Scoles, P. Hay, P. Borchers and S. Symeonides, *Conflict of Laws*, 4<sup>th</sup> ed., § 18.2. A similar approach has English law, although only in respect of

generally, however, the capacity of a party to enter into a contract is regulated by the law applicable to that party.<sup>8</sup>

There is no generally acknowledged rule on what law governs the establishment and organisation of legal entities. Broadly speaking, there are two different approaches: the conflict rule that designates the law of the state where the legal entity is incorporated or registered,<sup>9</sup> and the conflict rule that designates the law of the state where the legal entity has its central administration or main place of business (the so-called “real seat”).<sup>10</sup> The rationale for choosing one or the other connecting factor is clear: if the governing law depends on the place of registration, a company is recognised and can operate without having to adapt to company law rules of the countries where it has activity. The countries where the company carries out its activity are, in other words, ready to accept the criteria and rules of the company’s country of origin without questioning their suitability or expecting adjustment to their own standards.

If the governing law depends on the law of the country where the company has its real seat, on the contrary, this country insists on imposing its own standards. The company law’s rules

---

restrictions to the legal capacity, and without taking into consideration the law chosen by the parties: see Collins, L. Collins et al., *Dicey, Morris, Collins: The Conflict of Laws*, 14<sup>th</sup> ed. 2006, §§ 30-021ff.

<sup>8</sup> See, for Germany, J. Kropholler, *Internationales Privatrecht*, 2006, 581 and for Switzerland the Private International Law Act, article 155(c). The 1980 Rome Convention on the Law Applicable to Contractual Obligations, now replaced by the Rome I Regulation and representing the private international law in the European Community, excludes from its scope of application the choice of law relating to whether an organ may bind a company, which means that within Europe there is no harmonisation of the conflict rule applicable to the legal capacity of the parties, and each state has its own conflict rules to determine the law deciding whether the parties had the competence to enter into a contract. See, however, article 11 of the Rome Convention and article 13 of the Rome I Regulation, according to which, in the event of a contract entered into by persons located in the same state, the foreign party cannot invoke the foreign applicable law on legal capacity to assert his or her own legal incapacity, if that person had legal capacity under the law of the state where the contract was entered into (unless the other party was aware of the incapacity of that party). It is controversial whether this can be extended to companies, see Kropholler, cit., 581.

<sup>9</sup> Such as English law, see Collins, cit., §§ 30-002ff., US law, see the Restatement, Second, Conflict of Laws §§ 296 f. (1971) and Scoles, Hays, et al., cit., § 23.2ff., the Swiss Private International Law Act, article 154, the Italian Private International Law Act, article 25.

<sup>10</sup> See Kropholler, cit., 568ff. Where the real seat is deemed to be is not necessarily evident: While the Brussels Convention on Jurisdiction and The Recognition of Judgements, as well as the parallel Lugano Convention, left the criteria for determining where the seat is to the law of the forum, the Brussels Regulation EC 44/2001 has adopted a compromise solution for the purpose of determining where a legal entity is deemed to have a domicile, and makes reference to the state or states where the entity has any of its statutory seat, its central administration or its principal place of business. The New Lugano Convention, which is expected to come into force soon, reflects the Brussels Regulation.

on capitalisation, organisation of the corporate bodies or protection of the minority shareholders, etc. are considered to be so important, that all companies carrying out their main activity in that country are expected to comply with them, irrespective of where they are registered and of what criteria their company law of origin has.

Traditionally, the place of registration is used as the connecting factor particularly in the Common Law countries, whereas conflict rules in many Civil Law systems, particularly those inspired by German law, are traditionally based on the main place of business.

Within the European Union and the EFTA, however, a conflict rule based on the place of business has recently been deemed to be against the freedom of establishment if it results in imposing restrictions on the possibility of a company registered in one state to carry out its activity in another state.<sup>11</sup> Hence, for companies registered in a EU or EFTA country, another EU or EFTA state where they have their main seat cannot impose its own company law and has to recognise the capitalisation, transferability of shares, limits to the legal personality, etc., as they are determined in the company law of the country of origin. This, however, does not mean that the connecting factor of the real seat has disappeared from the landscape of European private international law: the European Court of Justice has recently confirmed that companies are creatures of national law, and that it is up to national law to determine the connecting factors that each state requires for a company to be organised or to continue existing under its law.<sup>12</sup> If a state has the real seat as connecting factor, and a company originally registered in that state moves its real seat to another country, thus losing the basis for the original registration, the country of origin may request that the company is wound up before the real seat is moved.

---

<sup>11</sup> See particularly the European Court of Justice decisions in the cases *Centros* (C-212/97), *Überseering* (C-208/00) and *Inspire Art* (C-167/01).

<sup>12</sup> The first decision that moved in this direction was the *Daily Mail* decision by the European Court of Justice (C-81/87), now confirmed by the decision *Cartesio* (C-210/06).

Thus, a conflict rule based on the real seat will be deemed to violate European law when it restricts a company's freedom of establishment by requesting that the company (duly organised in one member state) complies with requirements of the other member states where the company intends to carry out its main business. However, a conflict rule based on the real seat does not violate European law when it requires that the company (duly organised under that state's law) winds up before it moves its real seat to another state. Using the real seat as a connecting factor, thus, is acceptable under European law, when it regards the question of valid organisation and existence of a company in the country of origin. On the contrary, the real seat is not an acceptable connecting factor when it restricts the ability to carry out activity in the country of destination, thus limiting the freedom of establishment.

Imposing the conflict rule of the place of registration in regard of the freedom to establish means that all systems have to mutually recognise each other's company laws. This is in compliance with the policy underlying the European co-operation and its work towards an internal market: member states are supposed to share the fundamental principles upon which they regulate economic activity, and therefore they should accept each other's company laws without insisting on compliance with their own criteria.

In respect of companies coming from outside the EU or EFTA area, conflict rules are not affected by the requirement to ensure freedom of establishment, and it is up to each private international law to decide whether to accept any other country's company law, and thus apply the connecting factor of the place of registration, or to consider its own rules as prevailing for companies having their main activity in that country and thus apply the connecting factor of the real seat.

That the connecting factor may vary from private international law to private international law is certainly an element adding complexity to the picture; however, this complexity does not result in unpredictability, since ascertaining which connecting factor prevails in the applicable

conflict rule is not a matter of discretion of the judge, and can be made objectively. What may create uncertainty, however, is to find out which private international shall be applied.

In the context of international arbitration, there is no harmonised way to identify which private international law is applicable. For disputes solved by courts of law this is readily identified, since a court of law always applies the conflict rules contained in the private international law of its own country. For dispute solved by arbitration, on the contrary, arbitration laws and rules of institutional arbitrations present a variety of solutions, ranging from the application of the private international law of the place of arbitration,<sup>13</sup> to the application of the private international law that the arbitral tribunal deems most appropriate,<sup>14</sup> the application of conflict rules specifically designed for arbitration,<sup>15</sup> or the direct application of a substantive law without considering choice-of-law rules.<sup>16</sup>

The modern trend seems to be to avoid any precise reference, or for that matter any reference at all, to conflict rules: as an example may be mentioned that the UNCITRAL Working Group on Arbitration, engaged in the modernisation of the UNCITRAL Arbitration Rules, is discussing modernization of its article 33. Article 33 provides, among other things, that the arbitral tribunal shall apply the law that was chosen by the parties and, failing any choice made by the parties, the law designated by the private international law that the tribunal deems applicable. Among the positions that are being discussed by the Working Group, is whether reference to private international law should be eliminated from article 33.<sup>17</sup> Conflict

---

<sup>13</sup> This is the traditional approach that is still followed in some modern arbitration legislation, for example art. 31 of the 2004 Norwegian Arbitration Act.

<sup>14</sup> This approach is followed, among others, by the UNCITRAL Model Law and the English Arbitration Act, and it can result into application of the private international law of the country where the arbitral tribunal has its venue, of another law that seems to be more appropriate, or even, of no specific law (sometimes arbitrators compare the choice of law rules of all laws that might be relevant, and apply a minimum common denominator).

<sup>15</sup> For example, the Swiss arbitration law contains a choice of law rule that designates as applicable the law of the country with which the subject-matter of the dispute has the closest connection.

<sup>16</sup> French arbitration law, as well as the rules of the International Chamber of Commerce, of the London Court of International Arbitration and of the Arbitration Institute of the Stockholm Chamber of Commerce, give the arbitral tribunal the authority to apply directly the substantive law that it seems more appropriate, without going through the mediation of a choice of law rule.

<sup>17</sup> UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its 47<sup>th</sup> session, A/CN.9/641, para 110 and 111.

rules have the function of identifying the national law that shall be applied to the dispute, and focusing on the applicable national law in the context of international disputes is sometimes deemed to be anachronistic.<sup>18</sup> The modern trend prefers to leave open the possibility to apply international restatements of principles, codes of conduct and other non-binding and non-national sources. By so doing, however, the modern trend creates problems for the predictability of the applicable law. In the context of the legal capacity, that is analysed here, lack of reference to the applicable conflict rules means that the parties to a dispute would not be able to predict under what law the legal capacity of a party will be evaluated, if that party is registered in country A and has its real seat in country B.

## 7. Conclusion

The Swedish and English court decisions presented here show that private international law is still extremely practical and relevant even in fields where questions of choice of law could have been expected to be overcome by more modern approaches involving trans-national harmonisation – international commercial arbitration being the context in which such non-national aspirations are more likely to be met.<sup>19</sup>

---

<sup>18</sup> For analysis of the question, with further references, see See G. Cordero Moss, "International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith," (2007) *Global Jurist*: Vol. 7 : Iss. 1 (Advances), Article 3 and, more succinctly and updated, G. Cordero Moss, "The "Troika" and Its Effects On the Harmonisation of Contract Law –Illustrated By the Duty of Good Faith Between the Parties," (2009) *Transnational Dispute Management*, Vol. 6 Issue 1, pp. 2-21.

<sup>19</sup> Private international law has relevance to international arbitration on numerous other areas: whenever a contract has effects that potentially may affect third parties, such as when the relationship has implications of company-, property-, insolvency law. A research project at the University of Oslo is systematically analysing contract mechanisms in commercial transactions where there may be restrictions to the applicability of the law chosen by the parties, and what impact this has on the effectiveness of arbitral awards that may give effect to the parties' choice: <http://www.jus.uio.no/ifp/forskning/prosjekter/law-clauses/>. More extensively, on this subject, see also G. Cordero Moss, "International Arbitration and the Quest for the Applicable Law", (2008) *Global Jurist*: Vol. 8: Iss. 3 (Advances), Article 2 p. 1-42 and see G. Cordero Moss, "Arbitration and Private International Law", (2008) *International Arbitration Law Review*, vol. 11 Issue 4, p. 153-164.

The law applicable to each of the parties must be ascertained in either of the alternative routes presented here: the incapacity or the invalidity route. The former seems to be preferable from the point of view of the predictability of the results, because it leaves little room to the discretion of the judge. Interestingly, the degree of unpredictability that can be found in this approach is due to the ambitions to internationalise arbitration: in an effort to enhance the flexibility for arbitrators, the modern trend is to avoid too strict references to private international law in arbitration. This, in turn, creates uncertainty as to which conflict rules are applicable to ascertain, for example, the legal capacity of the parties.

Arbitral tribunals may be expected to properly exercise this discretion, but the mere existence of this flexibility opens for the possibility of contradicting decisions - which again is not favourable to the certainty of the legal systems. The result may be costly and lengthy processes that may end up in rendering the award ineffective, as in the Swedish and English cases examined here.

Paradoxically, a flexibility that was introduced to enhance arbitration results in a restriction of the effectiveness of arbitration. International dispute resolution would become more efficient if arbitration laws and rules made explicit reference to which conflict rules the arbitral tribunal shall apply.