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CONSTITUTIONALITY REVIEW OF FOREIGN LAW: THE RELEVANCE OF SUBSTANTIVE CONCERNS

CONTENTS: 1. Introduction. – 2. The judges' driving role in dealing with the issue of constitutionality of foreign law and the necessity of a substance-oriented approach. – 3. Substantive concerns and the inadequacy of traditional approaches to the present issue. – A. (*follows*) The exclusion of any form of constitutionality control. – B. (*follows*) The possibility of control only if the *lex causae* does not provide for a centralized mechanism of constitutional review. – C. (*follows*) The general allowance of constitutionality control of foreign law. – 4. The emergence of a substance-oriented approach to the issue in recent English case law. –A. (*follows*) *Hilal Abdul-Razzaq Al Jedda v. The Secretary of State for Defence.* – B. (*follows*) *Y1 v. Secretary of State for the Home Department*. – C. (*follows*) A confirmation of the proposed approach: the constitutionality issue in international commercial arbitration. – 5. Conclusions.

1. The question of whether a national court or an arbitral tribunal, when applying a foreign statute, has the power to incidentally evaluate this statute's legitimacy under the constitution of the country where it originated, and eventually not apply foreign laws which it considers unconstitutional, is an issue troubling judges and private international law academics since the 40's. (1) In the absence of any normative guidance on the

(*) This contribution was subject to independent external peer review.

(1) In English literature the issue has been dealt with by MANN, *The Sacrosanctity of the Foreign Act of State*, *Law Quarterly Rev.*, 1943, p. 42 ff and p. 155 ff; MORGENSTERN, *Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are Contrary to International Law*, *Int. Law Quart.*, 1951, pp. 326 and 330; LIPSTEIN, *Proof of Foreign Law: Scrutiny of Its Constitutionality and Validity*, *British Yearb. Int. Law*, 1967, p. 265 ff; O KAHN-FREUND, *Constitutional Review of Foreign Law?*, in FIUME, HAHN, KEGEL and SIMMONDS (eds.), *International Law and Economic Order, Essays in Honour of F.A. Mann on the Occasion of His 70th Birthday on August 11, 1977*, Munich, 1978, p. 207 ff; MARTIN, *Constitutional review of foreign law in English and German courts, A comparative study*, in *Oxford University Comparative Law Forum*, available at *http://ouclf.iuscomp.org/articles/martin.shtml*, 2002. With regard to literature in French, see NIBOYET, *Traité de droit international privé français*, *T. III*, Paris, 1944, p. 405 ff; *Id.*, *Qu'est-ce que la loi étrangère aux yeux des judges d'un Pays détérminé?*, *Revue dr. int. lég comp.*, 1918, p. 753 ff; BATIFFOL,

sound method to adopt in order to give an answer to this question, judges and scholars have formulated different approaches to the issue, trying to find a balance between, on the one hand, the necessity to apply foreign law as if the parties were before a judge of the State whose law is being applied (so-called "foreign court theory") (2) and, on the other hand, the prudence incumbent on a court when evaluating the validity of a foreign law so as not to twist the content of this law and, as a consequence, unduly interfere with the sovereignty of the foreign State in regulating matters submitted to its law ("international comity"). (3)

Authors who think that, from the theoretical point of view, a prudent approach based on comity should prevail tend to exclude the possibility of a constitutionality review of foreign law. Contrariwise, scholars who consider more important the application of the foreign court theory recognize such a power to the *forum*. Among the latter category of academics, few have recognized a full possibility of constitutionality review of foreign law,

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Traité élémentaire de droit international privé, Paris, 1959, p. 388 ff.; DE NOVA, *Note a Tribunal de Rome du 13 septembre 1954*, *Revue critique*, 1958, p. 534 ff. Concerning literature in Italian, see QUADRI, *Controllo sulla legittimità costituzionale delle norme straniere*, *Dir. int.*, 1959, p. 31 ff; MORELLI, *Controllo della costituzionalità di norme straniere*, *Riv. it. scienze giuridiche*, 1954, p. 27 ff; MOSCONI, *Norme straniere e controllo di costituzionalità e di legittimità internazionale*, *Dir. int.*, 1960, p. 426 ff; TOMMASI DI VIGNANO, *Lex fori e diritto straniero*, Padua, 1964, p. 109 ff; BALLARINO, *Costituzione e diritto internazionale privato*, Padua, 1970, pp. 3-7; CARBONE, *Sul controllo di costituzionalità della norma straniera richiamata*, this *Rivista*, 1965, p. 685 ff; SIEHR, *Diritto internazionale privato e diritto costituzionale*, translation from German by PICONE, *Foro it.*, 1975, p. 7 ff; BADIALI, *Il ruolo di giudice nel controllo della costituzionalità delle norme straniere richiamate*, this *Rivista*, 2006, p. 611 ff. Finally, with regard to German literature, see NIEDERER, *Einfuhrung in die allgemeinen Lehren des internationalen Privatrechts*, Munich, 1954, p. 342 ff; NEUMAYER, *Fremdes Recht und Normenkontrolle*, *RabelsZ*, 1958, p. 573 ff.

(2) INSTITUT DE DROIT INTERNATIONAL, *L'égalité de traitement entre la loi du for et la loi étrangère*, Session de Saint-Jacques-de-Compostelle, 1989, para II b, according to which «Il est recommandé que les autorités judiciaires, à l'aide des moyens que leur offrent les règles de procédure de leur pays, puissent prendre les initiatives nécessaires en vue de la recherche et de la constatation des dispositions des droits étrangers, *telles qu'elles sont appliquées dans leur pays d'origine*, en demandant notamment leur collaboration aux parties» (emphasis added). It is well-known, in this regard, that the foreign law system identified by rules of private international law applies in its entirety in the forum, i.e. including also public law. See VILLANI, DI FABIO, SBORDONE, *Nozioni di diritto internazionale privato*, Naples, 2013, p. 44.

(3) The concept of international comity, which is a form of reciprocal respect existing among courts of different countries, consists in a self-restraint which national courts impose to themselves in order to not interfere with the jurisdiction (and, finally, the sovereignty, of other States). See, for several references ZARRA, *Il ricorso alle anti-suit injunctions per risolvere i conflitti internazionali di giurisdizione e il ruolo dell'international comity*, this *Rivista*, 2014, p. 561 ff.

while others limit this possibility only to the cases where such a review is not reserved, in the *lex causae*, to a special court and is precluded to other judges ("centralized" system of constitutionality review). (4) As of today, none of these approaches has definitively prevailed.

The solution to this problem does not have a merely theoretical value, but has important repercussions on the rights of the disputing parties. Indeed, the application of a foreign law which – due to its alleged unconstitutionality – would not likely be applied in the courts of the country where it originated could have serious consequences on the rights of the parties, which risk being affected by a unconstitutional law simply because the dispute is being heard by a foreign judge. (5) The reference mainly applies to the rights of the parties as protected in the *lex causae*: if the legal system of the *lex causae* ensures protection to certain rights of a party, even by way of a declaration of unconstitutionality of a law undermining such rights, it seems correct that the same degree of protection is granted wherever such a system of law is applied. A different conclusion would also run against one of the main goals of private international law, which is to harmonize the application of the law regardless of the forum where a dispute is heard. (6) However, when approaching the issue, courts should also safeguard the rights protected by the law of the forum: the application of a law which is unconstitutional in its state of origin could lead to unlawful results also from the perspective of the *lex fori* (in particular in terms of public policy) and this is a factor the importance of which cannot be underestimated when deciding the proper method to apply to the issue of constitutionality of foreign law.

A close relationship between the issue of the constitutionality control by foreign judges and the substantive concerns at stake in individual cases, therefore, emerges. In the lack of any written law setting forth a criterion to be followed, the role of judges as concrete guardians of the safeguard of the parties' rights (as identified above) becomes of extreme importance. In

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(4) For detailed references, see para. 4 below and related footnotes.

(5) The risk of generating a prejudice to the rights of a person due to the fact that a dispute relating to such rights is not celebrated before the courts of the *lex causae* is a general issue of private international law. It is generally accepted, however, that this kind of discrimination should be avoided as far as possible. See MARONGIU BUONAIUTI, *La continuità internazionale delle situazioni giuridiche e la tutela dei diritti umani di natura sostanziale: strumenti e limiti*, *Dir. umani dir. int.*, 2016, p. 49 ff.

(6) See, *ex multis*, FOCARELLI, *Lezioni di diritto internazionale privato*, Perugia, 2006, p. 66; CONETTI, *L'arrêt Martini: considerazioni sulla scelta del criterio di collegamento*, in CONETTI (ed.) *Scritti di diritto internazionale privato*, Milan, 2011, p. 182; MALATESTA, *Rinvio*, in BARATTA (ed.), *Dizionario di diritto internazionale privato*, Milan, 2010, p. 424.

light of the goal of ensuring the safeguard of the substantive considerations at stake in individual disputes, adjudicators shall avoid to deal with the issue from a merely abstract point of view and embrace a substance-oriented approach to the issue in accordance to which the choice of the method to deal with constitutionality issues shall be based on its implications on the rights of the parties as protected, firstly, in the *lex causae* and, secondly, in the *lex fori*.

The above-mentioned relationship has not, at least until recently, been seriously taken into account by decision makers and academics facing the problem of constitutionality of foreign law, who have often chosen one among the above theoretical approaches without caring about the concrete effects of the selected method on the rights of the parties involved in the dispute.

Recently, however, some decisions that have incidentally dealt with the issue seem to have applied a different way of reasoning in comparison with existing case law and scholarship.

The reference applies to two English (7) judgments, respectively regarding (i) a claim for damages for unlawful detention in Iraq at time of war and (ii) the loss of English nationality by an Afghan person suspected to be involved in terroristic activities. While the claims behind these decisions did not directly regard the issue of the constitutional validity of the relevant foreign law, the judgments have – *obiter dicta* – analyzed the constitutionality of the domestic rules that judges were taking into consideration. In these cases, the courts concerned applied a way of reasoning whose importance transcends the case at stake and may offer some food for thought for a general analysis of the issue. Indeed, while accepting in general terms the possibility of an incidental constitutionality review of foreign law, the English Courts' approach appears to have been mainly driven by the substantive repercussions of their choice in the individual case rather than by the abstract necessity to follow a given theoretical approach. A careful reading of the decisions suggests that, in their incidental constitutional analysis, judges have firstly evaluated all the substan-

(7) Special Immigration Appeals Commission, 18 May 2012, *Y1 v. Secretary of State for the Home Department*, SC/112/2011; High Court of Justice, Queen's Bench Division, 5 March 2009, Court of Appeal, 8 July 2010, *Hilal Abdul-Razzaq Al Jedda v. The Secretary of State for Defence*, (2009) WC2A2LL, (2010) EWCA Civ 758 (CA). This last case, regarding unlawful detention, arose in parallel with the more famous one on the loss of English nationality by Mr. Al Jedda, giving rise to a judgment by the UK Supreme Court, 9 October 2013, *Secretary of State for the Home Department (Appellant) v. Al-Jedda (Respondent)*, 2013 UKSC 62 on appeal from (2012) EWCA Civ 358.

tive interests at stake in the dispute before them (both from the perspective of the *lex causae* and of the *lex fori*), and, then, after having figured out the possible repercussions of the application of the different approaches on the rights of the disputing parties, chosen the most suitable method to achieve a concrete balance of all of the conflicting values at stake. (8)

Such a substance oriented way of reasoning may find confirmation also in a recent arbitral decision (9) where the Tribunal had to consider the constitutional validity of a contract in light of the provisions of the Constitution of Ghana. As we will see below, with the aim of not obstructing the fulfilment of the reciprocal undertakings set forth in the contract, arbitrators did not hesitate to contradict the interpretation of the same issue given by the Supreme Court of Ghana.

The reasoning applied in these decisions has therefore renewed the interest for the discussed issue and has put particular emphasis, on the one hand, on the "choice influencing considerations" (10) which shall necessarily precede the selection of the proper approach as part of the judges' pre-understanding process, and, on the other hand, on the central role of courts in ensuring – on a case-by-case basis – a proper balance of the disputed rights and interests.

This article will assume the perspective of judges and will try to analyze which approach, among the ones emerging from the case law, may best solve the issue of constitutionality of foreign law ensuring the protection of the rights of the litigants. We will, first of all, discuss the role of judges in solving private international law issues where, as in the present case, there is no criterion dictated by the law (section 2). We will then refer to the traditional approaches to the issue of constitutionality of

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(8) This kind of approach is proposed, for every kind of conflict of laws issues by BROGGINI, *Conoscenza e interpretazione del diritto straniero*, in *Ann. Suisse Dr. Int.*, 1954, pp. 105-107. Such an approach, arguably based on the principle of reasonableness as developed in private law, is also strongly (and authoritatively) sustained by part of Italian private law scholarship, which affirms that each dispute shall be decided on the basis of an analysis and a subsequent balancing of the concrete interests and values at stake in the relevant case. Only after having analyzed which one, among such interests, deserves – in the present dispute – higher protection according to the law, it will be possible to assume a correct decision. See PERLINGIERI, *Profili applicativi della ragionevolezza nel diritto civile*, Naples, 2015, p. 16 ff.

(9) Permanent Court of Arbitration, 1 April 2014, *Balkan Energy (Ghana) Limited v. The Republic of Ghana*, PCA Case No 2010-7, Award on the Merits.

(10) These words have been used by LEFLAR, *Choice-Influencing Considerations in Conflicts Law*, *New York Un. Law Rev.*, 1966, p. 267 ff.

foreign law and assess them in light of their substantive repercussions on the rights of the disputing parties (section 3). Successively, the paper will discuss the more recent approach adopted by English courts (section 4), which may be the starting point for a solution to the problem which – through the driving role of judges – could grant a proper balance of the conflicting interests. As we will see, this approach finds confirmation also in the practice of international commercial arbitration. Section 5, finally, is devoted to some concluding remarks.

2. The first point to be clarified is the role of judges in choosing the approach to be applied to solve private international law issues where, as in the present case, there is apparently no normative guidance for them. With reference to the issue of constitutionality of foreign law, the question consists in understanding how judges choose among the above-mentioned approaches to the matter and what is the kind of reasoning that adjudicators shall endorse when making such a choice.

On the one hand, it could be said that judges have to choose the proper approach at an abstract level, i.e. understand which one – among the possible methods – best responds to their idea of private international law and has more legal sense at the time where the court speaks. According to this approach decision makers shall be indifferent to the concrete outcomes of the applied approach in the case at hand.

On the other hand, judges could choose to avoid any kind of theoretical reasoning and adopt a case-by case approach. Without caring about the abstract underpinning of the selected way to proceed, adjudicators might compensate for the lack of any normative guidance and – assuming the role of legislators for the individual case – choose the approach which best solves the issues at stake in the dispute at hand.

Both the above opinions may find support in legal writings dealing with the constitutionality of foreign law. Actually, as of today, scholars who have dealt with the subject have almost unanimously (11) analysed it in a very theoretical way and have only proposed a solution on the basis of the abstract correctness of a certain approach in light of its correspondence to a certain view of private international law. In accordance with these opinions, therefore, judges should not pay particular regard to the likely substantive outcome of the approach they choose.

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(11) With the sole (and partial) exception of BADIALI, *Il ruolo di giudice* cit., p. 611 ff.

This idea, however, reveals itself to be fallacious because it does not give due weight to the substantive interests at stake and actually does not find confirmation in the choices made by judges, which seem to be, indeed, strictly anchored to the particularities of the individual cases. (12)

In general terms, an approach which, in the absence of normative guidance, is mainly based on a case by case analysis of pending disputes and on the necessity to safeguard the parties' rights finds support in the writings of several US private international law scholars whose thoughts were related to the philosophical tendency denominated legal realism. (13) In these Authors' opinion one of the cardinal rules in choosing the law to be applied to a certain case is "the avoidance of conceptualistic reasoning and the employment, instead, of an instrumental policy based approach. According to the realists, the key questions are what goals is a given legal rule trying to achieve, and, how can the rule best be interpreted and applied so as to achieve these goals". (14) As a consequence "[t]raditional theory saw the results as already implicit in the preexisting legal rules, lying waiting somehow to be pulled out. (…) Realism, in contrast, saw judges engaged in a creative process of choosing what to do. The appropriate way to proceed was to marshal empirical

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(12) The necessity to find a balance between legal certainty and equitable considerations is a classic problem of private international law. See, in this regard, NEUHAUS, *Legal Certainty Versus Equity in the Conflict of Laws*, *Law and Contemp. Problems*, 1963, p. 795 ff.

(13) In this regard it is, however, worth noting that it is today undisputed that the entire field of private international law is permeated by substantive concerns. See, in this regard, *ex multis*, PICONE, *Le norme di conflitto alternative italiane in materia di filiazione*, in ID. (ed.) *La riforma italiana del diritto internazionale privato*, Padua, 1998, p. 303 ff; ID., *La teoria generale del diritto internazionale privato nella legge italiano di riforma della materia*, this *Rivista*, 1996, p. 301 ff; ID., *I conflitti tra metodi diversi di coordinamento tra ordinamenti*, *ibidem*, 1999, p. 339 ff; FRANZINA, *L'incidenza dei diritti umani sul diritto internazionale privato: il caso della protezione degli adulti vulnerabili*, *www.federalismi.it*, 2013, p. 1 ff; FAWCETT, *The Impact of Article 6(1) of the ECHR on Private International Law*, *Int. Comp. Law Quart.*, 2007, p. 1 ff; FUMAGALLI, *Criteri di giurisdizione in materia civile e commerciale e rispetto dei diritti dell'uomo: il sistema europeo e la garanzia del due process*, *Dir. umani dir. int.*, 2014, p. 567 ff; MULLER-FREIENFELS, *Conflicts of Law and Constitutional Law*, *Un. Chicago Law Rev.*, 1978, p. 611. See, also for several further references, ZARRA, *Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo internet*, this *Rivista*, 2015, p. 1239.

(14) BRILMAYER, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules*, *Recueil des cours*, t. 252, 1995, p. 32. Concerning legal realism see, *inter alia*, TAMANAHA, *Understanding Legal Realism*, *Texas Law Rev.*, 2009, p. 731 ff; GREEN, *Legal Realism as a Theory of Law*, *William & Mary Law Rev.*, 2005, p. 1915 ff.

facts, consider the policy arguments on either side, and make a choice [for the individual case]". (15)

Following this opinion and in light of the lack of written laws providing for a criterion to be followed to face issues of unconstitutionality in private international law, it could be said that the choice of the approach to the question of constitutionality in individual cases is necessarily to be put in relation with the substantive outcomes that such a choice involves. (16) By means of a substance-oriented approach to the issue, adjudicators shall ensure that the final result determined by the choice of a certain approach to the constitutionality issue is acceptable, firstly, from the perspective of the *lex causae* and, secondly, in terms of public policy, of the *lex fori*: if the application of an allegedly unconstitutional law would lead to the violation of the parties' rights as recognized either in the former or in the latter, such an application shall be avoided. (17)

The final goal of judges' choices of the appropriate method to the issue of constitutionality should be the achievement of justice in the individual case and the respect of the rights of the parties involved. (18) The

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(15) BRILMAYER, *op. cit.*, p. 33.

(16) In general terms, this approach has been recently sustained by PEARI, *Better Law as Better Outcome*, *Am. Journ. Comp. Law*, 2015, p. 171 ff and pp. 194-195. See also BROGGINI, *Conoscenza e interpretazione* cit., p. 107; LLEWELLYN, *The Bramble Bush: On Our Law and Its Study*, Oxford, 1951, p. 39, according to whom «[a]ltough the outcome in the case may be (and commonly is) a function of the rule laid down, the rule laid down may be (and commonly is) a function of the outcome of the case – partly sought for, shaped and phrased for the purpose of justifying the result desired».

(17) We could speak, in this regard, of «result selectivism». This wording has been used, *inter alia*, by HANCOCK, *Three Approaches to the Choice-of-Law Problem: The Classificatory, the Functional and the Result-Selective*, in NADELMANN, VON MEHREN ET AL. (eds.), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of H.E. Yntema*, Leiden, 1961, p. 365 ff. In this regard, it is worth highlighting that scholars following this approach usually referred to the *choice of a certain law* applicable to the merit in light of a certain result. In this article, instead, we refer to the *choice of a certain method* to be applied to a private international law issue in light of the necessity to achieve a certain result.

(18) See JUENGER, *A Third Conflict Restatement*, *Indiana Law Jour.*, 2000, pp. 415-416; SINGER, *Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts?*, *ivi*, pp. 659 ff and esp. 665. see also CAVERS, *A Critique of the Choice of Law Problem*, *Harvard Law Rev.*, p. 192 ff; ID., *The Choice of Law Process*, Ann Arbor, 1965, pp. 75-77 (in this second work the Author expressed the same opinion in less extreme terms). Reference to justice in the individual case may be found also in YNTEMA, *The Objectives of Private International Law*, *Canadian Bar Rev.*, 1957, p. 735; CHEATHAM, REESE, *Choice of the Applicable Law*, *Columbia Law Rev.*, 1952, 980-981. In this regard, it is important to point out that this approach, strictly anchored to the outcomes in the individual case, is partially different from the one endorsed by LEFLAR, *Choice-Influencing Considerations* cit., p. 296, who discusses about the «better law» in terms of abstract socio-economic standards. In Leflar's opinion, the abstractly better law is the one

way in which such a goal is to be achieved consists in "pre-understanding" the possible solutions of the case at hand (and the ways to achieve such solutions) and then choosing the approach which is best suited to reach the result of the protection of the parties' rights at stake. (19)

Approaches of this kind have been widely criticized because they allegedly encourage subjectivism by judges and run against predictability. (20) This is a truism and it is a matter of fact that referring choices to judges involves a certain degree of subjectivism. On the other hand, however, it is also a matter of fact that – in the cases where nothing is said by written law – it seems preferable to let judges assume the decision which concretely most protects the substantive interests at stake, rather than the one which theoretically seems most appropriate. This conclusion is reinforced by the circumstance that judges' choice of the rights the protection of which is to be ensured shall not be based on subjective perceptions, but shall take place within the framework of the rights protected in the systems of law with which they deal with (i.e. the *lex causa*e and the *lex fori*). It is not by chance, indeed, that even the critics of result-selectivism "recognize that result-orientation is often the most realistic explanation of most… conflict cases". (21)

The next paragraphs will therefore analyse the issue of constitutionality of foreign law on the basis of the proposed approach (22) and, as we will see, recently both judicial and arbitral practices (even if numerically scarce) could be seen as justifying the proposed reading.

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which usually let judges achieve also the better outcome in the individual case, but this is not the main aim which decision makers should try to reach.

(19) ESSER, *Precomprensione e scelta del metodo nel processo di individuazione del diritto*, Naples, 1972. pp. 41-42. See also CANALE, *La precomprensione dell'interprete è arbitraria?*, *Etica & Politica*, 2006, p. 5.

(20) See, *inter alia* and for several other references, WASSERSTEIN FASSBERG, *Realism and Revolution in Conflict of Laws: In With a Bang and Out with a Whimper*, *Un. Pennsylvania Law Rev.*, 2014-2015, p. 1919 ff; SYMEONIDES, *Result Selectivism in Conflict Law*, *Willamette Law Rev.*, 2009, pp. 31-32; see also the note, *Bundled Systems and Better Law: Against the Leflar Method of Resolving Conflicts of Law*, *Harvard Law Rev.*, 2015-2016, p. 551 ff.

(21) SYMEONIDES, *op. cit.*, p. 31.

(22) See, in this regard, VON MEHREN, *Choice of Law and the Problem of Justice*, in *Law and Contemporary Problems*, 1977, p. 39, saying that «[i]f a unitary source is not posited, compromises – designed to take competing views and policies into account and to advance harmony within a multistate order – can hardly be viewed as necessarily or inherently unjust. On the contrary, compromise as a principle of justice becomes understandable and attractive».

3. A. The first approach to emerge with regard to the issue of constitutionality review of foreign law denied any possibility of analysis of the validity of foreign laws in the *forum*. Such an approach has developed in various countries on the basis of different theoretical bases, but everywhere it has a common core, consisting in the idea that it is improper that a State is involved in the evaluation of the validity of foreign sovereign acts.

In England, this opinion was based on certain English judicial precedents, the first of which was *Duke of Brunswick v. King of Hannover*, (23) where it was said that the Courts would not adjudicate on acts done abroad by virtue of sovereign authority. (24) The discussed approach has mainly developed as a corollary of the above-mentioned doctrine of international comity, (25) according to which a form of reciprocal respect between States would impose that all foreign acts "are entitled to some kind of sacrosanctity, privilege or immunity". (26) In addition, in *Buttes Gas and Oil Co v Hammer (Nos 2 and 3)*, it was stated that the issue could emerge also as one of non-justiciability; (27) indeed, Lord Wilberforce referred to the undesirability of the English Court entering into issues as to the validity of acts of foreign States within their own territory and, mainly, to the difficulty of doing so where there are no "judicial or manageable standards" for doing so. (28)

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(23) House of Lords, 25 July 1848, (1844) 6 Beav 1, 49 ER 724; (1848) 2 HL Cas 1, 9 ER 993.

(24) Similarly, see English Court of Appeal, 29 April 1921, *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, (1921) 3 KB 532; 21 March 1929, *Princess Paley v. Weisz*, (1929) 1 KB 718. On these cases, see FACHIRI, *Recognition of Foreign Laws by Municipal Courts*, *British Yearb. Int. Law*, 1931, p. 95 ff; see also LAUTERPACHT, Public *International Law. Foreign Legislation Enacted in Violation of International Law. Effect in England*, *Cambridge Law Journ.*, 1954, p. 20 ff.

(25) See fn 3 above.

(26) MANN, *The Sacrosanctity of the Foreign Act* cit., p. 43. This Author, however, further criticizes this approach, which was – instead – sustained by DICKINSON, *Des conflits de lois relatifs aux effets patrimoniaux du mariage par Eugène Audinet; L'interprétation et l'application du droit international dans les pays anglo-américain*, *Recueil des Cours,* t. 40, 1932, p. 365. The same idea is sustained by Harman LJ in English Court of Appeal, 12 February 1965, *Buck v. Attorney General*, (1965) CH 768, where – asked to evaluate the validity of the Constitution of Sierra Leone he said that «these courts cannot make a declaration impugning the validity of the constitution of a foreign or independent state, at any rate where that is the object of the action». This decision will be discussed in greater depth later in this paragraph.

(27) On the concept of non justiciability see AMOROSO, *Insindacabilità del potere estero e diritto internazionale*, Napoli, 2012, pp. 151-152.

(28) House of Lords, 29 October 1981, (1982) AC 888 937-938. See also MULLER-FREIENFELS, *Conflicts of Law and Constitutional Law*, *Un. Chicago Law Rev,*, 1978, p. 602,

Similarly, in the USA there has been consistent case law (29) applying the so-called "act of state doctrine" according to which the Courts of the United States should "refrain from judging the validity of sovereign acts of a foreign State which have effect within that country's borders by refusing to adjudicate cases where such sovereign acts must be examined". (30) As a choice of law principle, the doctrine "instructs American courts to accept the answers to legal questions that are provided by foreign sovereign act in foreign territory". (31) The logical corollary of the above is that a national court could not judge on the constitutional validity of a foreign law. (32)

With regard to civil law countries, this approach has been mainly sustained in Italy, where the Court of Cassation once said that "the constitutionality review of foreign law cannot be admitted because it would imply an inquiry in the foreign system of law, *i.e.* an undue interference in a system which is extraneous to the one of the forum". (33) Such a conclusion has also been developed by certain scholars, who said that the activity of constitutionality review is reserved to the State where the rule which is the object of review has been enacted, due to the fact that it

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where he affirms that it is difficult to determine the desirability and feasibility of an inquiry into the constitutionality of foreign law.

(29) See, first of all, US Supreme Court, 29 November 1897, *Underhill v. Hernandez*, (1897) 168 US 250; see also 11 March 1918, *Oetjen v. Central Leather Co.*, (1918) 246 US 297; 11 March 1918, *Ricaud v. American Metal Co.*, (1918) 246 US 304; 23 March 1964, *Banco Nacional de Cuba v. Sabbatino*, (1964) 376 US 398; 24 May 1976, *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) 425 US 682. The case where the act of state doctrine has mainly been developed as a conflict of laws doctrine is, however, 17 January 1990, *W.S. Kirkpatrick Co. v. Environmental Tectonics Corp*. (1990) 493 US 400, where it was stated that "[t]he act of state doctrine… requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid".

(30) MORRISON, *The Act of State Doctrine and the Demise of International Comity*, *Indiana Int. Comp. Law Rev.*, 1991, 311. For an in depth examination of the doctrine, see CHOW, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, *Washington Law Rev.*, 1987, p. 397 ff; PATTERSON, *The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine Are Wrong*, *Un. California, Davis*, 2008, p. 111 ff; AMOROSO, *Insindacabilità del potere estero* cit., pp. 34-35.

(31) HARRISON, *The American Act of State Doctrine*, *Georgetown Journ. Int. Law*, 2016, pp. 507 and 510. See also the comment, *The Act of State Doctrine. Its Relation to Private and Public International Law*, *Columbia Law Rev.*, 1962, p. 1278 ff.

(32) In this regard, it is worth noting that the words «constitutional validity» are used to refer both to the adoption of the formal constitutional procedure in the enactment of the law and to the substantive compliance of the content of the law with the content of the constitution.

(33) Corte di Cassazione, 8 June 1957 No 2144, *Regno di Grecia v. Gamet*, *Foro it.*, 1957, p. 1967 (own translation).

consists in a political (34) and/or legislative (35) matter, and it would be therefore precluded to the judiciary of foreign States.

Whatever the theoretical foundation of the above opinion may be, the approach is not convincing.

Preliminarily, it is worth clarifying that – as stated by several authoritative sources – there is no foundation in public international law for a doctrine precluding the examination of the validity of foreign law to national courts, both in the cases where the parameter for such an evaluation is provided by international law (36) and where the parameter is provided by foreign constitutional law. (37) As a consequence, the foundation for such an approach could only be found either in national law provisions or in self-imposed forms of restraint adopted by national courts. The case law, however, reveals that neither the former nor the latter actually exist with regard to the subject matter of this article, *i.e.* the incidental evaluation of the constitutionality of foreign law in the context of domestic proceedings where such law is to be applied.

The starting point for such a discussion is what was stated by Diplock LJ in *Buck v. Attorney General*, (38) where he clarified that the limitation for the power to evaluate the validity of foreign law applies in the cases

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(34) KAHN-FREUND, *Constitutional Review of Foreign Law* cit., pp. 219 and 224. This Author expressly states that any decision concerning the compatibility of a law with the essential rights contained in the constitution is precluded to any judge, being it a political question. According to KAHN-FREUND "[t]o apply foreign law should not mean to change it". He only accepts, at 210-211, a review of the existence of foreign law, i.e. the ascertainment that the law has been enacted following the procedure established in the constitution.

(35) CARBONE, *Sul controllo di costituzionalità* cit., pp. 692-694. The exclusion of the possibility of a constitutional review of foreign law is endorsed also by BALLARINO, *Costituzione e diritto internazionale privato* cit., pp. 6-7. However, this Author based his opinion on the legal framework existing in Italy in the 70's and not on any theoretical assumption. Due to the many substantial amendments occurred in 1995 to the Italian system of private international law (with the adoption of law No 218 of 1995 which amended the whole system), such an opinion is now outdated and not relevant for the scope of the present article.

(36) See INSTITUT DE DROIT INTERNATIONAL, *The Activities of National Judges and the International Relations of Their State*, Milan Session, 1993, art, 3, according to which «[n]ational courts, when called upon to apply a foreign law, should recognize themselves competent to pronounce upon the compatibility of such law with international law. No rule of international law prevents national courts from acting here above indicated». See also AMOROSO, *Insindacabilità del potere estero* cit., pp. 72-73. See also Justice Harlan in the abovementioned case *Banco Nacional de Cuba v. Sabbatino* cit. Among scholars see CHOW, *Rethinking the Act of State* cit., p. 416, expressly stating that the act of state is merely a doctrine of internal deference.

(37) MARTIN, *Constitutional review of foreign law* cit., para II.B.

(38) Mentioned at fn 26 above.

where "the validity of that [foreign] law became the *res* of the *res judicata* in the suit". This was further explained, in the same case, by Russell LJ, by saying that "courts in this country have no jurisdiction to pronounce by declaration on the validity of the constitution of an independent sovereign state *when that declaration is all that is sought, and no ancillary rights justiciable in these courts depend on such a declaration*" (emphasis added). (39)

From the above statements, it emerges that nothing seems to preclude national judges to, incidentally, evaluate whether the foreign law they are applying is substantially compliant with the Constitution of the country of origin of that law. Such a statement is based on the assumption that, as today it is almost generally accepted, they have to apply foreign law in a way that is the same (or, at least, the most likely) it would have been before the courts of the country whose law is being applied. (40) This seems to involve neither a violation of international comity nor an appropriation of the power of foreign constitutional judges (either constitutional courts, in the cases where there is a centralized constitutional control, or all judges, if such a system is diffused). On the contrary, as it will be explained below, this protects the principle of equality and ensures the uniform application of the *lex causae*.

Concerning the alleged violation of the doctrine of international comity, it should be noted that in private international law this doctrine dictates "that the rights of each people (...) should retain force everywhere, insofar as they do not prejudice the power or rights of another state or its citizens". (41) As explained by Joseph Story (one of the doctrine's main

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(39) Cit. Such an approach was approved and adopted in High Court of Justice, 20 June 1990, *Dubai Bank Ltd v. Galadari & Others*, *Arab Law Quart.*, 1994, p. 357. A prior decision that seems to apply a similar approach has been endorsed by English Court of Appeal, *A/S Tallinna Laevauhisus v. Estonian Shipping Line*, (1947) 80 Lloyd's Rep 99.

(40) This approach has been developed in England since the decision *Collier v. Rivaz* (1841) 2 Curt. 855 cited in DICEY, MORRIS, COLLINS, *The Conflict of Laws*, London, 2016, p. 75; 163 E.R. 608 (see also Chancery Division, 21 May 1926, *Davidson v. Annesley* (1926) 1 Ch. 692) and has been also endorsed by the Institut de Droit International in 1989 (see fn 2 above). See also, inter alia, art. 15 of Italian Law No 218 of 1995, according to which «[f]oreign law shall be applied pursuant to its own criteria of interpretation and application». For a doctrinal analysis see BADIALI, *Il ruolo di giudice* cit., pp. 617-618; JUENGER, *General Course on Private International Law*, *Recueil des cours*, t. 193, 1983, pp. 198-199; SIEHR, *General Problems of PIL in Modern Codifications*, *Yearb. Priv. Int. Law*, 2005, p. 44; DAVÌ, *Ancora sulle finalità (e sui due diversi modelli) del rinvio nel diritto internazionale privato contemporaneo*, this *Rivista*, 2014, p. 1032.

(41) WATSON, *Joseph Story and the Comity of Errors*, Athens, 1992, p. 4. The statement was originally made by Ulrich Huber in his *Praelectiones juris romani et hodierni*. For an

proposers), (42) international comity is not an absolute obligation imposed by law but the mere recognition, based on reciprocal respect, of the value of foreign acts in the territory of a State. (43) However, "the theory of comity cannot wholly account for mandatory recognition of foreign acts of state". (44) Even if one would admit the existence of a mandatory rule of international comity, a violation of such a rule would take place if a judge would try to exercise the power of declaring *erga omnes* the invalidity of foreign law, but not if he only scrutinizes the real content of foreign law. As stated by Lord Diplock in the above-mentioned case *Buck v. Attorney General*, (45) the doctrine of international comity "does not purport to exercise jurisdiction over the internal affairs of any other independent state". When a judge incidentally examines the constitutionality of foreign law just for the sake of resolving a dispute pending before him, he does not exercise jurisdiction over the internal affairs of another State and does not carry out any legislative or political activity, but merely resolves the dispute before him trying to apply in the most appropriate way the *lex causae*. (46)

In addition to the above, it is worth highlighting that, as it was stated in the famous US Supreme Court case *Hilton v. Guyot*, (47) the restraint imposed by international comity to courts when applying foreign law shall be exercised having due regard for the rights of the persons who are under the jurisdiction of the *forum*. This consideration leads us to another substantial argument against the discussed approach, *i.e.* the fact that the

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analysis of the impact of international comity on international commercial litigation see ZARRA, *Il ricorso alle anti-suit injunctions* cit., 561 ff.

(42) STORY, *Commentaries on the Conflict of Law*, Clark (NJ), 2010, reprinting the 1834 Edition, p. 31 ff. See also WATSON, *op. cit.*, p. 21 ff.

(43) See also US Supreme Court, 3 June 1895, *Hilton v. Guyot*, (1895) US 113, 163.

(44) See CHOW, *Rethinking the Act of State* cit., p. 410. Similarly, see MORGENSTERN, *Recognition and Enforcement* cit., p. 329.

(45) See fn 20 above.

(46) BADIALI, *Il ruolo di giudice* cit., pp. 612-613 and 625, where the Author expressly distinguishes between two aspects of all processes of constitutional review, the first of which is merely judicial and regards the effects of the constitutional review on the case at hand, and the second of which is *lato sensu* legislative and regards the *erga omnes* effects of the review. Only the former aspects is at stake when we discuss about the constitutional review carried out by a judge of a country that is not the one where the law was enacted. See also MANN, *The Sacrosanctity of the Foreign Act* cit., pp. 51 and 155 and, more specifically, LIPSTEIN, *Proof of Foreign Law* cit., p. 266, who stated that «in the matter of proof of foreign law, the scrutiny of the validity of [foreign] law and its compatibility with higher rules of that legal system must be regarded as part of the judicial process» and not as a political or legislative activity.

(47) Mentioned at fn 43 above.

preclusion of constitutionality review of foreign law involves several concerns as to the principle of equality. Indeed, the reason why – as already said – it is commonly accepted that the main scope of private international law rules is to ensure that the outcome of the dispute in the *forum* is possibly identical to the one that would have been reached in the courts of the *lex causae.* Parties whose relationship is submitted to the same law should be treated equally in equal situations regardless of the *forum* where the dispute is heard. If the forum courts do not have the power to evaluate the constitutionality of foreign law, the parties might suffer a prejudice simply because of the place where the dispute is being heard. Hence, the application of foreign law would be meaningless (and even detrimental) if the *forum* does not have the same powers of inquiry on the substantial validity of the law as the judges of the country whose law is being applied. (48)

Finally, with regard to non-justiciability, it is necessary to take into account that, as English judges dealing with this issue have recognized, (49) there is today a globalization of constitutional values (50) which, in principle, should lead courts which frequently make constitutional analysis to be able to also ascertain whether a foreign law is constitutional. This statement risks, of course, to appear simplistic and – in concrete cases – it could happen that a judge really thinks he is unable to decide on the constitutionality of a foreign law due to the fact that he is not familiar with a certain system of law. In our opinion, this is, however, unlikely due to the vast spectrum of tools that courts today have in order to ascertain the content of foreign law.

In light of what is stated above, it appears perfectly reasonable that in all recent cases where the issue of constitutionality of foreign law has emerged national courts have refused all arguments which purported to deny the possibility of incidental constitutionality review of foreign law. (51)

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(48) BADIALI, *op. cit.*, p. 618.

(49) See the decisions analysed at para. 4 below.

(50) See, in this regard, JACKSON, *Paradigms of public law: transnational constitutional values and democratic challenges*, *Int. Jour. Const. Law*, 2010, p. 517 ff; SPIJKERS, *What's Running the World: Global Values, World Law, the United Nations and Global Governance*, available at http://ssrn.com/abstract=1565478, 2008, p. 1 ff; MÖLLER, *The Global Model of Constitutional Rights: Introduction*, in *LSE Law, Society and Economy Working Papers 4/2013*, 2013, p. 1 ff.

(51) The first decision in which the theory which refused the possibility of constitutional review of foreign law was subjected to discussion was Queen's Bench Division, Commercial Court, 12 January 1998, *Nuova Safim SpA v. Sakura Bank Ltd*, (1998) ALL

B. The second, and currently majoritarian, (52) approach with regard to the issue of the constitutionality review of foreign law denies the existence of a general limit for such a review but recognizes the possibility of constitutionality control only in the cases where the *lex causae* allows all judges to carry out such a control ("diffuse constitutionality control") and does not reserve it only to a special constitutional court ("centralized constitutionality control").

The reasons behind this approach are twofold. First, proposers of this method affirm that if the power of evaluating the constitutionality of a certain law is afforded to foreign courts, this would mean unduly recognizing to such judges a legislative power on a foreign State. (53) Secondly, it is said that the judges of the *forum* may not have more powers than the judges of the *lex causae* in evaluating the constitutionality of this law, but that their powers shall coincide. (54)

Both of these statements are unconvincing.

As to the former of them, as already said when discussing about the constitutionality review of foreign law as an alleged political task, it is based on a misconception of the activity carried out by national judges when applying foreign law. Indeed, it is not even conceivable that a national judge may have an abrogative power on a foreign law. (55) It is here worth repeating that courts shall only incidentally ascertain the existence and the validity of the law that they apply so as to accomplish to their duty to apply foreign law in the way it would have been applied in the state where it was enacted. The effects of the evaluation made in the forum are limited to the case at hand and cannot in any way be extended beyond it. Such an activity is merely judicial and not legislative.

Turning to the argument that the constitutionality review of foreign law would be precluded because it gives more powers to the *forum* than

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ER (D) 1, where Thomas J recognized, in an interlocutory decision, the possibility of investigating the practicability of a course different from the one adopted in England until that moment. The dispute was then settled and, therefore, the investigation proposed by Thomas J did not take place. The arguments of non-justiciability and of the alleged violation of international comity have been then expressly refused by the London Court of Appeal in *Al Jedda* cit., para. 74, and in *Y1* cit., para. 18.

(52) LIPSTEIN, *Proof of Foreign Law* cit., p. 266; MANN, *The Sacrosanctity of the Foreign Act* cit., p. 157; MARTIN, *Constitutional review of foreign law* cit., para. II.C; QUADRI, *Controllo sulla legittimità* cit., p. 33; MOSCONI, *Norme straniere* cit., p. 426; VILLANI, DI FABIO, SBORDONE, *Nozioni di diritto internazionale* cit.., p. 53.

(53) LIPSTEIN, *op. cit*., p. 266; MOSCONI, *op. cit*., pp. 428-429; QUADRI, *op. cit*., p. 35.

(54) MANN, *op. cit*., p. 157; MOSCONI, *op. cit*., p. 426.

(55) BADIALI, *Il ruolo di giudice* cit., p. 613.

those attributed to judges in the system of the *lex causae*, serious concerns related to the principle of equality then lead us to reject it. Indeed, accepting such an argument would mean that, even if a judge is convinced that a certain law would be treated as unconstitutional by his foreign colleagues, he is precluded from taking into account such unconstitutionality simply because the *lex causae* has a centralized system of constitutional control. (56) Again, therefore, the mere fact that the dispute is not being heard before the courts of the *lex causae* would be an element of discrimination: (57) while in the courts of the *lex causae* it will be possible to refer the matter to the constitutional court and, eventually, not apply the unconstitutional law, in foreign court this would be precluded, with the consequence that the case will be judged on the basis of an unconstitutional law. The proposed approach was explicitly rejected by Lipstein, by saying that "it may be urged that the reservation of the question of constitutionality for a special court is not merely a division of jurisdiction but a means of safeguarding certainty and uniformity in the last resort. In the meantime the law retains its validity throughout". This Author, therefore, proposed that "[t]he difficulty could be resolved if the courts of the forum were empowered to refer such questions to a court of the *lex causae* for determination". (58) However, such a preliminary reference procedure appears unrealistic, while the equality concerns raised above may finally lead to an appeal of the decision for misapplication of the applicable law or to a refusal of its enforcement in the courts of the *lex causae* for a failure in the application of the proper law, (59) or, alternatively, for public policy reasons.

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(56) This argument is not convincing, *a contrario*, also because the foreign system of law shall be taken into account in its entirety, and therefore also including the constitution. See PICONE, *La confusione tra legge e ordinamento nella dottrina italiano di diritto internazionale privato*, in ID., *Studi di diritto internazionale privato*, Napoli, 2003, pp. 717, 730 and 743.

(57) DANNEMANN, *Accidental Discrimination in the Conflict of Laws: Applying, Considering and Adjusting Rules from Different Jurisdictions*, *Yearb. Priv. Int. Law*, 2008, p. 113 has recently analyzed in depth the forms of discrimination that might result from the application of foreign law and the possible adjustments that can be adopted by judges in order to avoid such a discrimination.

(58) LIPSTEIN, *Proof of Foreign Law* cit., p. 268.

(59) In civil law countries it is indeed today well settled that foreign law is to be applied as law and not as fact (with the consequent application of the *iura novit curia* principle), while in common law systems the burden of introducing and proving foreign law stays on the parties. See HARTLEY, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, *Int. Comp. Law Quart.*, 1996, p. 271 ff; ESPLUGUES MOTA, *Application of Foreign Law*, *Yearb. Priv. Int. Law*, 2011, p. 273 ff; DOLINGER, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, *Arizona Journ. Int. Comp.*

Finally, it is also worth considering (60) that the reduction of the forms of constitutionality control only to diffused (61) and centralized (62) systems made by the proposers of the discussed approach is extremely simplistic and fails to acknowledge the existence of several different methods of constitutionality review that are not ascribable to the above-mentioned two forms. (63) Indeed, as acknowledged by comparative public law handbooks, there are several systems of constitutionality control that may be considered as hybrid forms of constitutionality review, due to the fact that they borrow certain features from both the diffused and the centralized systems of control. It is possible to mention, in this regard, *inter alia*, systems such as the Portuguese, (64) the Russian, (65) the Estonian (66) and of certain Latin American countries. (67) These countries have the

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Law, 1995, p. 225 ff; LALANI, *Establishing the Content of Foreign Law: A Comparative Study*, *Maastricht Journ. Eur. Comp. Law*, 2013, p. 75 ff; STERN, *Foreign Law in the Courts: Judicial Notice and Proof*, *California Law Rev.*, 1957, p. 23 ff; WILSON, *Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts*, *Int. Law Pol.*, 2013, p. 1111 ff; BROGGINI, *Conoscenza e interpretazione* cit., p. 105; GIULIANO, *L'applicazione del diritto straniero da parte del giudice nazionale negli ordinamenti dell'Europa continentale*, *Riv. dir. proc.*, 1963, p. 167 ff; RUBINO SAMMARTANO, *Il giudice nazionale di fronte alla legge straniera*, this *Rivista*, 1991, p. 315 ff; CORBETTA, *La Cassazione e l'interpretazione del diritto straniero richiamato dalle norme di conflitto*, *Corr. Giur.*, 2003, p. 398 ff.

(60) These reflections were firstly (and only) made by BADIALI, *Il ruolo di giudice* cit., p. 626 ff.

(61) The diffused system of constitutional control originated in the US Supreme Court decision *Marbury v. Madison*, (1803) 5 U.S. 137. The Court stated that the Constitution is a superior law and, as a consequence, all judges have the power to not apply laws which are contrary to it.

(62) The centralized system of control, based on Hans Kelsen's theories, was for the first time introduced by art. 140 of the 1920 Austrian Constitution.

(63) PIZZORUSSO, *Sistemi giuridici comparati*, 2nd Ed., Milan, 1998, p. 244; see also MORBIDELLI, PEGORARO, REPOSO, VOLPI, *Diritto Pubblico Comparato*, 2nd Ed., Turin, 2007, pp. 462-463; Badiali, *Il ruolo di giudice* cit., pp. 614-617, 626-629.

(64) Art. 204 of the 1976 Portuguese Constitution entitles all judges to not apply laws that they consider unconstitutional, but entitles to make an appeal to the *Tribunal Constitucional* against judges' decision.

(65) Art. 15 of Russian Constitution imposes to judges to directly apply the Constitution if the law they should apply is in contrast with the Constitution. However, art. 101 of the 1994 law on the Constitutional Court mandates also judges to refer the matter to the Constitutional Court.

(66) In this system judges have the power to declare the unconstitutionality of laws against the rights and liberties of peoples, but the final word on the constitutionality is given to the Constitutional Court in case of contrast with «the rules and the spirit of the Constitution».

(67) In Peru, Ecuador, Paraguay, Guatemala and Colombia there is a mixed system of diffused and centralized constitutional control, so that some Authors talked about a «con-

common feature that all judges have the power to not apply an allegedly unconstitutional law, but the final word on (un)constitutionality is left to an *ad hoc* constitutional court. In the hypothesis where a foreign judge has to apply the law of one of these countries in a case with foreign elements, the recourse to the approach discussed in this section would leave us with no answer to the question of the possibility to review the constitutionality of foreign law. On the one hand, the foreign judge could be entitled not to apply the alleged unconstitutional foreign law, but, on the other hand, the remedy of the recourse to the constitutional court for a final decision on the validity of the law would be missing (the foreign court would not have the power to refer the matter to the constitutional court of another country). In all these cases, the application of the method discussed in this paragraph would therefore lead us to a deadlock.

In conclusion, anchoring the possibility of review of foreign law to the characteristics of the foreign control of constitutionality review seems inappropriate.

C. The third traditional approach to the problem of constitutionality of foreign law always admits a constitutionality review of foreign law, provided that a form of constitutionality control (regardless of the fact that it is centralized or diffused) exists in the country of origin. (68) It is, indeed, obvious that if no constitutionality control exists in the system of the *lex causae*, as it happens e.g. in England and China, such a control cannot be exercised by foreign courts. (69)

The reason for this general allowance lies in the same function and goals of private international law, i.e. to ensure that a certain dispute is decided in a foreign country as if it is decided before the courts of the *lex causae*. Scholars talk, in this regard, of uniformity in the regulation of legal relationships. The application of foreign law would indeed be nonsensical if the outcomes of its application were potentially to lead to a different

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cepciòn iberoamericana difuso-concentrada». See, in this regard, MORBIDELLI-PEGORARO-REPOSO-VOLPI, *op. cit.*, p. 463.

(68) BADIALI, *Il ruolo di giudice* cit., p. 617 ff; SIEHR, *Diritto internazionale privato* cit., p. 13. See also, with regard to the general power of foreign courts to pronounce an opinion upon the exercise of sovereign power by a foreign government, VON BAR, *Private International Law* (translation by GILLESPIE), Edinburgh, 1892, p. 1121.

(69) BADIALI, *op. cit.*, p. 614. In England, in virtue of the supremacy of the Parliament, it is not allowed to judges to put into question the validity of laws emanated by it. The constitutional analysis of laws is precluded also in China. See, in this regard, ROSSI, *L'adattamento al diritto internazionale nell'ordinamento giuridico della Repubblica Popolare Cinese*, in *Riv. dir. int.*, 2016, pp. 451-452.

outcome if compared to the one that would have been reached in the country of origin. (70)

According to this approach, therefore, judges shall search the solution to the issue at stake "pragmatically", trying to figure out the likely outcome of an identical dispute before a court of the *lex causae*. Such an analysis cannot exclude a research on the substantive validity of the law which is being applied. As explained by Prof. Giorgio Badiali, this approach does not confer to judges an abrogative power with respect to foreign law, but merely gives them the full possibility to try to decide the dispute as if it was celebrated before his foreign colleagues. If a court avoids to consider a conflict between a foreign law and the constitution of the same country, it simply fails to properly apply foreign law. (71) Only in this way it can be ensured that the fact that a dispute is heard before a foreign court does not turn out to be a factor of prejudice for the disputing parties.

This approach is undoubtedly the one which best takes into account the substantive repercussions of the issue of constitutionality of foreign law. However, a rigid application of this method of analysis could, in certain cases, lead to undesirable results. The reference applies to all those systems of law where, while a constitutionality control is in principle admitted, it is never applied by judges. As noted by Antonio Cassese, indeed, in several ex-socialist countries "a whole set of state bodies is responsible for putting constitutional rules into effect and provision is made for the judicial review of illegal or unconstitutional acts. However, the lack of a 'constitutionalist' tradition and the scarce reliance on the 'rule of law' sometimes result in these guarantees remaining devoid of real effectiveness". (72) "It follows that constitutional rules, when they are couched in legal terms as enforceable standards of behaviour, are often misapplied or are not applied at all by the relevant officials". (73)

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(70) See, for an explanation of this approach, FRANZINA, *L'applicazione genuina del diritto straniero richiamato dalle norme di conflitto dell'Unione europea*, in TRIGGIANI, CHERUBINI, INGRAVALLO, NALIN, VIRZO (eds.), *Dialoghi con U. Villani*, Bari, 2017, p. 1113 ff; CARBONE, IVALDI, *Diritto stranieri e ordinamento italiano*, *Contratto e impresa*, 2000, pp. 1004-1005; PITTALUGA, *La prova del diritto stranieri: evoluzioni giurisprudenziali in Francia e in Italia*, this *Rivista*, 2001, p. 687 ff; SANGIOVANNI, *La conoscenza, l'interpretazione e l'applicazione della legge straniera da parte del giudice civile tedesco*, *ibidem*, 1999, p. 935; INSTITUT DE DROIT INTERNATIONAL cit. (fn 2 above), para. II.b.

(71) BADIALI, *op. cit.*, pp. 620-621.

(72) See in this regard CASSESE, *Modern Constitutions and International Law*, *Recueil des cours*, t. 192, 1987, p. 348.

(73) *Ivi*, p. 350.

How should a judge behave when confronted with the application of the law of one of such countries? Should he apply the literal interpretation of the constitution and carry on a constitutionality analysis of laws or should he look at the system of law as it lives? It does not seem possible to find a reply to this question in abstract terms. A concrete analysis of the circumstances of the individual case and of the status of constitutionality review in the system of law which is being applied will be necessary. This is the reason why the present author believes that it is not possible, in conclusion, to find an abstract solution that is always correct for the issue of constitutionality of foreign law (even if, as we have just seen, it is in principle correct to admit such a constitutionality review in all cases). The final decision on the appropriacy of making this kind of analysis shall be bestowed to judges, who will decide whether and how to exercise their power to evaluate the constitutionality of foreign law in light of the circumstances of the individual case. This is what seems to have happened in the recent English and arbitral case law that we will analyse below.

4. The issue of the constitutional review of foreign law recently incidentally emerged in two English cases which regarded different questions.

In the first of them the judges had to evaluate whether a person who was interned in Iraq in the absence of a process before the competent judicial authority was entitled to damages under English law (the lawfulness of the detention needing to be determined in accordance with Iraqi law).

In the second case, the Court had to understand if it was possible to deprive an Afghan person suspected of being involved in terroristic activities of his English nationality (acquired pursuant to a marriage in England). The problem here was that such a deprivation could have been possible, under English law, only provided that that person would not have remained stateless. For this reason, English court had to evaluate whether this individual had lost his original nationality when he became English citizen. (74)

The answer to the above incidental questions required an analysis to be carried out under Iraqi and Afghan law. In both these countries –

(74) Indeed, as specified by English Supreme Court, 9 October 2013, *Secretary of State for the Home Department (Appellant) v. Al-Jedda (Respondent)*, 2013 UKSC 62, para. 12 ff, it is essential to verify the existence of the status of foreign citizen of people which are going to be expelled by the Country in order to avoid that these people remain stateless. Citizenship, indeed, is considered as an essential and inalienable human right.

which have been subject to very relevant changes of their legal systems – new Constitutions, inspired by the respect for essential human rights, have been enacted after the establishment of new post-war governments. In the meanwhile, however, older laws inspired by previous regimes were still in force and, among such laws, there were the Iraqi law on internment of people issued at the time of war and the Afghan law on citizenship. This circumstance required an incidental analysis by English judges of the constitutionality of these older laws (evidently not inspired by the necessity of respecting essential human rights) in light of the new Constitutions.

As stated above, while the constitutional analysis carried out by English judges embodies an *obiter dictum*, the reasoning relied on in approaching the issue seems extremely innovative and, as a consequence, might transcend the relevance of the cases at hand. It is to be noted that, in both cases, the issue of the abstract possibility of constitutionality review of foreign law was decided in similar ways, *i.e.* by allowing judges to incidentally examine the constitutional validity of foreign law; and in both cases judges did not carry out a theoretical analysis of the subject and decided to be able to make a constitutionality review of foreign law in light of the substantive implications of their decisions.

An analysis of those two cases could be seen as an indication of the emergence of a certain tendency towards a case-by-case approach to the issue of constitutionality of foreign law and, as it is shown below, such a tendency also finds confirmation in recent arbitral practice.

A. In *Hilal Abdul-Razzaq Al Jedda v. The Secretary of State for Defence* ([75]) the High Court in London and then the Court of Appeal had to evaluate a request for damages for unlawful imprisonment by reasons of the Claimant's detention by British forces in a military detention center in Iraq. The legitimacy of the detention was to be evaluated on the basis of Iraqi law, provided that it that took place in Iraq and art. 11 of the 1995 English Private International Law Act refer the matter to the *lex situs*.

The imprisonment was based on certain legislative provisions enacted by the Coalition Provisional Authority (CPA), which exercised power in Iraq during the war. In particular, Memorandum No 3 of the CPA issued on 18 July 2003 authorized internment of people without a previous judicial decision if this was "necessary for imperative reasons of security";

([75]) High Court of Justice, Queen's Bench Division, 5 March 2009, Court of Appeal, 8 July 2010, *Hilal Abdul-Razzaq Al Jedda v. The Secretary of State for Defence*, (2009) WC2A2LL, (2010) EWCA Civ 758 (CA).

after the end of the occupation, UN Security Council Resolution No 1546 attributed such a power also to the Multinational Force which assisted the Interim Government of Iraq. The transitional phase was governed by a Transitional Administrative Law (TAL), article 26(C) of which expressly provided that CPA laws were expressly deemed to remain in force until rescinded or amended by legislation. The only legislative change affecting Memorandum No 3 was enacted in 2004, by stating that the decision of internment was to be reviewed by a Joint Detention Committee (JDC).

On 19 May 2006 a new Iraqi Constitution was promulgated, but the multinational force remained in Iraq upon request of the Iraqi Government. (76). This determined, on the one side, that the TAL was expressly abrogated. (77) On the other side, art. 130 of the Constitution stated that "[e]xisting laws shall remain in force unless annulled or amended in accordance with the provisions of the Constitution".

With regard to the essence of the right of liberty of people, art. 15 of the Constitution expressly provided that "[e]very individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and *based on a decision issued by a competent judicial authority*" (emphasis added).

This provision shall be read jointly with art. 37 paragraph 1 (B) of which states that "[n]o person may be kept in custody or investigated except according to a judicial decision".

However, art. 46 of the Constitution provides for a limitation of the aforementioned standards, by stating that "[r]estricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, *and insofar as that limitation or restriction does not violate the essence of the right or freedom*" (emphasis added).

The question before the judge was, therefore, to understand whether, after the coming into force of the Constitution, and in light of the provision of art. 130, the CPA provisions providing for internment without judicial review – which were not expressly abrogated by the Constitution – violated the essence of the right provided by art. 15 and 37 of the Constitution. Such a task was to be carried out despite the lack of an official English translation of the Constitution and, most importantly, in the absence of judicial precedents offering a guide in this regard. These

(76) See the High Court of Justice Decision, para 15.
(77) As it was stated under Art 143 of the Iraqi Constitution.

factors could have led the judge to consider the issue as non-justiciable before an English court.

However, the judge expressly stated that the drafting techniques used for Iraqi Constitution are not unfamiliar to English judges and do not require an Iraqi perspective in order to be understood. (78) He also clarified that the substantial standards to be applied were perfectly manageable for him and, therefore, there was no question of justiciability.Similarly, the judge excluded the existence of an issue of comity, because – as stated in the above-mentioned *Buck* decision – comity cannot prevent a judge from deciding a matter on which he has unquestioned jurisdiction. Furthermore, and more importantly, if the judge had avoided to decide on the issue, this would have been particularly unsatisfactory if the Secretary of State had immunity in Iraq. Indeed, Al Jeddah would have been deprived of any form of judicial protection, and this would have been contrary to his fundamental rights as protected in the *lex fori*. (79) Hence, mainly on the basis of the substantive repercussions of his choice and without recourse to any form of theoretical reasoning as a basis of his decision, Mr. Justice Underhill proceeded to examine the merit of the case.

According to the Claimant and his experts, CPA's laws were a form of *lex specialis* (enacted for a time of war) not intended to survive to the coming into force of the Constitution; furthermore, these provisions where expressly contrary to art. 15 and 37 of the Constitution and – being the right of judicial review of internment decisions at the essence of the right of liberty – such a right cannot be derogated even by laws.

The judge, however, *on balance* rejected this argument, and accepted the one presented by Respondent's experts. They stated that the language used in art. 130 is straightforward and the Constitution expressly abrogated existing laws where the drafters intended to do so. Moreover, according to this reasoning, the right to judicial review is not at the essence of the right of liberty and can, therefore be derogated according to art. 46. This conclusion is strengthened by the fact that – as stated by Respondent's experts – it is *conceivable* that an Iraqi judge would have accepted such a conclusion in light of the extraordinary scenario that characterized Iraq during and after the war, which seemed to authorize even a form of non-judicial review subject to severe safeguards. In these circumstances,

(78) Par. 41 of the High Court Decision.
(79) Par. 36 of the High Court Decision.

the judge considered as unlikely that the Constitution was intended to outlaw all forms of detention without process.

This solution appears unsatisfactory in the merit. Indeed, the approach assumed by the judge seems to be mainly driven by a will of protection of English interests and the interpretation of Iraqi Constitution appears to have been carried out with the goal of avoiding to affirming the responsibility of the Secretary of State.

The judge's decision was however reaffirmed by majority by the Court of Appeal. In this regard, it is interesting to note that all the three judges confirmed the possibility to review the constitutionality of Iraqi law and excluded the existence of an issue of comity and/or justiciability. However, they disagreed on the merit of the case. While Lady Justice Arden expressed the view that art. 46 of the new Constitution should act as a "stopping point" and preclude the possibility of detention without review by a formal judge (regardless of the war scenario in Iraq), Sir John Dyson and Lord Justice Elias confirmed that the review by an administrative body (even if not a formal judge) was sufficient to guarantee the respect of art. 46, in particular in light of the circumstances existing in Iraq.

B. The second relevant case is *Y1 v. Secretary of State for the Home Department*. (80) In this dispute the English Special Immigration Appeals Commission had to determine whether Art. 7 of the 2000 Afghan Law on Citizenship (enacted during the Taliban regime), which prohibited to any Afghan citizen to have dual nationality, with Article 4 of the 2004 Afghan Constitution adopted by the Loya Jirga (the supreme representative body of the people of Afghanistan) after the occupation of Afghanistan by the Northern Alliance supported by NATO and the establishment of the interim administration headed by Hamid Karzai. Such a rule sets forth that "[n]o member of the nation can be deprived of his citizenship of Afghanistan". Such an analysis was to be carried out in light of the Afghan Constitution providing, on the one hand, that "laws and decrees contrary to the provisions of this constitution are invalid" (Art. 162), and, on the other hand, that the Afghan Supreme Court was the only organ entitled to examine the constitutional validity of Afghan laws (Art. 121).

The question arose because the appellant, an Afghan citizen that in 2004 acquired also British nationality, was accused of supporting Islamic

(80) Special Immigration Appeals Commission, 18 May 2012, *Y1 v. Secretary of State for the Home Department*, SC/112/2011.

terrorists and, as a consequence, the British Secretary of State started proceedings aimed at depriving him of British nationality. However, Art. 40 of the 1981 British Nationality Act provided that the Secretary of State may not make an order depriving a person of his nationality if the order would make such a person stateless, i.e. a national of no state. In light of this provision, in the case where Art. 7 of the 2000 Afghan Citizenship Law was considered to be still in force, the appellant would have lost his Afghan nationality in 2004 (when he acquired British nationality) and, therefore, would have remained stateless if the Secretary of State would have deprived him of the British nationality. The Secretary of State would have been, therefore, precluded from exercising such a power. Instead, if Art. 7 was to be considered unconstitutional in light of the 2004 Constitution, the appellant was still an Afghan national and the Secretary of State would have been free to deprive him of his British passport. (81)

The judge was therefore confronted with a very fragmented legal scenario, in which several regimes, Constitutions and laws succeeded in Afghanistan since the communist government until the Karzai's one and in which, as a consequence, conflicts of norms are very common. This might have induced the court to consider improper to exercise its power to review the constitutional validity of Afghan laws. If the judge was rigidly anchored to a theoretical view of the subject, he should have probably considered the matter as non-justiciable in accordance with the first approach proposed above.

On the other hand, however, from an analysis of the particularities of the individual case it appears that the issue was closely related with three substantive aspects which, from the reasoning of the judge, were of essential importance. First, the risk to render a person stateless depriving him of an essential rights protected by the *lex fori*. (82) Second, the consideration that the radical change of political regime in Afghanistan would probably have involved a change of attitude towards radical views against dual nationality. (83) Third, and not less important, the implied English state interest to deprive of British nationality potential terrorists which in principle should have led, in this case, the English judge to affirm that the appellant did not loose his Afghan nationality. These substantive concerns were to be considered in light of the foreign court theory, expressly

(81) See paras 1-7.
(82) See para. 20.
(83) See para. 22.

endorsed by the deciding court, according to which the decision should have been as far as possible equal to the one that could be issued by an Afghan court. (84)

In light of the above substantive concerns, and without carrying out any form of theoretical analysis on the best approach *in abstracto* to the issue of constitutionality of foreign law, the Special Immigration Appeals Commission – after having reaffirmed (quoting *Al Jeddah*) that there is no legal impediment to the possibility of constitutionality review of foreign law – considered that Art. 4 and Art. 162 of the 2004 Afghan Constitution rendered invalid Art. 7 of the 2000 Citizenship law. The Secretary of State was therefore free to deprive the appellant of his British citizenship.

C. A confirmation of the existence of the tendency outlined above can be found also by briefly analyzing the debate which characterized the issue in international commercial arbitration. There are, of course, many differences existing between arbitration and litigation, (85) which might lead a reader to consider it pointless to examine arbitral practice in a paper concerning international litigation. In the present author's opinion, however, such an analysis is interesting for two reasons. Firstly, it is interesting to note that such a debate has, *mutatis mutandis*, very similar contours to the one which concerns international litigation. (86) Secondly, recent awards seem to confirm that arbitrators have dealt with the issue in a way which is comparable to the recent approach of domestic courts.

As to the debate which took place in scholarship, a first opinion has been expressed by Julio Cesar Betancourt who denied the possibility for arbitrators to even evaluate the constitutionality of foreign law. (87) Such an opinion is, first of all, based on the alleged circumstance that the power

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(84) See paras 7 and 20.

(85) The most significant of such differences, as far as the present article is concerned, is in the fact that arbitrators do not have a *lex fori* which influences their choices.

(86) PAULSSON, *Unlawful Laws and the Authority of International Tribunals*, *ICSID Rev. – FILJ*, 2008, p. 215 ff; PAULSSON, *The Idea of Arbitration*, Oxford, 2013, p. 231 ff; MAYER, *L'arbitre international et la hiérarchie des norms*, *Revue arb.*, 2011, p. 361 ff; BETANCOURT, *Understanding the 'Authority' of International Tribunals: A Reply to Professor J. Paulsson*, *Journ. Int. Dispute Settlement*, 2013, p. 227 ff; GRIGERA NAÓN, *Should International Commercial Arbitrators Declare a Law Unconstitutional?*, in CARON, SCHILL-SMUTNY-TRIANTAFILOU (eds.), *Practising Virtue: Inside International Arbitration*, Oxford, 2015, p. 308 ff; CAIVANO, *Planteos de inconstitucionalidad en el arbitraje*, *Rev. Peruviana Arb.*, 2006, p. 107 ff; OLAS, *May International Arbitral Tribunals Declare Laws Unconstitutional? An International and a Polish Perspective on the Issue of Dealing with Unlawful Laws*, *Journ. Int. Arb.*, 2017, p. 169 ff.

(87) BETANCOURT, *op. cit.*, p. 227 ff.

to review the constitutionality of foreign law is reserved to state justice. (88) As the same Author concedes, (89) this opinion is actually strictly related to a contractual conception of arbitration, in accordance to which an arbitral award is closer to a contract than to a judicial decision. Secondly, Betancourt appears skeptical about the idea that any arbitrator could accurately discern among methods of constitutional interpretation and properly resolve a constitutional issue under any system of law. (90)

This opinion is, however, non-convincing. As to its first prong, it is today a matter of fact that – as a consequence of the principle of *favor arbitrati* (91) – in the vast majority of legal systems arbitration awards are totally equalized to domestic courts' decisions and arbitration proceedings are to be considered as "judicial" to all effects. (92) This approach has found confirmation both in legislative and judicial activity of several countries, such as France, Switzerland, UK, USA and Germany. (93) As to

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(88) *Ivi*, p. 236, stating that «if the state courts have been given the power to determine the constitutional validity of national legislation, and if this power is exclusively reserved to the state in exercise of its jurisdictional function, and no constitutional system allows for the possibility that courts might delegate such a power to an international arbitral tribunal, it would be logical to conclude that, in this case, jurisdiction together with courts' other inherent powers cannot ever be constitutional delegated. Accordingly it can be said that the power to consider whether specific provisions of national law are valid by reference to constitutional norms is a categorically jurisdictional function that goes beyond the arbitrators' decision-making power. Consequently, it is submitted that, in arbitration proceedings, when a norm is purported to be contrary to constitutional provisions, arbitrators will have to inexorably 'apply' the purportedly unconstitutional norm, in which case they would be applying a norm that (…) is technically 'valid'».

(89) *Ivi*, p. 235.

(90) *Ivi*, p. 241.

(91) The principle of *favor arbitrati*, which concerns the vast majority of modern legal systems, encourages the recourse to arbitration instead of national courts. See, inter alia, MALATESTA, *Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell'arbitration exclusion*, this *Rivista*, 2014, p. 5 ff; ZARRA, *Il principio del favor arbitrati e le convenzioni arbitrali patologiche nei contratti commerciali internazionali*, *Riv. arb.*, 2015, p. 138 ff.

(92) See, in this regard, *ex multis*, PERLINGIERI, *La sfera di operatività della giustizia arbitrale*, *Rass. dir. civ.*, 2015, p. 594 ff; RICCI, *La "funzione giudicante" degli arbitri e l'efficacia del lodo*, *Riv. dir. proc.*, 2002, p. 351 ff; BRIGUGLIO, *La pregiudizialità costituzionale nell'arbitrato rituale e l'efficacia del lodo*, *Riv. arb.*, 2000, p. 639 ff.

(93) See RICCI, *La "funzione giudicante"* cit., p. 357 ff. It is today even discussed that a particular form of arbitration involving, on the one hand, banks and credit institutions and, on the other, consumers (so-called «*arbitro bancario e finanziario*»), with regard to banking and financial matters may refer constitutional matters to the constitutional court. See MAIONE, *Profili ricostruttivi di una (eventuale) legittimazione* a quo *dei Collegi dell'Arbitro Bancario Finanziario*, *www.judicium.it*, 2011, p. 1 ff. With regard to Italy, suffice it to mention that art. 824-*bis* of the Code of Civil Procedure has totally equalized arbitral award to judicial decisions. In addition, the Constitutional Court has confirmed, in its well-known

Betancourt's second argument, it is to be noted that one of the main reasons why two commercial parties decide to refer to arbitration is the perceived neutrality of arbitrators, which has to be joined to their experience in multi-jurisdictional cases (94) and the flexibility in the conduction of the proceedings, which allows arbitrators (with the support of the parties) to make recourse to several instruments to acknowledge even systems of law that they do not know. (95) As a consequence, it does not appear that arbitrators (as it was said for foreign judges) are ill-suited to make this kind of evaluation.

Having said that there is no reason to preclude arbitrators the possibility to incidentally make a constitutionality review of foreign law leading to the non-application of an allegedly unconstitutional rule, (96) we will now turn to the approaches which recognize, to a different extent, the existence of such a power.

An extreme position has been assumed by Jan Paulsson, according to whom arbitrators not only have the inherent authority to interpret and apply constitutional norms, but have an obligation to do so. This is because, as in international litigation, the law that applies to the dispute shall apply in its totality. (97) Moreover, Paulsson explains that, due to the procedural autonomy of arbitration, tribunals do not owe deference to decisions of national courts with regard to the discussed issue. (98)

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decision No 376/2001, that arbitrators have the power to refer to it matters of constitutional validity, thus considering arbitral tribunals the same as national courts. In addition, it today is also admitted that, in light of the judicial nature of arbitration, a set of proceedings may be transferred in its current status from national courts to arbitral tribunals (so-called *translatio iudicii*). See, in this regard, DEL ROSSO, *Note in tema di* translatio iudicii *tra arbitrato e processo*, *Il giusto proc. civ.*, 2014, p. 545 ff.

(94) LEW-MISTELIS-KRÖLL, *Comparative International Commercial Arbitration*, The Hague, 2003, p. 5 ff.

(95) KAUFMANN-KOHLER, *The Arbitrator and the Law: Does He/She Know it? How? And a Few More Questions*, *Arb. Int.*, pp. 636-638.

(96) See in this regard CAIVANO, *Planteos de inconstitucionalidad* cit., p. 129; OLAS, *May International Arbitral* cit., p. 196 ff.

(97) PAULSSON, *Unlawful laws cit.*, pp. 215, 219 and, mainly, 224, where Paulsson explains that «if Rex's decrees violate fundamental laws of his country, an international tribunal empowered to apply that national law should not give effect to them – and is under no obligation to wait for the national courts (if ever) to make such a determination; the international tribunal's authority to determine and apply that national law is plenary. (…) the international tribunal is empowered to determine national law whenever it has the mandate to apply it. When the tribunal does so, it is proper for it to refuse to recognize unlawful laws».

(98) Paulsson's approach seems to be influenced by his conception of arbitration as detached by its seat. See, for a survey in this regard, ZARRA, *L'esecuzione dei lodi arbitrali annullati presso lo Stato della sede e la Convenzione di New York: verso un'uniformità di*

A vigorous and authoritative reply to the abovementioned approach came from Pierre Mayer. (99) This Author said that it is not worth focusing on the formal hierarchy of norms, but it is necessary, instead, to look at the actual functions of laws. For this reason, if a certain rule is applied and enforced by the judiciary in a certain country, private arbitrators are not entitled to ignore this and shall therefore apply the law as it is applied in its state of origin. Unconstitutionality cannot be seen as truly effective if it does not exist for the judiciary of the country where a rule is enacted. (100)

Both the above approaches appear, however, unsatisfactory. On the one hand, to say that arbitrators should just ignore what is done by the judiciary of a certain country and just decide constitutionality issues on the basis of their interpretation of foreign law seems exaggerated: judicial interpretation contributes to the life of the law, which lives as it interpreted by its national judges. Arbitrators shall, also as a matter of comity, (101) take into account the case law of the State the law of which they are applying. On the other hand, it is also true that arbitrators' work is based on a choice of the disputing parties, who delegate to an arbitral tribunal (and not to the state judiciary) the interpretation of the selected system of law. If, in the tribunal's opinion, the interpretation of a certain rule given by national courts contradicts the main principles encapsulated in the Constitution of a certain country, they should indeed let their idea of justice, equity and fairness prevail over relevant judicial interpretation.

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vedute?, *Riv. arb.*, 2015, p. 574 ff. An approach according to which the case law of the foreign country the law of which is being applied was sustained also by Italian Corte di Cassazione, 26 February 2002 No 2791, *Giur. it.*, 2003, p. 1 ff, with a comment by DI MURO.

(99) MAYER, *L'arbitre international* cit., p. 361 ff.

(100) PAULSSON, *The Idea of Arbitration*, *cit*., p. 248 ff, replied to Mayer's opinion by saying, first, that the fact that arbitrators are not state organs is a further argument in favour of entitling them to apply «a law» and not a «legal order». For this reason, the parties have also the legitimate expectation that all the rules (including the Constitution) which compose a certain legal system will be applied by an arbitral tribunal and not only the reading of these rules that has been given by the judiciary of that country. At 252 Paulsson states: «[i]t is a very different matter when parties explicitly stipulate the protection of a neutral jurisdiction and all the more so one which is not a national organ owning deference, as it were, to those of a fellow state. Then they are indeed seeking the application of the stipulated norms, but not by the organs of a state whose conduct 'on the ground' may not have their trust».

(101) GRIGERA NAÓN, *Should International Commercial Arbitrators* cit., p. 308. See, in this regard, the arbitral award issued in the ICC Case No 6320 of 1992, mentioned by Grigera Naon at p. 310 ff, where the arbitrators, even if recognizing their power to make a constitutional review of applicable substantive law, stated that it would have been improper – as a matter of comity – to do so, in particular because the applicable law was not declared unconstitutional by the judiciary of the relevant State.

Indeed, it seems that, also in international arbitration, the issue cannot be resolved without taking into account the circumstances of the individual case and the substantive repercussions of the choice of the approach to the issue of constitutionality of the *lex causae*. ([102]) In this regard, the present author shares the opinion of Horacio Grigera Naón, who proposed a "pragmatic course of action" which is "premised on a result-oriented or 'look before you leap' approach permitting to identify the most appropriate substantive legal solution for the case at stake, which requires not defeating the parties' legitimate expectations and observing a legal reasoning also responsive to concerns of fairness, efficiency and neutrality". ([103]) Indeed, as it was explained by Andrea Carlevaris, "[i]n the lack of specific mandatory procedural duties, arbitrators may ascertain the content of the

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([102]) This is not the place to analyse the issue in its completeness. However, it is worth noting that the main relevant difference existing between judges and arbitrators is that, while the formers' evaluation of the proper approach to the issue shall be seen only from the perspective, first, of the *lex causae* and, second, of the *lex fori*, arbitrators shall take into account more systems of law. The first of them is the applicable *lex arbitri* (i.e. the whole set of rules, both national and institutional, which govern arbitral proceedings; see MISTELIS, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri"*, *Am. Rev. Int. Arb.*, 2006, p. 164 ff). In the cases where the *lex arbitri* precludes constitutionality review by arbitrators and, instead, the tribunal does so, there is the risk that the award is annulled at the state of the seat; contrariwise, if such a law entitles arbitrators to make a constitutionality review (as happens, e.g., in Argentina; see GRIGERA NAÓN, *Should International Commercial Arbitrators* cit., p. 309), this problem does not exist. Secondly, the tribunal shall take into account the content of the substantive law to be applied to the dispute. Does it allow judges to make constitutionality reviews? Can, in light of the content of the law to be applied, it be assumed that the parties legitimately expected that arbitrators carry out constitutional interpretation? These questions cannot be ignored by an arbitrator when deciding how to manage an issue of constitutionality of the applicable law. Thirdly, arbitrators should look at whether, in the case where they decide not to make a constitutionality review of the foreign law they are applying, the applied rules do not actually run against basic constitutional principles which are globally recognized (the reference could also apply, for those who believes in the existence of such a concept, to basic principles which constitute the so-called transnational public policy. See, in this regard, LALIVE, *Transnational (or Truly International) Public Policy and International Arbitration*, in SANDERS (ed.), *ICCA Congress Series No. 3*, The Hague, 1986, p. 257 ff) or against basic constitutional principles of the state where it is likely that the award will be enforced. If this is the case, indeed, there is the risk that the recognition and enforcement of the arbitral award are refused on the basis of art. V(2) of the 1958 New York Convention for their contrariness to public policy. Lastly, arbitrators shall take into account the repercussions of the approach they choose on the rights of the disputing parties. This has to be done with reference to all the above-mentioned systems of law: it is the arbitrators' task to ensure that the method that they choose to deal with a constitutionality issue does not produce unacceptable result (i.e. violations of essential rights) in such systems of law, otherwise there is the serious risk that the final award will be annulled or its enforcement will be refused.

([103]) Grigera NAÓN, *Should International Commercial Arbitrators* cit., p. 314.

applicable law in virtue of the wide discretionary powers that they have in relation to the conduct of the proceedings and the decision of the case". (104) This could also lead tribunals, in presence of particular circumstances, to disregard decisions made by national courts of the state the law of which is being applied, provided that the reasons for doing so are clearly expressed in the award and that both the parties had the opportunity to discuss the issue.

Recent case law seems to confirm the correctness of the proposed approach. Reference applies, in particular, to the *Balkan Energy v. Ghana* award (105) in which the Tribunal had to evaluate the constitutional validity of a contract with respect to the Constitution of Ghana. Such an analysis was necessary in order to understand whether the parties had the right to require the fulfilment of the reciprocal undertakings set forth in that contract.

Art 181(5) of the Constitution of Ghana establishes that parliamentary approval is necessary for all international business or economic transactions to which the state is a party. The Claimant, a Ghanaian company fully owned by an English corporation (Balkan Energy Limited), agreed to refurbish and commission a barge in Ghana. The agreement was between two Ghanaian entities, but the fact that the Claimant was actually managed from the UK introduced an element of internationality in the contract. From a formal point of view, parliamentary approval was not required, while from the substantial one it was so. Prior to signing the contract, the Minister of Justice and Attorney General of Ghana, Joseph Gatey, ensured Balkan Energy that parliamentary approval was not necessary. (106) After the dispute arose, however, the Supreme Court of Ghana said that the contract was not enforceable because it was an international transaction which lacked of previous approval by the Parliament. The Arbitral Tribunal was therefore called to rule not only on the merit of the dispute, but preliminarily on whether the Ghana Supreme Court judgment was binding on it. After having expressed the highest respect for the Supreme Court of

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(104) CARLEVARIS, *L'accertamento del diritto nell'arbitrato internazionale tra principio* jura novit curia *e onere della prova*, *Riv. arb.*, 2008, p. 514 (own translation). See also, in this regard INTERNATIONAL LAW ASSOCIATION, *Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (Final Report)*, rapporteurs DE LY, RADICATI DI BROZOLO-FRIEDMAN, Rio de Janeiro Conference, 2008, p. 1 ff.

(105) Permanent Court of Arbitration, 1 April 2014, *Balkan Energy (Ghana) Limited v. The Republic of Ghana*, PCA Case No 2010-7, Award on the Merits.

(106) See para. 111 of the Award.

Ghana, (107) the Tribunal decided to depart from its conclusions. (108) In this regard, it is interesting to note that – in justifying its power to carry out a constitutionality review even against a previous Supreme Court decision – the Tribunal expressly relied on the rights of the Claimant and on the substantive repercussions of its decision. Considering that, on the basis of the circumstances of the case, the Claimant had reasonable expectation that the Respondent accepted the validity of the agreement and was, therefore, entitled to rely on the Respondent's fulfilment of the obligation it has assumed, the Tribunal accepted to review the constitutionality of the agreement and to disregard the Supreme Court's conclusions. (109)

In conclusion, notwithstanding the fact that this decision refers to the constitutionality of a contract and not of a law, it seems that it can be interpreted as a clear signal towards a case-by-case approach to the issue of constitutionality review of law also in international arbitration, which – as it happened in recent domestic case law – disregards any predetermined approach and mainly takes into account the substantive concerns related to the individual case.

5. This article discussed whether, when applying foreign law, national judges have the power to review the validity of such law in light of the constitution of the country where that law originated.

This is a problem that has been traditionally dealt with in a very theoretical way. Courts have usually chosen, among the possible approaches to the issue, the one which on an abstract level seemed more appropriate to them, without taking into due consideration, firstly, the strict relationship existing between the approach to the constitutionality review of foreign law and the substantive concerns at stake in individual disputes and, secondly, the circumstance that, due to the lack of a normative guidance, judges shall play a central role as guarantors of the safeguard of the rights of the parties (as protected, firstly, in the *lex causae* and, secondly, in the *lex fori*).

In light of the above, from the perspective of adjudicators, it does not seem possible to approach the issue disregarding the particularities of the individual case. Indeed, only by pre-understanding the dispute and assuming a result-oriented approach aimed at safeguarding the rights of the

(107) Para. 374.
(108) Para. 388.
(109) See paras 391 and 397.

disputing parties, judges can ensure, on a case-by case basis, that their decision is not only correct but also justifiable for the parties and the surrounding community. A different method of dealing with the issue would also run against the one of the main goals of private international law, viz. the harmonization in the application of the law regardless of the forum where a dispute is heard. Indeed, as we have tried to demonstrate above, the application of the traditional approaches risks to generate an accidental discrimination: a party might be affected by an unconstitutional law simply because the dispute is being heard by a foreign judge. If the legal system of the *lex causae* ensures protection to certain rights of a party, even by way of a declaration of unconstitutionality of a law undermining such rights, it seems correct that the same degree of protection is granted wherever such a system of law is applied.

An analysis of certain recent decisions, which regarded different issues but which incidentally dealt with the question of the constitutional review of foreign law, offers important elements for pinpointing a tendency to overcome the traditional abstract approaches to constitutionality of foreign law in favor of a case-by-case approach, in which the substantive repercussions of the decision are the main driving factor of judges' decisions. A case-by-case analysis allows judges to understand whether they possess the legal tools to carry on a form of constitutionality review of foreign law (110) and to take in due account the parties' rights at stake. Moreover, this approach might turn out to be useful also to manage situations in which judges have to deal with cases regarding countries in which a form of constitutionality review exists but it is, *de facto*, never exercised. There is apparently no correct approach to face these scenarios. It is, indeed, very difficult to foresee how the foreign court would behave. A rigid application of a certain theoretical approach risks therefore leading the judge to reach undesired results. A case-by-case analysis of the individual case and of the substantive concerns at stake could, instead, prove useful in helping courts to reach the most possibly correct decision.

It is early to say whether this approach will be consolidated in the future, but it is nevertheless worth highlighting its importance as a new possible way of facing the issue of constitutionality of foreign law.

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(110) It is here submitted that, in the vast majority of cases, judges will feel able to proceed in such an analysis, considering that many constitutional values are today common to the vast majority of modern constitutions.

ABSTRACT: *This article analyses how judges could solve the issue of constitutionality review of foreign law and tries to understand which approach, among the ones emerging from the case law, may best solve such an issue while ensuring at best the protection of the rights of the disputing parties. Starting from a general discussion of the role of judges in solving private international law issues where, as in the present case, there is no criterion dictated by the law, the Author then refers to the traditional approaches to the issue of constitutionality of foreign law emerged in the available case law and assesses them in light of their substantive repercussions on the rights of the disputing parties. Afterwards, the paper focuses on some recent decisions in which the issue emerged before English courts and analyses the approach that has been adopted in these disputes. Being such an approach based on a concrete balance of the conflicting interests at stake, the Author argues that it may be the starting point for a new solution to the discussed issue, considering that a proper solution for a dispute cannot disregard the particularities pertaining to such a specific dispute. Indeed, it is arguable that this approach finds confirmation also in the practice of international commercial arbitration when the issue of the constitutionality of applicable law has emerged.*