THE POSSIBLE CONFLICT OF LAW RULES EMPLOYED IN INTERNATIONAL COMMERCIAL ARBITRATION TO DISCERN THE GOVERNING LAW: AN ANALYSIS

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Abstract

It is rarely the case that highly diversified commercial contracts, containing arbitration as a dispute resolution method, mention specifically all the applicable governing laws. Indeed, modern transnational arbitration agreements often do not mention the applicable law governing the contract, primarily because of the increased flexibility that this ambiguity offers. However, it should be noted that there exists no clear and established consensus within the international community regarding the mechanism that may be followed by an arbitral tribunal to determine the law governing the contract, in case it is not expressly chosen by the parties. Although concepts of private international law, or conflict of laws are often used by the arbitral tribunal to arrive at the law governing the contract- the practise itself has been widely debated, and even disregarded by recent tribunals. Moreover, there exists an inherent lack of consistency among the various conflict rules followed by tribunals in such a situation. As a result of this, parties to an arbitration agreement are often compelled to have their contract governed by a law not envisaged by either side. Through this article, the author attempts to discern a logical thread of hierarchy between the multifarious conflict rules that are generally adopted by an arbitral tribunal. This, he does by analyzing the advantages and disadvantages of the various conflict rules under the broad delocalization regime. The author, in this article also explores the possibility of bypassing the application of conflict rules altogether by direct application of substantive law by the tribunal. The article ultimately vouches for the development of an international consensus on the mechanism for determining the applicable governing law.

I. Introduction

Arbitration is all about choices. Primarily, the parties make the *choice* to submit their dispute to arbitration. Once that primary choice is made, it is again the *choice* of the parties to decide the arbitrators, the place or *situs* of arbitration, the procedure governing

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arbitration, and most importantly, the law governing the merits of their dispute, which is meant to be settled through arbitration.[1]

This marked shift, from an imposed municipal law to a mutually agreeable applicable law, forms the bedrock of the principles governing international commercial arbitration. Party autonomy, therefore, forms the fundamental operative force in commercial arbitrations. The choice of applicable law, governing the contract, *almost* always rests on party autonomy. However, there has been considerable divergence with regard to the steps to be followed by the arbitral tribunal, in case such a choice is not made.[2]

In such a case, where the law governing their contract is not chosen, it falls upon the arbitral tribunal to make the necessary choice. This is often done with reference to various *conflict of law* rules that are available to the tribunal, and the complication arises in determining the applicable conflict rule. Recently, a trend has developed among tribunals, calling for a total abandonment of the application of conflict of law rules, favouring a direct application of substantial law.[3]

In this article, I will first address the conflict between the theories of 'localization' and 'delocalization', in the context of modern arbitration. Thereafter, I would attempt to provide an overview of the various conflict methods used *generally* by arbitral tribunals. In that section, I will also address the debate surrounding the direct application of substantive law. In the same section, I would review the various legal systems both at the national and international level, with regard to their points of divergence in the application of conflict rules.

Finally, I would conclude this paper with the affirmation of the need for a hierarchical system of conflict rules, in determining the applicable law.

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[1] **MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION** § 1.1 (Larry E. Edmonsoned, 2003).

[2] See A.F.M. Maniruzzaman, *Conflict of Law Issues in International Arbitration : Practice and Trends,* 9 **ARB. INT'L 371 (1993)[HEREINAFTER 'MANIRUZZAMAN'].**

[3] P. Bellet, *Forward,* **LAW & POLICY INT'L BUS.** 673 (1984).

The 'localization- delocalization' conflict

While resolving conflict of law issues in international commercial arbitration is certainly more flexible than in international litigation, there is arguably an additional complication arising out of the very fact that arbitral tribunals are not bound by the *lex fori,* in the same manner in which a judge is.[4]

This gives rise to the question as to whether, in a case where the parties have not chosen an applicable law governing the merits, the conflict rules of the seat of arbitration or *lex fori,* would bind the tribunal.

A. The Traditional Approach: Localization

Historically, one of the most commonly used method for resolving the question of the applicable conflict of law rules was to apply the conflict of law rules of the *situs*[5]. A more recent extension of this rule has been to bypass the conflict of law rules altogether and apply the substantive law of the seat of arbitration.[6]

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[4] **GREENBECK, KEE & WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE, 97, (2011) [**hereinafter **'GREENBECK, KEE&WEERAMANTRY'].**

[5] *Id*; *See also,* **FOUCHARD, GILLIARD, GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION,** 867 (Emmanuel Gilliard& John Savage ed., 1999) [hereinafter '**FOUCHARD, GILLARD, GOLDMAN'**]; **GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION** 2119 (2009) [hereinafter 'BORN'].

[6] **A. EHRENZWEIG, CONFLICT OF LAWS 540 (1962);** Wilner, *Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study*, 19 **RUTGERS L. REV**. 646, 676-77 (1965); *See* PPG Indus. Inc. v. Pilkington plc, 825 F.Supp. 1465 (D. Ariz. 1993); Splosna Plovba of Piran v. Agrelak SS Corp., 381 F.Supp. 1368, 1370 (S.D.N.Y. 1974); In re Doughboy Indus. Inc., 233 N.Y.S.2d 488 (N.Y. App. Div. 1962); Tzortzis and Sykias v. Monark Line A/B [1968] 1 Lloyd's Rep. 33;Norske Atlas Co. v. London Gen. Ins. Co. (1927) 43 TLR 541 (K.B.); Czarnikow v. Roth, Schmidt & Co. [1922] 2 K.B. 478, 488 , *See also,* The Sri Lankan Arbitration Act, 1995, §24(3).

The first approach was recommended as the primary method of addressing the issue of applicable conflict rules by the Institute of International Law in 1957[7], and approved in 1959.[8]

But, as will be explained subsequently, an unavoidable implication of this theory was to make the otherwise independent arbitral tribunal shackled with the same limitations as that of a national court, in so far as application of 'conflict rules' are concerned. This is because the method made it *mandatory* for an independently formed arbitral tribunal to apply the conflict rules of the seat- in the same way a national court of the seat would be bound to do- thereby compromising the flexibility of an international commercial arbitration.

The premise of this theory is that there exists no *truly* international commercial arbitration, as every system of private international law ultimately relies on a national law to settle the dispute, and the tribunal, being seated in, and acting under the domestic jurisdiction of a particular country, the *lex-fori* of that country automatically becomes the obvious choice.[9] In the opinion of the author, this might be too simplistic an argument - as the gradual emergence and application of 'general principles of international law' to the *merits* of a case (as explained subsequently in Chapter III) evinces that it is not necessary for the tribunal to always rely on one *national* legal system or the other.

Initially, this approach was avidly followed by a number of civil law countries, as well as England[10], and even arbitral tribunals[11]. This method is still followed in the Chinese[12]and

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[7] ***Institute of International Law, Resolution on Arbitration in Private International Law, 1957 (Amsterdam), Tableau des Résolutions Adoptées (1957-1991) 237, at Art. 11(1) (1992).***

[8] *Id*, at 254.

[9] *See* Mann, *Lex Facit Arbitrum*, 2 **ARB. INT'L** 241, 244-245, 248 (1986)

[10] This approach was followed in England before the passing of the English Arbitration Act, 1996.

[11] Award in ICC Case No. 1512 of 1976, 1 Y.B. Comm. Arb. 128 (ICC Int'l Comm. Arb.); Award in Case No. 2730 of 1984, 111 J.D.I. (Clunet) 914 (ICC Int'l Comm. Arb.); Award in Case No. 2735 of 1977, 104 J.D.I. (Clunet) 947 (ICC Int'l Comm. Arb.); Final Award in Case No. 5460 of 1988, 13 Y.B. Comm. Arb. 104, 106 (ICC Int'l Comm. Arb.).

[12] **JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA** 105 (2008).

Malaysian[13] laws, which makes it mandatory for the tribunal to apply their national conflict rules.

However, the drawbacks of this theory, which has led to substantial erosion of this approach, can be found in the resulting benefits of the delocalization approach, discussed below.

The Erosion of the Traditional Approach and Delocalization

1. The Drawbacks with the Traditional Approach

The method of applying the conflict rules of the seat of arbitration initially received support at an international level, especially from the European countries. However, the problem with the application of this theory was soon to be exposed.

Critics of this method argued that the choice of the seat of arbitration may be a result of various practical considerations, like geographic convenience, the advanced quality of the arbitral tribunal in that seat etc., and gave no indication whatsoever on the issue of applicable law.[14] Therefore, to mandatorily bind the arbitral tribunal to the conflict rules of the seat of arbitration is to import the same limitations that would bind national courts, and thereby undermine the principle of party autonomy[15]. Furthermore, by binding the tribunal to only *domestic* conflict of law rules, it has been argued, mars the transnational characteristic of arbitration.[16]

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[13] Malaysian Arbitration Act, 2005, §30(4).

[14] See Award in Case No. 7375 of 1996, 11(12) Mealey's Int'l Arb. Rep. A-1, A-37 (ICC Int'l Comm. Arb.); Award in Case No. 117 of 1999, 1 Stockholm Arb. Rep. 59, 64 (ICC Int'l Comm. Arb.; Award in Case no. 6257 of 1993,18 Y.B. Comm.Arb. 44 (ICC Int'l Comm. Arb.**); D. CARON, L. CAPLAN& M. PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 126 (2006).**

[15] Goldman, *La LexMercatoria Dans Les Constacts Et L'Arbitrage Internationaux: R'ealit'e Perspective* **475 J DU DROIT INTL** (1979); SapphireInt'l Petroleum Ltd v. Nat'l Iranian Oil Co., Ad Hoc Award (15 March 1963) 35 I.L.R. 136, 170 (1967) [hereinafter 'Sapphire'] .

[16] Gabrielle J. Kaufmann-Kohler, *Aspects de la mise en œuvre du droit en arbitrage*, REV. DR. SUISSE 403, 414 (1988); PHILIPPE FOUCHARD, L' ARBITRAGE COMMERCIAL INTERNATIONAL ¶¶ 546 *et seq.* (1965).

This criticism eroded the application of the localized approach to arbitral disputes, and today it is very rare that arbitral tribunals follow this approach[17].The untenable nature of this approach has been brought forth by various scholars, who have argued against it[18].

However, it would be wrong to presume that this approach has been totally abandoned as there is still some notable support for this theory among scholars[19]and arbitral tribunals[20], on the ground that *presumptively,* the parties choice of the seat of arbitration constitutes an *implied* acceptance of the choice of law rules of that state, and more importantly, it provides the parties with the most predictable, neutral and fairest choice of law.[21]

It is the opinion of the author, that it is rarely the case the parties would choose a seat of arbitration, merely based on factors like geographic convenience- as essentially *seat* and *place* of arbitration exists as distinct concepts under arbitration law. In fact, in a situation where the parties themselves select the seat, but do not choose any law applicable to govern the contract- it is only fair to presume that the parties intended the former to govern the contract as well. The author therefore, would support the direct application of substantive law, despite its supposed erosion. This is because, as explained later, the other option available to the parties, viz., letting the arbitral tribunal deciding the 'appropriate conflict rule'- gives rise to a *probability* of the application of a legal system un-envisaged by the parties. In such a situation, given the lack of any hierarchy between

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[17] **CRAIG PARK AND PAULSON , INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 290 (2001)**

[18] **REDFERN AND HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 234 (2009) ;FOUCHARD, GILLIARD, GOLDMAN,** *supra* note 5, at 1541**; GREENBECK, KEE & WEERAMANTRY,** ***s****upra* note.4, at 108.

[19] **BORN,** *Supra* note 5, at 2124-2127**; O. Lando,** ***The Law Applicable to the Merits of the Dispute*** **in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 101 (1986).**

[20] Case no. 5460 of 1987, 13 Y.B. Comm.Arb. 104(ICC Int'l Comm. Arb.);Award in ICC Case No. 8619, in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 230 n. 230 (2001) ; ICC Ca–se no. 4504;.; ICC Case No. 1598; ICC Case No. 3540, in **S. JARVIN & Y. DERAINS, COLLECTION OF ICC ARBITRAL AWARDS** 1974-1985*,* 19, 105 (1990); Interim Award in Case no. 6149 of 1995, 20 Y.B. Comm. Arb. 41 (ICC Int'l Comm. Arb.).

[21] *See* **BORN**, *supra* note 5, at 2141.

the multifarious conflict rules available to the tribunal, the legal system ultimately chosen to govern the contract would largely depend on the arbitrators' individual &personal preference of one rule above another. The underlying idea behind this approach is that parties desire predictability and neutrality in the governing law, rather than uncertainty and unfamiliarity.

Therefore, in a case where the parties have not made a specific choice, it would be wise to undertake an analysis of the contract as a whole, and thereafter arrive at a conclusion as to whether the choice of seat was dictated by any external factor, with a strong presumption in favour of extending the law of the seat to the law governing merits. In case such an external factor is not discernable, law of the seat may be applied, due to the prevalence of factors such as predictability, neutrality and fairness.[22]

2. Delocalization/ Denationalization Trends

As an aftermath of the criticism to the traditional approach, there has been a considerable shift towards 'delocalization' or 'denationalization' of the arbitral tribunal. This approach detaches the arbitral tribunal from the *lex fori*.[23]Under the 'localization' approach, the arbitral tribunal was sought to be bound by the *lex fori;* whereas, this approach, as an antithesis to 'localization', leaves it to the tribunal to decide the conflict rule it considers *appropriate.*[24]

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[22] However, other modern approaches, like the 'Cumulative Approach', as has been discussed below, may also provide a viable alternative in case the intention of the parties cannot be determined.

[23] *See* generally **A. SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION, CHAPTER 1 (1989) [Arguing that arbitral tribunals have no *lexfori*];** H.P. de Vries, *International Commercial Arbitration: A Traditional View,* 1 **J. INT'L ARB.** (1984).

[24] Article 28(2) , UNCITRAL Model Law on International Commercial Arbitration, 1985; Article VII, European Convention on International Commercial Arbitration , 1961 ; *See also* **W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, P. 17.01 (2000**).[Hereinafter **'CRAIG, PARK AND PAULSSON**']

This approach of allowing the arbitral tribunal increased the flexibility of choosing the applicable conflict rule and has gained momentum in international statutes[25], national courts[26] and even among arbitral tribunals[27].

This has led to the formation of a new trend which disassociates the arbitral tribunal from the control of laws of the place where such arbitration is being held. The tribunal is given the authority to decide on the applicable conflict rule on a case to case basis, giving primacy to the party autonomy.

Whereas *prima-facie* this approach indeed appears to increase party-autonomy in international commercial arbitration; on a close examination it should be observed that in reality, it simply increases the autonomy of the tribunal, which, as explained next need not *necessarily* translate into increased party autonomy, and predictability.

The discussion regarding the various conflict rules used by arbitral tribunals, in the next Chapter, attempts to offer an insight into the ambiguity that prevails over the application of these divergent rules.

The Possible 'Conflict Rules'

In the attempt to arrive at an appropriate 'conflict rule' which would point towards the applicable substantive law, various alternative approaches to the traditional theory have been developed. The striking feature of these approaches is that whereas individually they have widely used by various international tribunals, as whole the international community is yet to reach at a consensus on any particular conflict rule, or the establish a hierarchical order among the available rules.

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[25] **CRAIG, PARK AND PAULSSON**, *Id*; *See also* Article 13(3) ICC Rules (1975); Article 33 UNCITRAL Rules (1976); Art. 42(1) Washington Convention (1965).
[26] Konkar Indomitable Corp. v. FritzenSchiffsagentur und Bereederung, 1981 U.S. Dist. LEXIS 9637 at 6-7 (S.D.N.Y. 1981); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (U.S. S.Ct. 1974); Compagnied'Armement Maritime SA v. CompagnieTunisienne de Nav. SA, [1971] A.C. 572, 600 (House of Lords).
[27] Case No. 2930 of 1984, 9 Y.B. Comm. Arb. 105 (ICC Int'l Comm. Arb.); Final Award in Case No. 6527 of 1993, 18 Y.B. Comm. Arb.44 (ICC Int'l Comm. Arb.); Partial Award in Case No. 8113 of 2000, 25 Y.B. Comm. Arb. 324, 325 (ICC Int'l Comm. Arb.); Sapphire, .*supra*note15.

This creates complications in a situation where different conflict rules point towards totally different substantive laws, and consequentially the rights and obligations of the parties differ very widely based on the specific conflict rule used by the tribunal. To add to this, although these 'conflict rules' in legal theory are based on very different approaches; they may be used simultaneously or alternatively by the same arbitrator in one particular matter.[28]

B. Cumulative Application of Various Conflict Rules

Undoubtedly the least controversial conflict rule, the cumulative approach allows the arbitrators to examine all the conflict rules of the different legal system connected to the matter, and determine whether they converge and point to the same substantive law.[29] The conflict rule of all the connected legal systems may be similar, or they may be different and yet point to the same substantive law. In either case, the substantive law thereby indicated is chosen by the arbitrators as the law governing the merits of the dispute.[30]

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[28] Yves Derains, ***Possible Conflict of Laws Rules and the Rules Applicable to the Substance of the Dispute,*** in **PIETER SANDERS, UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION,** ICCA Congress Series, Lausanne 2 169 – 195 (1984).

[29] Yves Derains, *L'application cumulative par l'arbitre des systèmes de conflit de loisintéressés au litige (A la lumière de l'expérience de la Courd'Arbitrage de la Chambre de Commerce Internationale)*, REV. ARB. 99 (1972) ;*See also*Award in Case No. 953 of 1978, 3 Y.B. Comm. Arb. 214 (ICC Int'l Comm. Arb.); Award in Case No. 1512 of 1976, 1 Y.B. Comm. Arb. 128 (ICC Int'l Comm. Arb.); Award in ICC Case No. 2272, in **S. JARVIN & Y. DERAINS (EDS.),COLLECTION OF ICC ARBITRAL AWARDS** 1974-1985 11 (1990); Award in Case No. 2879 of 1979, 106 J.D.I. (Clunet) 989, 990 (ICC Int'l Comm. Arb.); Award in Case No. 2930 of 1984, 9 Y.B. Comm. Arb. 105 (ICC Int'l Comm. Arb.); Award in Case No. 3043 of 1979, 106 J.D.I. (Clunet) 1000 (ICC Int'l Comm. Arb.); Award in Case No. 4434 of 1983, 110 J.D.I. (Clunet) 893 (ICC Int'l Comm. Arb.).

[30]Award in Case No. 4996 of 1985, French agent of an Italian company v. Italian company, 113 J.D.I. 1131 (ICC Int'l Comm. Arb.); Award No. 3043 of 1978, South African company v. German company, 106 J.D.I. 1000 (ICC Int'l Comm. Arb.); Award in Case No. 5717 of 1988, ICC BULLETIN, Vol. 1, No. 2, at 22 (1990); Award in Case No. 6281 of 1989, Egyptian buyer v. Yugoslavian seller, 116 J.D.I. 1114 (ICC Int'l Comm. Arb.),Award in Case No. 6283 of 1990, Agent (Belgium) v. Principal (U.S.A.), 17 Y.B. Comm. Arb. 178 (ICC Int"l Comm. Arb.); Award in Case No. 6149 of 1990, Seller (Korea) v. Buyer (Jordan), 20 Y.B. Comm..Arb. 41 (ICC Int'l Comm. Arb.); Award in

The benefit of this approach is that since it considers the national conflict rules of all the legal systems connected with the dispute, it is not open to criticism on grounds of non-neutrality and non-predictability. Furthermore, this approach also reduces the cost of arbitration as it does not require the arbitrators to analyze the various conflict rules in order to give preference to one over the other.[31] The application of this rule also ensures that the interest of the various states in the dispute is respected, and therefore increases enforceability of the award. The effect of this approach is to 'internationalize' the award, which is aptly suited for such disputes.

However, Born has criticised this approach on the ground that this method can only be used in case of a 'false conflict', i.e., when there is no real conflict , as all the conflict rules ultimately lead to the same result.[32]This rule becomes ineffective when the different conflict rules point towards different substantive laws, as in often the case in multiparty contract (as opposed to bi-party contracts).[33] This criticism seems correctly based, as it very rare that in a multiparty contract, involving several jurisdictions- all legal systems would point to the same conflict rule, or applicable substantive laws. In most cases, this rule would have very limited or no contribution, thereby compelling the arbitrator to choose an alternate rule. Thus, the comfort of similarity between the laws is marred by its extremely rare application.

Although the applicability of this approach is limited when major differences exist between the conflict rules of the various legal systems involved, the author is of the opinion that it would be a suitable step for any arbitral tribunal to approach the conflict issue first through this method. This is primarily because of the aforementioned advantages which would take into the interest of all the concerned parties to the dispute.

Case No. 7250 of 1992, American distributor v. Dutch producer, ICC BULLETIN, Vol. 7, No. 1, at 92 (1996).

[31] Grigera Na'on, *Choice-of-Law Problems in International Commercial Arbitration*, 289 RECUEIL DES COURS 9, 36-37, (2001) [hereinafter 'Na'on].

[32] **BORN,** *supra* note 5, at 2129.

[33] *Id; See,* Award in ICC Case No. 6281, in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), Collection of ICC Arbitral Awards 1991-1995 409 (1997); Partial Award in Case No. 7319 of 1999, 24a **Y.B. Comm. Arb.**.141 (ICC Int'l Comm. Arb.)

Extending this approach further, arbitral awards have sometimes gone beyond the conflict rules and directly considered the various substantive laws and examined the possibility of a same legal outcome, notwithstanding the different legal systems involved.[34]

Application of the General Principles of Private International Law

Since arbitrators are not bound by the *lex fori,* and have the scope of applying any conflict of law rule that they deem *appropriate,* tribunals often refer to 'general principles of private international law' to guide them to the applicable substantive law.[35]

Indeed, an application of these 'general principles' seems quite apt in the realm of commercial arbitration, where the parties seek neutrality, predictability and effective international enforcement. This approach is free from the conflict rules peculiar to various national legal systems and provides the commercial world with an internationally recognized and accepted, uniform conflict rules, which, in turn, increases predictability.[36]

However, unfortunately, there exists no uniformly accepted set of 'general principles' and the views of different scholars and arbitral tribunals have differed quite extensively as to what these might constitute. In reality, the conflict rules the various legal systems have differed so extensively that to discern a thread of 'general principles' running across all the legal system becomes quite difficult.

There is a possibility that the usage of the concept of 'general principles' might increase with wider acceptance of the various international conventions on private international

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[34] Na'on, *supra* note 31, at 29.

[35] M. Akehurst, *Jurisdiction in International Law*, 46 BYBIL 222 (1972–73); Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 J.D.I. 475, 492 (1979); Pierre Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 REV. ARB. 181; Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. – FOREIGN INV. L.J. 208, 216 (1995); **JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION – A STUDY IN COMMERCIAL ARBITRATION AWARDS 436. (1978);** Maniruzzaman, *Supra* note 2, at 377.

[36] Na'on, *supra* note 31, at 36, 236.

law, which have long been regarded as sources of 'general principles.[37] Arbitral tribunals have, on various instances, considered these regional and international conventions to contain the general principles that govern the conflict rules.[38]

While some commentators have noted the growing usage of these general principles among international tribunals[39], others scholars have criticised the application of these principles of the basis of their unpredictably, and the uncertainty surrounding what exactly these principles are.[40]

It remains, however, that these criticisms are not enough the totally discredit the application of this method to resolve the conflict. The contemporary inquiry into these 'general principals' by the arbitral tribunals has almost always been carried with reference to the above mentioned conventions or other arbitral awards, which by definition, reflect substantial consensus with regard to status of these principles.[41]

It is the opinion of the author that if, while deciphering 'general principles' arbitrators keep these conventions as their reference point, rather than their own diverse experiences, and if there is indeed a greater acceptance of these conventions, or any new

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[37] *See,* The Rome Convention on the Law Applicable to Contractual Obligations, 1980; The Hague Convention on the Law Applicable to International Sales of Goods,1955; The Law Applicable to Contracts for the International Sale of Goods 1986; The Law Applicable to Intermediary Agreements and Agency, 1978.

[38]Award in Case No. 6360 of 1990, ICC BULLETIN, Vol. 1, No. 2, at 24 (1990); Award in Case No. 7205 of 1993, French company v. Owner of Saudi company, 122 J.D.I. 1031 (1995), and observations by J.-J. Arnaldez; Award in Case No. 7319 of 1992, French supplier v. Irish distributor, ICC BULLETIN, Vol. 5, No. 2, at 56 (1994); Award in Case No. 7177 of 1993, Greek agent of an Antiguan corporation v. Greek company, ICC BULLETIN, Vol. 7, No. 1, at 89 (1996); Award in Case No. 5885 of 1989, Seller v. Buyer, 16 Y.B. Comm.. Arb. 91, 92 (1991); ICC BULLETIN, Vol. 7, No. 1, at 83 (1996); Award in Case No. 5713 of 1989, Seller v. Buyer, 15 Y.B. Comm..Arb.70 (1990).

[39] **J. LEW, RELEVENACE OF CONFLICT OF LAW RULES IN PRACTISE OF ARBITRATIONS,** 451, 7 ICCA Congress Series (1994).

[40] BORN, *Supra* note 4, at 2132**; SJ TOOPE, MIXED INTERNATIONAL ARBITRATION 51 (1990).**

[41] Andrea Giardina, *International Conventions on Conflict of Laws and Substantive Law, in* **A.J. VAN DEN BERG**, ICCA CONGRESS SERIES NO.7, PLANNING EFFICIENT ARBITRATION PROCEEDINGS/ THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION, 459 (1996).

internationally agreed upon set of principles, this method might result in producing the best guidelines to solve conflict issues. However, a viable alternative, at least for the present purposes may be to decipher a set of general principles on conflict of laws among *only* those legal systems *connected to the dispute.*

The Closest Connection Method

Another method of resolving the conflict is to select the conflict rules of the legal system which has the closest connection to the dispute. It should be noted that the inquiry is not into the *state,* but the *legal system* which has the closest connection to the dispute at hand.[42] This practise has been followed by a number of arbitral tribunals to discern the applicable law. [43] The Rome Convention and various domestic legal systems also adopt this technique as one of the methods for selecting the applicable law.[44]

The selection of the *conflict rule* of the system most closely connected to the dispute, rather than the substantive law has some patent disadvantages.

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[42] **M.A. CLARKE, THE LAW OF INSURANCE CONTRACTS** 23 (1989); *See also*The Resolution 'The Proper Law of the Contract in Agreements between a State and a ForeignPrivate Person' of the *Institut de Droit International (adopted by the Institut at its Athens Session*, *September 4–13*, *1979*, 58 *AnnIDI* (1979) at pp. 193, 195 (Articles 1 and 5).

[43] Award in Case No. 1422 of 1974, 101 J.D.I. (Clunet) 884 (ICC Int'l Comm. Arb.); Award in Case No. 3742 of 1984, 111 J.D.I. (Clunet) 910 (ICC Int'l Comm. Arb.); Award in Case No. 4434 of 1983, 110 J.D.I. (Clunet) 893 (ICC Int'l Comm. Arb.); Final Award in Case No. 5885 of 1990, 1(2) ICC Ct. Bull.23 (ICC Int'l Comm. Arb.); Interim Award in Case No. 6149 of 1995, 20 Y.B. Comm. Arb.41 (ICC Int'l Comm. Arb.).

[44] Art 4(1) of the Rome Convention,*supra*note37; *See* §188 , Restatement (Second) of the Conflict of Laws of the United States of America,1971; §1-105 Uniform Commercial Code of the United States of America, 1978; Article 5 of the Foreign Economic Contract Law of the People's Republic of China,1985.

This is firstly because , in a multi-party contract, where there are several legal systems connected to the dispute, and there is no indication as to which one of these has the 'closest connection', the tribunal would have to revert back to the general principles of private international law to guide them to choose the system with the closest connection. Even to decide the factors to be taken into account in order to determine which connection is the closest requires the tribunal to apply general principles of international law. However, as discussed above, the there exists no uniform set of general principles, and therefore it imports a substantial degree of subjectivity into the selection of the 'closest' legal system.[45]

Secondly, after selecting the legal system with the closest connection, which is a complicated matter in itself, it requires the arbitral tribunal to analyze the various conflict rule of that system, which is also often quite complex. Thereafter, it again requires the tribunal to select a national legal system and apply the laws of such system to the dispute.

The author therefore observes that this approach present multiple levels of complicated and subjective and uncertain selection- first, on the means of technique of selecting closet connection, second on the applicable conflict rule from the system with the closest connection, thirdly the selection of another system through the conflict rule of the former system and lastly the application of the laws of that system. The parties may ultimately arrive at an applicable law which none of them ever intended to apply to their dispute.[46]

In any case, it is the opinion of the author, that if the tribunal does reach a decision on the legal system closest to the dispute, it is only logical to apply the substantive law of that system to the merits of the case, than to merely apply conflict rules of that system. For eg, if a tribunal arrives at a decision that the legal system with closest connection with the dispute is England, it is only logical to apply the English law to the govern the *contract;* rather than use the conflict-rules of the English law, which might point to say, Germany- which has little to do with the dispute.

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[45] *See* **GREENBECK, KEE &WEERAMANTRY,** *Supra* note 4, at **111.**
[46] *See* **BORN,** *supra* note 5, at 2133.

Direct Application of the Substantial Law

A general modern tendency has been to allow the arbitral tribunal considerable latitude in selecting their choice of law, while insisting that they do so by way of appropriate conflict rules.[47] In stark contrast to that approach, the post-modern 'direct application' method allows the arbitral tribunal to bypass the conflict rules altogether and select the substantive law that the arbitrators deem applicable to the dispute.[48]

This approach is being increasingly supported by arbitral tribunals.[49] In fact, this approach of dispensing with the conflict rules altogether , and simplifying the process by directly applying the substantive law of the countries that the arbitrators deem applicable has recently been developed into various national legal systems as well.[50]

However, a complication might arise with the application of this approach when the national law expressly points towards an application of a conflict rule,[51] but the parties choose to be governed by the rules of the various institutions, which have endorsed this rule.[52] In such a situation, party autonomy should be given prominence to the national

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[47] **A. REDFERN AND M. HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION, 128 (1991).**

[48] O. Lando, *Conflict of Law Rules for Arbitrators, in* 157-178 **FESTSCHRIFTFÜR ZWEIGERT (1981) ;**Yves Derains, *Attente légitime des parties et droit applicable au fond en matière d'arbitrage commercial international,* in TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 81 (1984-1985) ; Lalive, *Supra* note 35, at 10; MATTHIEU DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL 652 (1990) ; **GILLIARD,** *supra* note **5, AT 876.**

[49] Award in Case No. 1675, *in* **S. JARVIN & Y. DERAINS (EDS.), COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 197 (1990);** Award in Case No. 4132 of 1983, Italian company v. Korean company, 110 J.D.I. 891 (ICC Int'l Comm. Arb.); French company v. Swiss, French and Luxembourg companies, 105 J.D.I. 985 (1978); Belgian purchaser v. Belgian company, seller, 110 J.D.I. 897 (1983), 10 Y.B. Comm. Arb. *See also* Award in Case No. 6840 of 1991, Egyptian seller v. Senegalese buyer, 119 J.D.I. 1030 (1992).

[50]Article 1496 of The French Code of Civil Procedure,(1981); Article 187 of The Swiss Private International Law Act (1987); Article 1054 of Netherland Arbitration Act (1986); Article 28(1)(b) of the Indian Arbitration and Conciliation Act,1996.

[51] *Eg*: English Arbitration Act, 1996.

[52] *See,* Art. 28(1) of the 1997 AAA International Arbitration Rules; Art.17(1) of the 1998 ICC Rules; Art. 22.3 of the 1998 LCIA Rules; Art. 34.1 of the ACICA Rules; Art. 25.1 of the KCAB International Rules; Artcle 15 of the BANI Rues; Rule 6 of the Indian

rules, and the arbitrators should be allowed to choose the applicable law without reference to any particular conflict rules.

It has been argued that this method takes away the *channelling* effect of the conflict rules, and thereby leaves the determination of the law governing the merits to the individual subjective choice of the arbitrators.[53] Therefore, it has been urged that even in legal systems where such direct choice approach is endorsed, the arbitral tribunal should, *suomoto* undertake a defined and objective conflict of law analysis to determine the applicable law.[54]

It is submitted that the first criticism, with regard to subjectivity is not well placed. This is primarily because, as it has been observed above, even in the application of conflict rules, there remains substantial divergence among arbitral tribunals with regard to the application of one rule above another. Therefore, subjectivity cannot be viable argument to discredit a rule. However, the second mandate on the arbitrators is an agreeable proposition, as long as it is left to the choice of the tribunals.

Conclusion

The uncertainty prevailing around the application of possible conflict rules is indeed perplexing, and yet most interesting. As the author has tried to establish in this article, although there are various methods which are open to the arbitrators to determine the applicable governing law, the multiplicity of these methods, coupled with a lack of hierarchy and unclear boundary between the traditional and modern approaches makes it impossible to discern any uniform practise and trend. In reality, it is ultimately the subjective choice and reasoning of the arbitrator, based of course, on their own experience and background, that determines the applicable law. Hence, it would be recommended for the parties to expressly mention a choice of governing law while concluding the contract.

Arbitration Centre Rules. For a commentary, *see*YVES DERAINS AND ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 221 (1998).

[53] *See,* **BORN, Supra note 5, at 2137; P**artial Award in Case No. 8113 of 2000, 25 Y.B. Comm. Arb.324, 325 (ICC Int'l Comm. Arb.).

[54] **BORN,** *id.*

In case such a choice is not made, it would be a wise step for the tribunal to first approach the dispute through 'cumulative method'. However, in case of a 'true conflict', when that does not apply, the tribunal should choose the substantive law of the seat the seat, for the security and predictability that it provides. In the alternative, when such direct application is impliedly excluded by the parties, the tribunal might consider the application of the conflict rules of the seat of arbitration. Failing that the tribunal should consider the 'general principles' of the connected legal system. 'Closest connection' being itself one of the very few agreed upon general principles should be the next obvious choice, in case any other 'general principle' is discernable.

It is admitted that there are several types of other types of rules also used by the tribunals, but a thorough examination of every rule is beyond the scope of this paper. This article has attempted to provide a logical hierarchy among the most *generally* used conflict-rules, based upon an analysis of the advantages and disadvantages of each individual rule. However, the author concludes by recommending wider acceptance of the various international conventions on conflict rules, thereby giving rise to a uniform international set of conflict rules. Once this is achieved, the applicable law should be decided keeping these conventions and principles therein as the touchstone. That would make choice of law predictable, neutral and truly international in character.