

**Till Meier\***

## **Conflict of laws rules in international arbitration – The “direct choice” approach**

### **Abstract**

In diesem Beitrag wird die Bestimmung des anwendbaren Rechts durch Schiedsrichter behandelt. Zunächst werden die gängigen Ansätze vorgestellt. Sodann wird die Methode der „*direct choice*“ näher beleuchtet. Abschließend wird eine alternative Herangehensweise vorgeschlagen.

This article addresses the arbitrators’ selection of the law applicable to the merits of the dispute. It presents the common methods and scrutinises the “direct choice” approach as the latest trend. Finally, an alternative approach to determine the substantive law is illustrated.

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## A. Introduction

Parties often choose international arbitration to resolve their disputes because they are interested in an efficient, flexible, neutral and enforceable dispute resolution method.<sup>1</sup> In addition to these features, arbitration proceedings seek to provide predictability.<sup>2</sup> Choice of law issues, however, stand in contrast to this consideration.<sup>3</sup> Questions may arise in relation to the law applicable to the arbitral procedure, the arbitration agreement and the merits of the dispute.<sup>4</sup> The *Supreme Court of the United States* concluded: “A contractual provision [determining the applicable law] is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction”.<sup>5</sup>

Parties that may be subject to an international arbitration, thus, act in their own interests when they specify the applicable law in advance. This article, nonetheless, will focus on instances where the parties did not agree on the applicable substantive law, in particular with respect to the substantive law applicable to the merits of the dispute.<sup>6</sup> In these instances, it falls to the arbitral tribunal to determine the substantive law.<sup>7</sup> This raises the question what approach the arbitrators can apply to select the applicable law. During the last decades, the discretion of arbitrators in that regard has been broadened tremendously and, hence, has resulted in their choice of law being “virtually unlimited”.<sup>8</sup>

This article will shed some light on the selection of the substantive law by arbitrators. It will give an overview of the most relevant methods that arbitrators have applied (**B.**). Then, the “direct choice” approach, as the most recent approach, will be examined (**C.**). Finally, this article will suggest an alternative procedure for

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<sup>1</sup> *Len/Mistelis*, Comparative International Commercial Arbitration, 2003, paras. 1.15-1.30.

<sup>2</sup> *Born*, International Commercial Arbitration, 2<sup>nd</sup> edition 2014, p. 2616.

<sup>3</sup> *Ibid.*, p. 2617.

<sup>4</sup> *Ibid.*, p. 2618.

<sup>5</sup> *Supreme Court of the United States*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 *et seq.* (1974).

<sup>6</sup> Hereinafter, “substantive law” refers to the substantive law applicable to the merits of the dispute. Aside from this, questions may also arise in relation to the substantive law applicable to the parties’ arbitration agreement.

<sup>7</sup> *Hague Conference on Private International Law*, Feasibility Study on the Choice of Law in International Contracts – Special Focus on International Arbitration, 2007, para. 27; *Jones*, Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties, *Singapore Academy of Law Journal* 26 (2014), 911 (911).

<sup>8</sup> *Fouchard/Gaillard/Goldman*, International Commercial Arbitration, 1999, p. 865.

arbitrators to determine the substantive law (**D.**) and conclude by summarising all relevant findings (**E.**).

## **B. Overview of the most relevant methods to determine the substantive law**

International conventions, national arbitration statutes and institutional arbitration rules lay down several approaches for arbitrators to select the substantive law. Most of these legal instruments ascribe a broad freedom to the arbitrators in that regard.<sup>9</sup> The arbitrators often refer to conflict of laws rules included in those legal instruments.<sup>10</sup> For this reason, the various methods which they apply to ascertain the substantive law will be outlined in the context of corresponding legal instruments.

In principle, the arbitrators’ selection of the substantive law is based on the concept of either *voie indirecte* or *voie directe* (**I.**). Consistent with the concept of *voie indirecte*, arbitrators have relied on the ordinary conflict of laws rules of the arbitral seat (**II.**) or on conflict of laws rules they considered “appropriate” or “applicable” (**III.**). Likewise, they have referred to specific conflicts of laws regimes such as the “closest connection” formula (**IV.**). In spirit of the concept of *voie directe*, arbitrators have abstained from having recourse to conflict of laws rules altogether (**V.**).

## **I. The concepts of *voie indirecte* and *voie directe***

There are two overarching concepts to select the substantive law: the concept of *voie indirecte* and the concept of *voie directe*.<sup>11</sup> The concept of *voie indirecte* dictates a two-tier system: arbitrators must, in a first step, determine the applicable choice of law rules and, in a second step, apply these rules to ascertain the law or rules of law which resolve the merits of the dispute.<sup>12</sup> In contrast, the concept of *voie directe* sets forth that the arbitrators may directly select a particular substantive law or rules of law.<sup>13</sup> This concept “allows arbitrators to apply a law or rules of law without explaining their choice through a conflict of laws rule”.<sup>14</sup>

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<sup>9</sup> *Born* (fn. 2), p. 2619.

<sup>10</sup> Some legal instruments even require the arbitrators to apply the conflict of laws rules provided for: *Fouchard/Gaillard/Goldman* (fn. 8), pp. 869 *et seq.*

<sup>11</sup> *Lew/Mistelis* (fn. 1), para. 17–48.

<sup>12</sup> *Jones* (fn. 7), p. 911.

<sup>13</sup> *Ibid.*, p. 911.

<sup>14</sup> *Hague Conference on Private International Law* (fn. 7), para 35.

## II. Ordinary conflict of laws rules of the arbitral seat

A traditional view required arbitrators to apply the ordinary conflict of laws rules of the arbitral seat (meaning the conflict of laws rules applicable in the state courts of the arbitral seat).<sup>15</sup> For instance, the *Institute of International Law* adopted a resolution in 1957 stipulating: “The rules of choice of law in force in the *state of the seat of the arbitral tribunal* must be followed to settle the law applicable to the substance of the difference.”<sup>16</sup> The International Arbitration Rules of the *Zurich Chamber of Commerce* (1989), still, impose the mandatory application of the conflict of laws rules of the arbitral seat for an arbitration proceeding which has its seat in Zurich.<sup>17</sup> In accord with these legal instruments, state courts and a number of arbitral tribunals directly applied the ordinary conflict of laws rules of the arbitral seat.<sup>18</sup> Amongst others, the sole arbitrator in *ICC 5460* held that “[t]he place of this arbitration is London, and on any question of choice of law *I must therefore apply the [...] rules of the private international law of England*”.<sup>19</sup> Likewise, a number of scholars argued in favour of having recourse to ordinary conflict of laws rules of the arbitral seat.<sup>20</sup> *Mann* stipulated that the law of the arbitral seat governs the entirety of the arbitral “tribunal’s life and work” and, in particular, governs “the rules of the conflict of laws to be followed by [the arbitral tribunal].”<sup>21</sup>

Proponents of this view emphasised the judicial nature of arbitration and, consequently, assimilated arbitrators and judges.<sup>22</sup> In line with this, they argued that “every arbitration is a national arbitration”.<sup>23</sup> Advocates of this theory also contended that by selecting an arbitral seat the parties implicitly agree on the applicability of the conflict of laws rules of the arbitral seat.<sup>24</sup> In consideration of this, they concluded that an arbitral tribunal is bound by the ordinary conflict of laws rules of

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<sup>15</sup> *Born* (fn. 2), pp. 2629 *et seq.*, adds that the mandatory application of the substantive law of the arbitral seat may also be encountered in a limited number of jurisdictions.

<sup>16</sup> *Institute of International Law, Tableau des resolutions adoptees* (1957-1991), Resolution on Arbitration in Private International Law (1957), p. 237 (emphasis added).

<sup>17</sup> *Jones* (fn. 7), p. 919 with further references.

<sup>18</sup> *Born* (fn. 2), p. 2631.

<sup>19</sup> *ICC Case No. 5460*, Yearbook Commercial Arbitration (1988), p. 106 (emphasis added).

<sup>20</sup> In particular: *Mann, Lex Facit Arbitrum*, Arbitration International 2 (1986), 241 (241).

<sup>21</sup> *Ibid.*, p. 248.

<sup>22</sup> *Foucharde/Gaillard/Goldman* (fn. 8), p. 867.

<sup>23</sup> *Mann* (fn. 20), pp. 244 *et seq.*

<sup>24</sup> *ICC Case No. 9771*, Yearbook Commercial Arbitration (2004), p. 52.

the arbitral seat.<sup>25</sup>

However, the view that arbitral tribunals must apply the ordinary conflict of laws rules of the arbitral seat has long been abandoned by contemporary international arbitration legislation, state courts and arbitral tribunals.<sup>26</sup> This view disregards the transnational nature of arbitration.<sup>27</sup> The sole arbitrator in the *Sapphire* arbitration, accordingly, reaffirmed that arbitrators do not have a *lex fori*: “Contrary to a State judge, who is bound to conform to the conflict law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. [The arbitrator] must [...] disregard national peculiarities.”<sup>28</sup> In addition, the choice of an arbitral seat by the parties, the arbitration institution or the arbitral tribunal does not portend that there is an agreement on the applicable law.<sup>29</sup> Parties rather choose an arbitral seat for reasons entirely unrelated to the arbitration proceedings such as convenience or neutrality of the respective country.<sup>30</sup> In accordance with this, the arbitral tribunal in *ICC 1422* ruled that “it is appropriate to eliminate forthwith the law of the forum, whose connection with the case is purely fortuitous”.<sup>31</sup> The application of the ordinary conflict of laws rules of the arbitral seat may even stand in contrast to the parties’ intentions.<sup>32</sup> In line with this, the arbitral tribunal in *ICC 2930* observed that “the most authoritative present-day doctrine and international arbitration jurisprudence admit that in determining the substantive law, the

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<sup>25</sup> *Mann* (fn. 20), p. 248.

<sup>26</sup> *Born* (fn. 2), p. 2630; *ICC Case No. 8113*, Yearbook Commercial Arbitration (2000), p. 325. On the contrary, *Mankowski*, Schiedsgerichte und die Rom I-VO, Recht der internationalen Wirtschaft 1 (2018), 1 (1), argues that the Rome I Regulation – as the conflict of laws rules applicable in any European court – likewise ought to apply in arbitration proceedings which have their seat in a member state of the European Union.

<sup>27</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 868.

<sup>28</sup> *Sapphire International Petroleum Ltd. v. The National Iranian Oil Co.* (1967) 13 ICLQ 1011. In accord with this: *ICC Case No. 1512*, Yearbook Commercial Arbitration (1976), p. 129.

<sup>29</sup> *Berger*, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, 3<sup>rd</sup> edition 2015, para. 24–7; *Fouchard/Gaillard/Goldman* (fn. 8), p. 868; *Sapphire International Petroleum Ltd. v. The National Iranian Oil Co.* (1967) 13 ICLQ 1011, affirms that this, in particular, applies to circumstances in which the parties have not chosen the arbitral seat themselves (but rather the arbitration institution or the arbitral tribunal has undertaken this task).

<sup>30</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 635.

<sup>31</sup> *ICC Case No. 1422*, *Journal du droit international* (1974), p. 884.

<sup>32</sup> *Jones* (fn. 7), p. 918.

arbitrator may leave aside the application of the conflict rules of the forum”.<sup>33</sup>

### III. Conflict of laws rules deemed “applicable” or “appropriate”

Other legal instruments empower arbitral tribunals to determine the substantive law by applying the conflict of laws rules which they consider applicable or appropriate.<sup>34</sup> As a manifestation of this approach, Art. 28 (2) of the UNCITRAL Model Law on International Commercial Arbitration reads: “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by *the conflict of laws rules which it considers applicable*.”<sup>35</sup> England adopted this approach via the Arbitration Act (1996). It is also set forth in the European Convention on International Commercial Arbitration (1961).<sup>36</sup> This approach grants an arbitral tribunal broad freedom to determine the substantive law, but eventually requires the application of more specific conflict of laws rules as well as an analysis and explanation in that regard.<sup>37</sup> In the following, some of the more specific conflict of laws rules will be outlined in greater detail.

Arbitrators have primarily relied on four distinct methods to select the “applicable” or “appropriate” conflict of laws rules. These methods include the cumulative method (1.) and having recourse to general principles of private international law (2.) Additionally, arbitrators use the conflict of laws rules of the state most closely connected to the parties’ dispute (3.). Finally, the conflict of laws rules of the arbitral seat play a certain part in selecting the “applicable” or “appropriate” conflict of laws rules (4.).

#### 1. The cumulative method

If the arbitrators decide to have recourse to the cumulative method, they apply the conflict of laws rules of all legal systems<sup>38</sup> connected with the underlying dispute.<sup>39</sup>

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<sup>33</sup> *ICC Case No. 2930*, Yearbook Commercial Arbitration (1984), p. 106.

<sup>34</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 871.

<sup>35</sup> Art. 28 (2) of the UNCITRAL Model Law (emphasis added).

<sup>36</sup> Art. VII (1) of the European Convention (1961); Sec. 46 (3) of the English Arbitration Act (1996).

<sup>37</sup> *Born* (fn. 2), p. 2634.

<sup>38</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 872, explain that this method implies that the arbitrators should only consider the legal systems which the parties could reasonably have expected to be connected with the dispute. In their opinion, this would be consistent with the rationale of this method to not defeat the parties’ reasonable expectations. The author

For instance, this method was used in *ICC 7319* where the sole arbitrator applied both French and Irish conflict of laws rules as these legal systems had “a direct connection to the parties and the dispute.”<sup>40</sup> Both rules provided for the application of Irish law.<sup>41</sup> The cumulative method primarily has three benefits. It may detect a “false conflict”<sup>42</sup> in which all potentially-applicable conflict of laws rules select the same national law.<sup>43</sup> For that reason, this approach also makes it more difficult for the parties to challenge an arbitral award based on an alleged failure to apply the proper conflict of laws rules.<sup>44</sup> Lastly, the cumulative method introduces an international element into the proceedings and therefore is particularly apt for the use in international arbitration.<sup>45</sup> If the potentially applicable conflict of laws rules point towards different national laws, the cumulative method, however, is of limited utility.<sup>46</sup> In these instances, this approach merely identifies the conflict instead of ultimately resolving it.<sup>47</sup>

## 2. General principles of private international law

The arbitrators may, likewise, resort to general principles of private international law.<sup>48</sup> This approach requires arbitrators to find common or widely accepted principles in the fundamental systems of private international law.<sup>49</sup> In this regard, arbitral case law and international conventions might provide for a sound solution.<sup>50</sup> In *ICC 5713*, for instance, the arbitral tribunal found that “the general trend in conflicts of law [is] to apply the domestic law of the current residence of the

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of this article agrees that arbitrators should not be required to apply the conflict of laws rules of legal systems with no sensible connection to the parties’ dispute.

<sup>39</sup> *Born* (fn. 2), p. 2649; *Licensors & Buyer v. Manufacturer*, Yearbook Commercial Arbitration (1997), p. 203. In some cases, arbitrators decided to apply the cumulative method on the level of substantive laws. For instance: *ICC Case No. 2272*, Yearbook Commercial Arbitration (1977), p. 151.

<sup>40</sup> *ICC Case No. 7319*, Yearbook Commercial Arbitration (1999), p. 145.

<sup>41</sup> *Ibid.*, pp. 145 *et seq.*

<sup>42</sup> Amongst others: *Wortmann*, Arbitration International 14 (1998), 97 (109).

<sup>43</sup> *Born* (fn. 2), p. 2649 with further references.

<sup>44</sup> *Ibid.*, p. 2650.

<sup>45</sup> *Craig/Park/Paulsson*, International Chamber of Commerce Arbitration, 3<sup>rd</sup> edition 2000, para. 17.02.

<sup>46</sup> *Born* (fn. 2), p. 2650.

<sup>47</sup> *Ibid.*, p. 2650.

<sup>48</sup> *Hague Conference on Private International Law* (fn. 7), para. 31.

<sup>49</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 873.

<sup>50</sup> *Ibid.*, p. 873.

[party required to perform the characteristic performance].”<sup>51</sup> To this end, the arbitral tribunal referred to the Hague Convention on the Law Applicable to International Sales of Goods (1955).<sup>52</sup> Other sources of transnational conflict of laws rules that were consulted by arbitrators include the Rome I Regulation as well as the Hague Convention on the Law Applicable to Intermediary Agreements and Agency (1978).<sup>53</sup> Equally, the UNIDROIT Principles of International Commercial Contracts are considered to be a source of general principles of private international law.<sup>54</sup>

### **3. Conflict of laws system of the state most closely connected to the parties’ dispute**

Another method which has been adopted by a number of arbitral awards employs the conflict of laws system of the state most closely connected to the parties’ dispute.<sup>55</sup> The arbitrators determine the closest connection on the basis of various criteria such as the place of the arbitral seat, the seat of the parties and the place of contracting.<sup>56</sup> Yet, the application of this method has been heavily criticised for mainly one reason. In the words of *Born*, one of the most influential international arbitration scholars and practitioners: “Selecting the conflicts rules [...] of the state that is most closely connected to the underlying dispute aggravates the uncertainties of [a] conflict of law analysis by effectively requiring two such analyses [without any] discernible benefits.”<sup>57</sup> Indeed, identifying the state most closely connected to the dispute of the parties may be a complex matter.<sup>58</sup> Also, these rules can lead to the application of conflict of laws rules which select a substantive law that neither of the parties would have intended.<sup>59</sup>

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<sup>51</sup> *ICC Case No. 5713*, Yearbook Commercial Arbitration (1990), p. 71.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Fouchard/Gaillard/Goldman* (fn. 8), pp. 874 *et seq.*; *ICC Case No. 2930*, Yearbook Commercial Arbitration (1984), p. 106.

<sup>54</sup> *Hague Conference on Private International Law* (fn. 7), para. 31.

<sup>55</sup> *Born* (fn. 2), p. 2653, fn. 205 with further references; *ICC Case No. 6149*, Yearbook Commercial Arbitration (1995), pp. 53 *et seq.*

<sup>56</sup> *ICC Case No. 6149*, Yearbook Commercial Arbitration (1995), p. 53.

<sup>57</sup> *Born* (fn. 2), p. 2654.

<sup>58</sup> *Mukhopadhyay*, The Possible Conflict of Law Rules Employed in International Commercial Arbitration to Discern the Governing Law: An Analysis, *Indian Journal of Arbitration Law* 2 (2013), 110 (122).

<sup>59</sup> *Born* (fn. 2), p. 2654.

#### 4. Conflict of laws rules of the arbitral seat

Although the application of ordinary conflict of laws rules of the arbitral seat has been abandoned to a large part, arbitrators nonetheless have recourse to conflict of laws rules of the arbitral seat specifically designed for arbitration.<sup>60</sup> This is because these rules may correspond with the parties’ intentions and thus may be the most appropriate choice.<sup>61</sup>

#### IV. The “closest connection” formula

Pursuant to a “closest connection” formula, arbitrators have applied the substantive law of the state most closely connected to the parties’ dispute.<sup>62</sup> This formula is prescribed by arbitration statutes of countries such as Germany, Italy, Mexico and Switzerland.<sup>63</sup> § 1051 (2) of the German Code of Civil Procedure, for instance, stipulates: “[T]he arbitral tribunal shall apply the law of the state *with which the subject-matter of the proceedings is most closely connected.*”<sup>64</sup> Art. 187 of the Swiss Private International Law Statute contains a similar standard. Yet, this provision does not only empower the arbitrators to select a particular national law, but also allows them to apply “rules of law”.<sup>65</sup> It sets forth: “The arbitral tribunal shall decide the case according to the rules of law [...] *with which the case has the closest connection.*”<sup>66</sup> The “closest connection” standard is also the rationale behind the determination of the applicable law under the Rome I Regulation.<sup>67</sup> Hence, in identifying which state is most closely connected to the parties’ dispute, the Rome I Regulation may provide for guidance.<sup>68</sup> The habitual residence of the party required to effect the character-

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<sup>60</sup> *ICC Case No. 5460*, Yearbook Commercial Arbitration (1988), p. 106; *ICC Case No. 3540*, Yearbook Commercial Arbitration (1982), p. 126.

<sup>61</sup> *Born* (fn. 2), p. 2648; *SCC Case Nos. 80/1998 and 81/1998*, Stockholm Arbitration Report 2 (2002), p. 50.

<sup>62</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 870 with further references; *CAC Case No. 44/70*, Yearbook Commercial Arbitration (1977), p. 143.

<sup>63</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 870 with further references.

<sup>64</sup> § 1051 (2) of the German Code of Civil Procedure (emphasis added).

<sup>65</sup> The question whether arbitrators should be allowed to only choose a particular national law or rather should be empowered to apply rules of law (including systems of transnational rules such as the *lex mercatoria*) goes beyond the scope of this article. An overview of those two regimes is provided by: *Blessing*, Choice of Substantive Law in International Arbitration, Journal of International Arbitration 14 (1997), 39 (56-58).

<sup>66</sup> Art. 187 of the Swiss Private International Law Statute (emphasis added).

<sup>67</sup> Cf. Art. 4 of the Rome I Regulation; *Born* (fn. 2), p. 2632.

<sup>68</sup> *Schmalz*, in: Arbitration in Germany – The Model Law in Practice, 2<sup>nd</sup> edition 2015, § 1051 ZPO para. 42.

ristic performance of the contract, accordingly, is the most important element used to ascertain the state with the closest connection to the underlying dispute.<sup>69</sup> Also, the common nationality of the parties, a common usual residence and, to a lesser extent, the language of the contract, the place of signature or the currency can become relevant.<sup>70</sup>

## V. The “direct choice” approach

The most recent approach for arbitrators to determine the substantive law abandons the reference to conflict of laws rules altogether.<sup>71</sup> Arbitrators may directly apply whatever substantive rules of law they consider appropriate (“direct choice”).<sup>72</sup> As the pioneer legislation, Art. 1496 of the French Code of Civil Procedure<sup>73</sup> stipulated: “[Absent an agreement by the parties], the arbitrator shall decide the dispute [...] *in accordance with the rules of the law he considers appropriate.*”<sup>74</sup> This approach has subsequently been followed by jurisdictions such as the Netherlands, Canada, Hungary, India, Kenya and Slovenia.<sup>75</sup> In accord with this, Art. 1054 (2) of the Dutch Code of Civil Procedure ascribes a considerable leeway to the arbitrators: “Failing [a choice of law by the parties], the arbitral tribunal shall make its award *in accordance with the rules of law which it considers appropriate.*”<sup>76</sup> Consistent with this, many leading arbitration institutions including the *American Arbitration Association (AAA)*, the *International Chamber of Commerce (ICC)*, the *London Court of International Arbitration (LCIA)* and the *Stockholm Chamber of Commerce (SCC)* amended their rules to introduce the “direct choice” approach.<sup>77</sup> Art. 21 (1) of the ICC Rules of Arbitration (2017) serves as an example. It states:

“In the absence of any [agreement by the parties], the arbitral tribunal shall apply *the rules of law which it determines to be appropriate.*”<sup>78</sup>

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<sup>69</sup> *Schmalz* (fn. 68), § 1051 ZPO para. 46.

<sup>70</sup> *Ibid.*, § 1051 ZPO para. 48.

<sup>71</sup> *Redfern/Hunter*, *International Arbitration*, 6<sup>th</sup> edition 2015, para. 3.219.

<sup>72</sup> *Born* (fn. 2), p. 2634.

<sup>73</sup> Art. 1511 of the revised French Code of Civil Procedure.

<sup>74</sup> Art. 1496 of the outdated French Code of Civil Procedure (emphasis added); *Fouchard/Gaillard/Goldman* (fn. 8), p. 876.

<sup>75</sup> *Born* (fn. 2), p. 2635, fn. 106 with further references; *Redfern/Hunter* (fn. 71), para. 3.217, fn. 274 with further references.

<sup>76</sup> Art. 1054 (2) of the Dutch Code of Civil Procedure (emphasis added).

<sup>77</sup> *Fouchard/Gaillard/Goldman* (fn. 8), pp. 865 *et seq.*

<sup>78</sup> Art. 21 (1) of the ICC Rules of Arbitration (2017) (emphasis added).

However, neither the national arbitration statutes nor the institutional arbitration rules provide arbitrators with specific guidance as to their selection of the substantive law.<sup>79</sup> In the absence of such guidance, arbitrators have primarily based their decisions on the content<sup>80</sup> of the chosen substantive rules and their connection to the case.<sup>81</sup>

### C. Evaluation of the “direct choice” approach

The discretion of arbitrators to determine the substantive law has increased immensely. Whilst they were originally required to apply the ordinary conflicts of laws rules of the arbitral seat, arbitrators nowadays enjoy an almost boundless freedom. More and more legal instruments allow for arbitrators to directly apply whatever substantive law they consider appropriate. In the following, the “direct choice” approach will be examined.

Firstly, this article will clarify that the “direct choice” approach, if understood correctly, does not dispense arbitrators from their duty to give reasons for their choice of law (I.). Secondly, this approach provides for a substantial degree of flexibility (II.). Thirdly, it can lead to swifter arbitration proceedings (III.). However, fourthly, the relinquishment of any conflict of laws analysis results in less predictability for the parties (IV.). Fifthly, the “direct choice” approach is difficult to reconcile with the minimal judicial review of the merits of arbitral decisions (V.). Sixthly and finally, this approach is more prone to produce awards which are based on subjective instincts of individual arbitrators (VI.).

### I. The arbitrators’ obligation to give reasons for their choice of law

Sometimes the “direct choice” approach is misperceived as an approach which does not require the arbitrators to give reasons for their choice of law.<sup>82</sup> This might

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<sup>79</sup> *Ferrari/Silbermann*, Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong – NYU Law and Economics Research Paper No. 10-40, 2010, p. 20.

<sup>80</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 876, stipulate that the chosen substantive rules might be more modern or more suitable to govern the contract because the concepts referred to in the contract are rather found in civil or, conversely, common law jurisdictions.

<sup>81</sup> *Ibid.*, p. 876.

<sup>82</sup> *Williams*, Limitations on Uniformity in International Sales Law: A Reasoned Argument for the Application of a Standard Limitation Period under the Provisions of the CISG, *Vindobona Journal of International Commercial Law & Arbitration* 10 (2006), 229 (237), concludes that “the arbitrator [does not need to] provide any explanation for the decision”.

be due to the fact that statutory regimes which follow this approach “putatively require no conflict of law analysis at all”.<sup>83</sup> Likewise, in some cases an arbitrator’s line of reasoning remains unarticulated to a substantial extent<sup>84</sup> which can augment the respective misperception.

However, “the arbitrators must provide a reasoned explanation for their choice [of law] in accordance with the legitimate expectations of the parties” in any event.<sup>85</sup> This may, amongst others, result from the arbitrators’ express duty to render an enforceable award as provided for in a number of institutional arbitration rules.<sup>86</sup> Art. 42 of the ICC Rules of Arbitration (2017), for instance, affirms such a duty as a “general rule”. Arbitrators may include their reasoned explanation either in the final award or in a partial award.<sup>87</sup>

## II. Considerations of flexibility

Pursuant to the proponents of the “direct choice” approach, its most essential benefit is its significant degree of flexibility.<sup>88</sup> Arbitrators are not limited in their choice of law.<sup>89</sup> Even more, this approach allows arbitrators to base their awards on the *lex mercatoria* as well as other non-state law and thus “look[s] beyond a national system of rules”.<sup>90</sup> In line with this, the arbitral tribunal in *ICC 9875* explained “that the difficulties to find decisive factors qualifying either Japanese or French law as applicable [...] reveal the inadequacy of the choice of a domestic legal system”.<sup>91</sup> It subsequently regarded the *lex mercatoria* as the most appropriate rules of law to be

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<sup>83</sup> *Born*, International Arbitration: Law and Practice, 2<sup>nd</sup> edition 2015, para. 10.

<sup>84</sup> *Ferrari/Silbermann* (fn. 79), p. 21, set forth that “[a]rbitrators are also known to have chosen the substantive law of a particular country without explaining why that country’s law is applicable”; *Lando*, in: Essays on International Commercial Arbitration, The Law Applicable to the Merits of the Dispute, 1991, p. 140; *ICC Case No. 8547*, Yearbook Commercial Arbitration (2003), pp. 31 *et seq.* (the arbitrators chose the UNIDROIT Principles as supplementary rules without any substantial explanation).

<sup>85</sup> *Schwartz/Derains*, Guide to the ICC Rules of Arbitration, 2<sup>nd</sup> edition 2005, p. 241.

<sup>86</sup> *Jones* (fn. 7), p. 915.

<sup>87</sup> *Berger* (fn. 29), para. 24–17.

<sup>88</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 876, illustrate the flexibility of the “direct choice” approach by referring to several choice of law decisions made by arbitrators.

<sup>89</sup> *Born* (fn. 2), p. 2634.

<sup>90</sup> *Ferrari/Silbermann* (fn. 79), pp. 19 *et seq.* However, such a flexibility to have recourse to the *lex mercatoria* can also result in arbitral awards which disregard the reasonable expectations of the parties, see **C. V. 2.**

<sup>91</sup> *ICC Case No. 9875*, International Court of Arbitration Bulletin (2001), p. 97.

applied.<sup>92</sup>

### III. Considerations of swift arbitration proceedings

Although the “direct choice” approach requires arbitrators to reason their choice of law, it still liberates them from complex conflict of laws analyses (1.). This may lead to swift arbitration proceedings which are in accord with the parties’ corresponding desire (2.). Yet, there are more appropriate alternatives to ensure swift arbitration proceedings (3.).

#### 1. Liberation of arbitrators from complex conflict of laws analyses

Sometimes, conflict of laws analyses involve highly complex issues and thus prolong the arbitration proceedings.<sup>93</sup> As two prominent international arbitration scholars state: “This search for the applicable substantive law may be a time-consuming [...] process”.<sup>94</sup> The “direct choice” approach resolves this problem by eliminating the requirement of a conflict of laws analysis in its entirety.<sup>95</sup> This means that arbitrators are liberated from performing complex conflict of laws analyses and may rather select the substantive law or rules of law which they consider appropriate for the underlying dispute.<sup>96</sup> In essence, the “direct choice” approach “simplif[ies] the process”.<sup>97</sup> In light of this, the arbitral tribunal in *ICC 18203* found that “it is not an uncommon practice for arbitrators, especially those seating under the ICC Rules [of Arbitration], not to feel bound by strict, rigid, complex or too mechanical conflict-of-laws rules”.<sup>98</sup>

#### 2. Arbitral awards in line with the parties’ desire for swift arbitration proceedings

As the arbitrators are able to directly move on to choose the applicable substantive law or rules of law, they may principally render an award in less time. This conforms to the parties’ desire for swift arbitration proceedings due to a potential

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<sup>92</sup> *ICC Case No. 9875*, International Court of Arbitration Bulletin (2001), p. 97.

<sup>93</sup> *Born* (fn. 2), p. 2617.

<sup>94</sup> *Redfern/Hunter* (fn. 71), para. 3.200.

<sup>95</sup> *Fouchard/Gaillard/Goldman* (fn. 8), p. 876.

<sup>96</sup> *Ibid.*, pp. 875 *et seq.*

<sup>97</sup> *Mukhopadhyay* (fn. 58), p. 123.

<sup>98</sup> *ICC Case No. 18203*, Yearbook Commercial Arbitration (2016), p. 289.

decrease in costs.<sup>99</sup>

However, in several instances, the arbitrators who applied the “direct choice” approach felt the urge to justify their conclusions as to the applicable substantive law.<sup>100</sup> As such, the arbitrators examined whether the substantive result would have been similar if they had applied a national law instead of the non-state law which they had resorted to.<sup>101</sup> Amongst others, the arbitral tribunal in *ICC 3540* decided that it “will examine whether the solution contained in its award based on the *lex mercatoria* and the application of the maxim *pacta sunt servanda* [...] would be fundamentally different from that resulting [...] from the two national laws invoked by the parties”.<sup>102</sup> Hence, the “direct choice” approach does not always expedite arbitration proceedings.

### 3. Alternatives to ensure swift arbitration proceedings

Additionally, the parties are not dependent on this approach to ensure fast proceedings. Institutional arbitration rules foresee time limits within which the arbitral tribunal shall render the final award<sup>103</sup> and likewise provide for expedited arbitration procedures.<sup>104</sup> The parties may agree on the application of such institutional arbitration rules or, in any event, can agree on the application of an expedited arbitration procedure.<sup>105</sup> This means that swift arbitration proceedings are compatible with conflict of laws analyses.

## IV. Considerations of predictability

More importantly than their desire for swift arbitration proceedings, the “[p]arties often choose international arbitration to resolve their disputes because they desire enhanced certainty and predictability [with respect to] their legal rights”.<sup>106</sup>

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<sup>99</sup> *Lew/Mistelis* (fn. 1), para. 1.30, point out the interrelation between swift arbitration proceedings and reduced costs.

<sup>100</sup> *Lando* (fn. 84), p. 141.

<sup>101</sup> *Ferrari/Silbermann* (fn. 79), p. 22.

<sup>102</sup> *ICC Case No. 3540*, Yearbook Commercial Arbitration (1982), p. 130.

<sup>103</sup> For instance: Art. 31 of the ICC Rules of Arbitration (2017).

<sup>104</sup> For instance: Art. 30 of the ICC Rules of Arbitration (2017).

<sup>105</sup> Art. 30 (2) (b) of the ICC Rules of Arbitration (2017), for instance, states that the parties may agree on the application of an expedited procedure.

<sup>106</sup> *Born*, International Arbitration: Cases and Materials, 2<sup>nd</sup> edition 2015, p. 961.

Conflict of laws analyses serve as catalysers for predictable arbitral awards (1.). In light of this, the “direct choice” approach results in less predictable arbitral awards (2.).

### 1. Conflict of laws analyses as catalysers for predictable arbitral awards

It is true that the application of conflict of laws rules may prove difficult and, therefore, may lead to some frustration.<sup>107</sup> Nonetheless, conflict of laws rules channel and structure “the decision-maker’s discretion and [provide] the parties with a measure of certainty about the substantive law governing their conduct”.<sup>108</sup> These rules, thus, are essential for ensuring that the parties receive predictable arbitral awards.<sup>109</sup>

### 2. Arbitral awards are becoming less predictable

The “direct choice” approach, nonetheless, abandons the requirement for arbitrators to apply conflict of laws rules. As a result, it runs the risk that the arbitral awards are less predictable for the parties to an international arbitration.<sup>110</sup> This, however, neglects the parties’ desire for arbitration proceedings in a predictable environment.<sup>111</sup> In light of this, the *Hague Conference on Private International Law* and many scholars have criticised the “direct choice” approach as “uncertain” and “unpredictable”.<sup>112</sup> This approach “makes it impossible for the parties to foresee the law which the arbitrators deem applicable to the merits of the dispute”.<sup>113</sup> As a consequence, “the parties are not able to present their case.”<sup>114</sup> In view of this, the arbitral tribunal in *ICC 8113* decided that it will “not [...] determine the proper law directly but through the application of an appropriate rule of conflict”.<sup>115</sup>

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<sup>107</sup> *Born* (fn. 2), p. 2646.

<sup>108</sup> *Ibid.*, pp. 2646 *et seq.*

<sup>109</sup> *Wortmann* (fn. 42), p. 100.

<sup>110</sup> *Hague Conference on Private International Law* (fn. 7), para. 3, confirms that unpredictability still prevails in situations where the parties have not chosen the applicable law.

<sup>111</sup> *Mukhopadhyay* (fn. 58), p. 115, sets forth that the parties to an international arbitration desire predictability rather than uncertainty.

<sup>112</sup> *Hague Conference on Private International Law* (fn. 7), para. 37; *Ferrari/Silbermann* (fn. 79), p. 20; *Wortmann* (fn. 42), p. 100.

<sup>113</sup> *Hague Conference on Private International Law* (fn. 7), para. 37, adds that the arbitrators, in practice, often look at the relevant connecting factors to select the substantive law.

<sup>114</sup> *Wortmann* (fn. 42), p. 100.

<sup>115</sup> *ICC Case No. 8113*, Yearbook Commercial Arbitration (2000), p. 325.

## V. Considerations of minimal judicial review

Furthermore, the “direct choice” approach is difficult to reconcile with the, in principle, limited judicial review of the merits of arbitral awards. This limited judicial review (1.) empowers the arbitrators to render awards which disregard the reasonable expectations of the parties concerning the applicable substantive law (2.).

### 1. Limited judicial review of the merits of arbitral awards

International arbitration conventions and most (national) arbitration statutes prescribe a general presumption in favour of the recognition of arbitral awards.<sup>116</sup> Most notably, the New York Convention and the UNCITRAL Model Law entail this presumption.<sup>117</sup> Art. III of the New York Convention states that “[e]ach Contracting State *shall recognize arbitral awards as binding*”; Art. V of the New York Convention foresees only limited grounds on which recognition and enforcement of an arbitral award may be denied.<sup>118</sup> In accordance with this, state courts both in common and civil law jurisdictions have confirmed that the merits of arbitral awards may, in principle, not be reviewed.<sup>119</sup> This prohibition includes choice of law decisions with respect to the substantive law.<sup>120</sup> As such, the French *Cour de Cassation* in *Comp. Valenciana de Cementos Portland v. Primary Coal Inc.* held that the *Cour d’appel de Paris* was not required to examine how the sole arbitrator determined and implemented the applicable rule of law.<sup>121</sup> Similarly, the *Landgericht Hamburg* in *Bank A v. Bank B* found that “dealing with an objection relating to an [...] excess of authority would lead, in the present case, to reviewing the [...] correctness of the arbitral award as to the merits” and rejected this objection.<sup>122</sup> The *US Court of Appeals for the Ninth Circuit* in *ATSA of California, Inc. v. Continental Ins. Co.* simply

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<sup>116</sup> *Born* (fn. 2), p. 3410.

<sup>117</sup> *Ibid.*, p. 3410.

<sup>118</sup> Art. III of the New York Convention (emphasis added); Art. V of the New York Convention.

<sup>119</sup> *American Const. Machinery & Equipment Corp. Ltd. v. Mechanised Const. of Pakistan Ltd.*, 659 F.Supp. 426, 429 (1987); *Bank A v. Bank B*, Yearbook Commercial Arbitration (2000), p. 713; *Born* (fn. 2), p. 2776, fn. 863 *et seq.* with further references.

<sup>120</sup> *Born* (fn. 2), p. 2776 (“the arbitrators’ choice-of-law decisions are subsumed within their rulings on the merits of the parties’ dispute”).

<sup>121</sup> *Comp. Valenciana de Cementos Portland v. Primary Coal Inc.*, *Revue de l’arbitrage* (1992), Issue 3, p. 457.

<sup>122</sup> *Bank A v. Bank B*, Yearbook Commercial Arbitration (2000), p. 713.

stated that an “arbitrator has [the] authority to determine the applicable law”.<sup>123</sup>

There is, however, one exception where state courts may engage in the review of the merits of the arbitral awards: violations of public policy.<sup>124</sup> In accordance with this, a “failure by the arbitrators to have regard to relevant mandatory rules may result in the award either being set aside by the court with the supervisory jurisdiction over the arbitration or being unenforceable in other countries on the ground of public policy.”<sup>125</sup> Art. V (2) (b) of the New York Convention, in this spirit, allows for the non-recognition of arbitral awards if “the award would be contrary to the public policy of [the country in which recognition and enforcement is sought]”.<sup>126</sup> In light of this, the arbitral tribunal in *SCC 158/2011* decided to apply mandatory rules of French law in addition to the application of Swedish law.<sup>127</sup> The arbitral tribunal in *ICC 2930*, likewise, concluded that “any contract concerning import into Yugoslavia or export from Yugoslavia is subject to the mandatory provisions of this law”.<sup>128</sup> Further, the arbitral tribunal in *ICC 4132* ruled that it may not directly apply a particular law if “consideration of public policy [were] involved to an appreciable extent”.<sup>129</sup> Lastly, the *Supreme Court of the United States* held that “the application of American antitrust law [requires arbitrators] to decide that dispute in accord with [this law]”.<sup>130</sup>

Nonetheless, apart from the rather exceptional violations of public policy,<sup>131</sup> “there are virtually no controls that operate upon the arbitrators to ensure a ‘correct’ choice of law decision”.<sup>132</sup> Errors of arbitrators regarding the choice of law thus only exceptionally result in the non-recognition of arbitral awards.<sup>133</sup>

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<sup>123</sup> *ATSA of California, Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (1983).

<sup>124</sup> *Born* (fn. 2), p. 2777.

<sup>125</sup> *Wortmann* (fn. 42), p. 103.

<sup>126</sup> Art. V (2) of the New York Convention.

<sup>127</sup> *SCC Case No. 158/2011*, Yearbook Commercial Arbitration (2013), pp. 268 *et seq.*

<sup>128</sup> *ICC Case No. 2930*, Yearbook Commercial Arbitration (1984), p. 107.

<sup>129</sup> *ICC Case No. 4132*, Yearbook Commercial Arbitration (1985), p. 50.

<sup>130</sup> *Supreme Court of the United States, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 *et seq.* (1985).

<sup>131</sup> *Born* (fn. 2), p. 3669.

<sup>132</sup> *Ferrari/Silbermann* (fn. 79), p. 27.

<sup>133</sup> *Born* (fn. 2), pp. 2776 *et seq.*

## 2. Arbitral awards disregarding the parties’ expectations

The “direct choice” approach provides for a high degree of flexibility. Arbitrators may choose whatever substantive law or rules of law they consider appropriate. On its own, this may be considered as an advantage of this approach. However, in combination with the limited judicial review of the merits of arbitral awards, it poses a risk to the parties. As a corollary of this limited judicial review, the parties might face difficulties to undo the impacts of arbitral awards which disregard their reasonable expectations. Indeed, case law shows that awards where the arbitrators (potentially) exceeded their authority still might be recognised and enforced to the detriment of (one of) the parties:<sup>134</sup> *Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.* illustrates this dilemma. In this case, the defendant resisted enforcement of an award on the ground that the arbitral tribunal applied the UNIDROIT Principles without the parties’ consent and in violation of the Terms of Reference.<sup>135</sup> However, the *US District Court for the Southern District of California* confirmed the arbitral award because “[o]ne of the issues presented to the [arbitral tribunal] was whether general principles of international law apply”.<sup>136</sup> As such, absent a violation of the New York Convention, the arbitral tribunal was allowed to refer to the UNIDROIT Principles.<sup>137</sup> Even if this decision “can be [understood] as less than an outright rejection of an ‘excess of power’ defense”,<sup>138</sup> it still raises doubts as to whether the “direct choice” approach is desirable. Also, in *Norsolor S.A. v. Pabalk Ticaret Ltd.*, the Austrian *Oberste Gerichtshof* had to decide whether the arbitrators exceeded their powers as they invoked the *lex mercatoria* and had recourse to rules of equity without any special authorisation from the parties.<sup>139</sup> The Austrian *Oberste Gerichtshof*, however, refused to set aside the award.<sup>140</sup> Such decisions reveal the drawback of the flexibility of the “direct choice” approach.

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<sup>134</sup> In principle, the winning party would not want to undo the impacts of an arbitral award, even if the arbitrators (plainly) disregarded its reasonable expectation as to the applicable law.

<sup>135</sup> *Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F.Supp.2d 1168, 1172 *et seqq.* (1998).

<sup>136</sup> *Ibid.*, 1173.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ferrari/Silbermann* (fn. 79), p. 27.

<sup>139</sup> *Norsolor S.A. v. Pabalk Ticaret Ltd.*, Yearbook Commercial Arbitration (1984), p. 160.

<sup>140</sup> *Ibid.*, p. 161.

## VI. Considerations of neutrality

Lastly, the parties to an international arbitration are interested in neutral proceedings.<sup>141</sup> They might have chosen to resolve their dispute in international arbitration since their involvement in the nomination of the arbitrators often results in an increased neutrality compared to proceedings before state courts.<sup>142</sup> However, the “direct choice” approach is difficult to reconcile with the parties’ desire for neutral arbitration proceedings. It is more likely to engender arbitral awards which favour subjective tendencies of individual arbitrators.<sup>143</sup> *Born* concludes that the “direct choice” approach “does little to further interests of predictability or *fairness*”.<sup>144</sup> The risk of arbitrators favouring subjective tendencies was confirmed by contemporary arbitral awards. Amongst others, the arbitral tribunal in *ICC 3131* decided that “[f]aced with the difficulty of choosing a national law [...], [...] it was appropriate [...] to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*”.<sup>145</sup> The arbitral tribunal in *ICC 4145*, in accord with this, favoured Swiss law because the other potentially-applicable law would have led to the invalidity of the parties’ agreement.<sup>146</sup> Equally, the arbitrators might refer to a specific law as they believe it is most modern, most commercial or most developed.<sup>147</sup>

Finally, even if the arbitrators did not rely on their subjective instincts, the parties could still be dissatisfied with the arbitrators’ decision with regard to the substantive law and thus consider them biased. For instance, arbitrators might apply the law or rule of law most convenient or familiar to them (such as the laws of the countries of which they are nationals). Then, the application of the “direct choice” approach “risks being perceived as an arbitrary decision in favour of [this law or rule of law]”.<sup>148</sup>

In short, the “direct choice” approach entails the risk that arbitrators base their decisions on subjective instincts and, in such a case, may cause the parties to doubt the arbitrators’ impartiality.

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<sup>141</sup> *Born* (fn. 2), p. 2659 (with respect to the substantive law).

<sup>142</sup> *Conrad/Münch/Black-Branch*, International Commercial Arbitration, 2013, para. 1.20.

<sup>143</sup> *Born* (fn. 2), p. 2647.

<sup>144</sup> *Ibid.*, p. 2647 (emphasis added).

<sup>145</sup> *ICC Case No. 3131*, Yearbook Commercial Arbitration (1984), p. 110.

<sup>146</sup> *ICC Case No. 4145*, Yearbook Commercial Arbitration (1987), p. 101.

<sup>147</sup> *Ferrari/Silbermann* (fn. 79), p. 22.

<sup>148</sup> *Jones* (fn. 7), p. 915.

#### D. Alternative approach to determine the substantive law

The “direct choice” approach has displayed a number of disadvantages. This approach disregards the parties’ desire for neutral and predictable arbitration proceedings. Also, it is difficult to reconcile with the minimal judicial review of the merits of awards. For those reasons, several scholars have suggested alternative approaches to determine the substantive law.<sup>149</sup> Flexibility and predictability were the most important criteria.<sup>150</sup> In view of this, this article will propose a three-tier test to determine the substantive law.

Arbitrators should, firstly, seek to effectuate an (implicit) agreement by the parties **(I.)**. Secondly, they ought to turn to the cumulative method to sort out “false conflicts” **(II.)**. Thirdly and finally, arbitrators should apply the “closest connection” formula **(III.)**.

#### I. Parties’ agreement

Consent is the cornerstone of arbitration.<sup>151</sup> An arbitral tribunal should hence respect the parties’ intentions as expressed in their (implicit) agreement.<sup>152</sup> In line with this, the arbitral tribunal in *ICC 6474* explained that “the first and foremost duty of the arbitrator is undoubtedly to base his decisions [...] on the common will of the [p]arties”.<sup>153</sup>

Consequently, arbitrators ought to defer to an explicit choice of law by the parties **(1.)**. If the parties did not agree on the applicable law, the arbitrators should look at whether a choice of law nevertheless can be implied from the arbitration agreement, the contract or the circumstances of the case **(2.)**.

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<sup>149</sup> *Born* (fn. 2), pp. 2656–2661, suggests a combination of the cumulative method and the conflict of laws rules of the arbitral seat; *Jones* (fn. 7), p. 931, considers the combination of the cumulative method and the “direct choice” approach; *Wortmann* (fn. 42), pp. 111 *et seqq.*, favours a combination of the conflict of laws rules of the arbitral seat, the cumulative method as well as general principles of private international law.

<sup>150</sup> *Hague Conference on Private International Law* (fn. 7), para. 59, focuses on these two criteria in order to develop an international legal instrument dealing with choice of law.

<sup>151</sup> *Park*, in: *Multiple Party Actions in International Arbitration, Non-signatories and International Contracts: An Arbitrator’s Dilemma*, 2009, para. 1.03.

<sup>152</sup> *Lew/Mistelis* (fn. 1), para. 17–38.

<sup>153</sup> *ICC Case No. 6474*, *Yearbook Commercial Arbitration* (2000), p. 283.

## 1. Explicit choice of law

Parties to an international arbitration introduce choice of law clauses into their contracts for a number of reasons.<sup>154</sup> For instance, they might have agreed on a particular law or rule of law due to considerations of comprehensiveness, predictability or familiarity.<sup>155</sup> Irrespective of this, the arbitrators are principally expected to respect such clauses.<sup>156</sup> This is because it is generally recognised that the parties can choose the substantive law or rules of law applicable to their dispute.<sup>157</sup> International conventions, national laws and institutional arbitration rules “unequivocally” affirm this freedom of the parties.<sup>158</sup> Relating to the interpretation of choice of law clauses, the arbitral tribunal in *ICC 18203* reaffirmed that it must seek “to construe the [p]arties’ true intention[s]”.<sup>159</sup> This might lead to the conclusion that the parties have agreed either on a conflict of laws rule or on a particular law or rule of law.<sup>160</sup>

## 2. Implicit choice of law

In instances where the parties did not conclude an explicit agreement with respect to the applicable law, arbitrators should still seek to determine whether the parties implicitly made an agreement to that effect.<sup>161</sup> This is because the arbitrators act as agents of the parties and, accordingly, exercise a delegated authority to select the substantive law.<sup>162</sup> For determining whether the parties have made an implicit choice of law, the arbitrators may take into consideration a number of different factors including the language of the contract, the nature of the transaction or the selection of the arbitration institution.<sup>163</sup> Furthermore, the parties’ selection of an arbitral seat can carry considerable weight.<sup>164</sup> Although this choice does not auto-

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<sup>154</sup> *Born* (fn. 2), p. 2747.

<sup>155</sup> *Ibid.*

<sup>156</sup> In line with this: *ICC Case No. 11440*, Yearbook Commercial Arbitration (2006), p. 130; *Born* (fn. 2), pp. 2690-2730, lays out exceptional circumstances in which the arbitrators should refuse to give (full) effect to a choice of law clause.

<sup>157</sup> *Redfern/Hunter* (fn. 71), para. 3.97.

<sup>158</sup> *Born* (fn. 2), p. 2671.

<sup>159</sup> *ICC Case No. 18203*, Yearbook Commercial Arbitration (2016), p. 287.

<sup>160</sup> *Hague Conference on Private International Law* (fn. 7), para. 7.

<sup>161</sup> *Redfern/Hunter* (fn. 71), para. 3.201, express their concerns about a certain artificiality involved in establishing an implicit agreement by the parties.

<sup>162</sup> *Lew/Mistelis* (fn. 1), para. 17-40.

<sup>163</sup> *Born* (fn. 2), p. 2733.

<sup>164</sup> *Wortmann* (fn. 42), p. 108.

matically portend that there is also an agreement on the applicable law, it includes “an implied acceptance of aspects of the procedural law of the arbitral seat [which usually encompasses] choice-of-law rules”.<sup>165</sup> In light of this, the arbitral tribunal in *ICC 9771* decided that the parties’ selection of Stockholm as the arbitral seat indicated “that Swedish conflict of law rules should apply in determining the applicable law”.<sup>166</sup> An investigation into the intent of the parties, however, can also lead to the application of another conflict of laws rule or a particular law or rule of law.<sup>167</sup> In accord with this, the sole arbitrator in the *Sapphire* arbitration concluded that the parties’ implicit choice of law referred to the “principles of law generally recognised by civilised nations”.<sup>168</sup> Finally, an examination of the parties’ intentions might reveal the absence of any choice of law.<sup>169</sup> The arbitral tribunal in *ICC 8113*, for instance, scrutinised whether the parties implicitly agreed on the application of German law as they signed their contract during a meeting in Hamburg.<sup>170</sup> Yet, the arbitrators concluded that this was “due to practical reasons” and therefore held that an implicit agreement was absent.<sup>171</sup>

## II. The cumulative method

If the parties have not agreed on the applicable law, neither explicitly nor implicitly, the arbitrators should turn to the cumulative method to detect “false conflicts” in which all potentially-applicable conflict of laws rules point to the same national law.<sup>172</sup> This method offers many benefits and, accordingly, is regarded “least controversial”.<sup>173</sup> It reflects the parties’ expectations as well as the relevant state

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<sup>165</sup> *Born* (fn. 2), pp. 2659 *et seq.*

<sup>166</sup> *ICC Case No. 9771*, Yearbook Commercial Arbitration (2004), pp. 52 *et seq.*

<sup>167</sup> *ICC Case No. 3540*, Yearbook Commercial Arbitration (1982), p. 129, finds that the application of the *lex mercatoria* seems to be the implicit choice of the parties.

<sup>168</sup> *Sapphire International Petroleum Ltd. v. The National Iranian Oil Co.* (1967) 13 ICLQ 1011, 1015.

<sup>169</sup> *ICC Case No. 8113*, Yearbook Commercial Arbitration (2000), p. 325.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Born* (fn. 2), p. 2658, suggests that the cumulative method must be applied on both the level of conflict of laws rules and the level of substantive laws. However, an examination of the potentially-applicable substantive laws may often prove difficult because of the differences in the various legal regimes. In line with this, in the opinion of the author of this article, the cumulative method should not be applied on the level of substantive laws unless the conformity of the potentially-applicable substantive laws is easily discernible.

<sup>173</sup> *Mukhopadhyay* (fn. 58), p. 117.

interests and policies.<sup>174</sup> As such, arbitral awards are more likely to be enforced.<sup>175</sup> The cumulative method also assists in preventing a number of (potentially complex) conflict of laws analyses<sup>176</sup> and, consequently, may reduce the costs of arbitration proceedings.<sup>177</sup>

### III. The “closest connection” formula

Finally, there may be instances in which the parties did not agree on the applicable law and the cumulative method was unsuccessful. This situation poses a “true conflict”,<sup>178</sup> Although these instances are limited,<sup>179</sup> arbitrators will eventually be confronted with such a situation. Then, they should have recourse to the “closest connection” formula.

First and foremost, this formula is well-recognised (1.). Further, it provides for a certain degree of flexibility (2.). At the same time, the “closest connection” formula conforms to the parties’ desire for predictable arbitration proceedings (3.).

#### 1. Acceptance

The “closest connection” formula is well-recognised in scholarly literature.<sup>180</sup> Amongst others, scholars have ascribed an “intrinsic value” to this formula because it “[provides] some certainty as to the law or rules of law ultimately applicable”.<sup>181</sup> Equally, they have regarded it to be “highly appropriate” since it offers a considerable degree of flexibility without, however, empowering the arbitral tribunal “to just determine any kind of law which it might fancy”.<sup>182</sup> In light of this wide acknowledgement, this solution has been labelled a “general principle of private

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<sup>174</sup> *Born* (fn. 2), p. 2658.

<sup>175</sup> *Mukhopadhyay* (fn. 58), p. 118.

<sup>176</sup> *Born* (fn. 2), pp. 2658 *et seq.*

<sup>177</sup> *Mukhopadhyay* (fn. 58), p. 118.

<sup>178</sup> *Born* (fn. 2), p. 2650, describes a “true conflict” as a situation where different conflict of laws rules point towards two or more different national substantive laws.

<sup>179</sup> *Berger* (fn. 29), para. 24–8, doubts the significance of conflict of laws issues in general and argues that arbitrators often are able to resolve the disputes solely on the facts and the terms of the contract; *Frick*, *Arbitration in Complex International Contracts*, 2001, p. 9, sets forth that the parties choose the applicable law in three out of four cases.

<sup>180</sup> *Born* (fn. 2), p. 2659; *Fry/Greenberg/Mazza*, *The Secretariat’s Guide to ICC Arbitration*, 2012, para. 3–757.

<sup>181</sup> *Ferrari/Silbermann* (fn. 79), p. 12.

<sup>182</sup> *Blessing* (fn. 65), p. 54.

international law”.<sup>183</sup> Contemporary arbitral awards have confirmed the “closest connection” formula as the most prominent approach to determine the substantive law.<sup>184</sup> In this connection, the arbitral tribunal in *ICC 4237* found that international arbitral practice has demonstrated “a preference for the conflict rule according to which [a] contract is governed by the *law of the country with which it has the closest connection*”.<sup>185</sup> The arbitral tribunal in *ICC 14667* likewise observed that the “closest connection” formula has been adopted by state courts in the majority of common law jurisdictions.<sup>186</sup> International legislation such as the Rome I Regulation equally entails this formula.<sup>187</sup> This means that the “closest connection” formula already offers a significant degree of harmonisation. Additionally, the fact that several national arbitration statutes prescribe this formula indicates that the respective states consider it to be appropriate.<sup>188</sup>

## 2. Flexibility

Moreover, the “closest connection” formula offers a considerable degree of flexibility. It “leaves substantial scope” to the arbitrators for their choice of the substantive law.<sup>189</sup> This is because it determines the substantive law based on a number of criteria to which the arbitrators may choose to attach more or less weight (on a case-by-case basis).<sup>190</sup> For instance, the arbitral tribunal in *ICC 6719* evaluated the strength of the connections between all potentially-applicable laws and the underlying dispute.<sup>191</sup> It chose to attach particular weight to the place where the contractual goods were manufactured because the contract was also signed at this place and the manufacture of such goods was closely supervised by the authorities of the respective state.<sup>192</sup> The arbitral tribunal therefore held that Italian law was the substantive

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<sup>183</sup> Greenberg, *The Law Applicable to the Merits in International Arbitration*, *Vindobona Journal of International Commercial Law & Arbitration* 8 (2004), 315 (320).

<sup>184</sup> *ICC Case No. 5717*, *International Court of Arbitration Bulletin* (1990), p. 22; *ICC Case No. 4237*, *Yearbook Commercial Arbitration* (1985), p. 55.

<sup>185</sup> *ICC Case No. 4237*, *Yearbook Commercial Arbitration* (1985), p. 55 (emphasis added).

<sup>186</sup> *ICC Case No. 14667*, *Yearbook Commercial Arbitration* (2015), pp. 98 *et seq.*

<sup>187</sup> *Born* (fn. 2), p. 2632.

<sup>188</sup> *ICC Case No. 7319*, *Yearbook Commercial Arbitration* (1999), p. 146, stipulates that the increasing number of states which have ratified the Rome I Regulation prove the far-reaching acceptance of the “closest connection” formula.

<sup>189</sup> *Born* (fn. 2), p. 2635.

<sup>190</sup> *Hague Conference on Private International Law* (fn. 7), para. 34; Cf.: *Lando* (fn. 84), p. 142.

<sup>191</sup> *ICC Case No. 6719*, *Journal du droit international* (1994), pp. 1077 *et seq.*

<sup>192</sup> *Ibid.*, p. 1077; *Fouchard/Gaillard/Goldman* (fn. 8), p. 869.

law most appropriate for the particular case.<sup>193</sup> In contrast, other conflict of laws rules like the conflict of laws rules of the arbitral seat can sometimes be incapable of adapting to the particular circumstances surrounding the parties’ dispute.<sup>194</sup> Such “mechanical solutions”, however, must be avoided in order to provide the arbitrators with the necessary freedom to determine the applicable law.<sup>195</sup>

### 3. Predictability

Despite its considerable degree of flexibility, the “closest connection” formula remains more predictable in comparison to other conflict of laws rules.<sup>196</sup> This is because this formula principally<sup>197</sup> allows parties to foresee which legal system is likely to be chosen by the arbitrators.<sup>198</sup> To this end, the parties can have recourse to commentaries on the Rome I Regulation or decisions of the *European Court of Justice*. These sources can provide for some guidance as to the “closest connection” formula.<sup>199</sup> Aside from this, this formula is predictable since it is an objective test to determine the substantive law: it prevents arbitrators from rendering non-transparent decisions.<sup>200</sup> In accord with this, “the discretionary choice of law by arbitrators who use the *voie directe* method” can be avoided.<sup>201</sup> This not only increases the neutrality of arbitration proceedings,<sup>202</sup> but also prevents unpredictable choice of law decisions due to arbitrators’ subjective instincts.

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<sup>193</sup> ICC Case No. 6719, *Journal du droit international* (1994), p. 1078.

<sup>194</sup> Mukhopadhyay (fn. 58), p. 113, states that the conflict of laws rules of the arbitral seat are less flexible.

<sup>195</sup> Cf.: *Hague Conference on Private International Law* (fn. 7), para. 59.

<sup>196</sup> Wortmann (fn. 42), p. 106, correctly sets forth that the strict application of the conflict of laws rules of the arbitral seat is especially certain and predictable. However, in the opinion of the author of this article, the conflict of laws rules of the arbitral seat can, in some instances, be too rigid and therefore are disregarding considerations of flexibility.

<sup>197</sup> Jones (fn. 7), p. 921, argues that the “closest connection” formula may result in uncertainty due to electronic commerce. He also indicates that the application of this formula could lead to *dépeçage* (different parts of the contract are governed by different laws).

<sup>198</sup> Wortmann (fn. 42), p. 100, emphasises that “it is absolutely essential for the parties to know the potential applicable law in advance”.

<sup>199</sup> ICC Case No. 9771, *Yearbook Commercial Arbitration* (2004), p. 54, sets forth that the Rome I Regulation may serve as a guideline for ascertaining the content of legal instruments which contain the “closest connection” standard (such as the Swedish conflict of laws rules).

<sup>200</sup> Schmalz (fn. 68), § 1051 ZPO para. 43.

<sup>201</sup> *Hague Conference on Private International Law* (fn. 7), para. 34.

<sup>202</sup> Schmalz (fn. 68), § 1051 ZPO para. 43.

## E. Conclusion

If the parties to an arbitration have not agreed on the law applicable to the merits of the dispute, arbitrators are responsible for this determination. To this end, arbitrators relied on many different approaches. Some of them had recourse to conflict of laws rules such as the (ordinary) conflict of laws rules of the arbitral seat or the conflict of laws rules of the state most closely connected to the parties’ dispute. Other arbitrators determined the substantive law with references to the cumulative method, general principles of private international law or the “closest connection” formula. Lastly, arbitrators chose to apply the “direct choice” approach to select the law applicable to the merits of the dispute.

Many legal instruments adopted the “direct choice” approach which allows arbitrators to determine the substantive law without having recourse to any conflict of laws rules. This approach does not liberate arbitrators from giving reasons for their choice of law. Still, it offers a high degree of flexibility and may lead to faster arbitration proceedings. The “direct choice” approach, however, does not correspond with the parties’ desire for predictable and neutral arbitration proceedings. In addition, this approach is difficult to reconcile with the minimal judicial review of the merits of arbitral awards. Finally, it might result in the application of a particular law or rules of law which neither of the parties would have intended.

A more predictable and neutral approach would be based on the consent of the parties. In a first step, arbitrators should ascertain whether the parties have made any explicit or implicit agreement with respect to the substantive law. Subsequently, they should apply the cumulative method to sort out “false conflicts”. This prevents a number of complex conflict of laws analyses and makes sure that the parties’ expectations are not defeated. In a last step, arbitrators should apply the “closest connection” formula. This formula is well-recognised and balances considerations of flexibility and predictability. Further, it rests on objective criteria and therefore guarantees neutral arbitration proceedings.

It is much to be hoped that the international arbitration community can eventually agree on a uniform approach for arbitrators to determine the substantive law. This is essential because the parties to an international arbitration desire certainty and predictability.