



Munich Personal RePEc Archive

**Law applicable to merits of the  
arbitration dispute (an overview of the  
English, Swiss and French arbitration  
laws)**

Athanasakis, Dimitrios

1 September 2008

Online at <https://mpra.ub.uni-muenchen.de/10334/>  
MPRA Paper No. 10334, posted 09 Sep 2008 00:51 UTC

# **Law applicable to the merits of the arbitration dispute (an overview of the English, Swiss and French arbitration laws)**

**Dimitrios Athanasakis, LLB, LLM, Advocate (Thessaloniki)**

Due to the plethora of international elements of a contract to arbitrate, i.e. nationalities of the parties, nature of the transaction and the legal background of the arbitrator, questions of law applicable to the substance of the dispute are always at stake. In the course of arbitral proceedings, issues of law applicable to the arbitral dispute are raised after a concise examination of the law applicable to the arbitration agreement, namely whether the parties have consented to arbitrate the subject-matter in issue and the law applicable to the arbitral procedure. The present study draws upon the principle of party autonomy, in both theoretical and practical aspects in the context of the freedom of contract principle. It further considers the restrictive role of mandatory rules upon the above principle. Light shall also be shed on the current trends of international mandatory rules and public policy as discussed in ICC awards by experienced arbitrators and solely developed within the ambit of international commercial arbitration. Furthermore, a consistent examination of possible choices of law and rules of law such as a-national rules i.e. *lex mercatoria* and general trade usages will sketch the existing variety of possibilities in choice of law both on the parties and lawyers leading arbitrations. The last Section will independently examine an absence of choice of law, and several doctrines which envisaged the stance of the three distinguished European arbitral systems: English, Swiss and French.

## **Introduction**

In recent years expert English practitioners have stressed the rigidity and malfunctioning of previous English arbitral legislation and a new Arbitration Act came into force in 1996 to clarify vital issues in the topic. However, seven years later the above Act still reserves the arbitrator's liberty to directly choose himself an applicable law, without going through a conflict method or giving him any guidelines, as Swiss law does, to choose the applicable law. This does pose impediments on the evolution of English arbitration. Switzerland on the other hand being traditionally neutral and distant from any influences of common European trends, has developed a constructive arbitral system. French law has been more liberal by bringing into force a new Arbitration Act in the early 1980's.

The lack of developed countries to reach a consensus on issues of law applicable to the merits of the arbitral dispute and choice of law methods renders the drafting of a common text difficult. Nevertheless private international law makers were convinced of the need to revamp national and institutional arbitration rules for the sake of international commerce. Historically, disparities among national legal systems have established trade competition and thus achieved its evolution. In any case, the parties are free to set their own rules by choosing a given national system which best serves their interests and expectations.

Nonetheless, the following analysis considers consistent methods used by arbitrators in the course of delivering an award. Irrespective of an express, implied or absence of choice of law by the parties, the arbitrator in practice has pioneered more flexible and convenient techniques, suited to commercial expectations. These in turn should ensure the lack of any objections at the possible place of enforcement.

## **Section I: Party autonomy in arbitral systems**

### **1.1 Party autonomy in arbitral systems- General Observations**

The principle of party autonomy emanates from the freedom of contract doctrine in international commercial law. Professor *Bonell* has put forward an appropriate definition: “The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order”.<sup>1</sup> In the context of private international law, this entails the recognition of the parties’ right in a domestic or international contract to select the law which shall govern their transaction. Generally, the “mission of private international law” is to determine the scope of party autonomy and the formal requirements connected with its exercise, even in cases where the parties have made an express choice of law either through an arbitration clause or a choice of law clause within the contract.<sup>2</sup>

*Berti* has illustrated the free choice of law by the parties as “the most essential cornerstone in international law, recognised in practically all national legal systems”.<sup>3</sup> Rigid objections to the party autonomy concept were motivated on the basis that by choosing a law to govern their rights the parties are awarded excessive powers of a legislative body who choose a law threatening the State’s sovereignty (the *territorialist attitude*). However, as a matter of principle, contractual stipulations should not extend to violate the authority of territorial sovereign and national public policy considerations. In the past many countries such as the ex socialist countries of Eastern Europe or China exercised strict control over the choice of law in international contracts concerning mostly a private and a state party. But

---

<sup>1</sup>Michael Joachim Bonell: “*The UNIDROIT Principles Of International Commercial Contracts*”, <http://www.unidroit.org/english/principles/pr-exper.htm>, at page 7.

<sup>2</sup>Guiditta Cordero Moss- Tano Aschehoug: “*International Commercial Arbitration*”, Rome 1999, at page 246.

<sup>3</sup>Stephen V. Berti: “*International Arbitration in Switzerland*”, Kluwer Law International, London 2000, at page 198.

nowadays the position has changed by allowing a “delegation of sovereign powers to private individuals”.<sup>4</sup>

The freedom of choice principle was celebrated in the rulings of the Athens session of 1979 of the Institute of International Law.<sup>5</sup> The same Institute declared the full autonomy of the parties to choose substantive rules in its Santiago de Compostela session in 1989 and its Basle resolution in 1992 respectively.<sup>6</sup> Much earlier though, the Geneva Convention of 1961 had pronounced the principle of party autonomy in Article VII para 1. Nevertheless, this provision is of limited effect, since the parties have to choose “one law”, namely a state law. The concept of “law” in the UNCITRAL Rules is reflected in Article 33(1) and interpreted as making a choice of law in force even as amended. This involves the question of time of choice which should not be an impediment to the arbitral dispute. “Law” may also comprise a Convention which has not yet been ratified and in that case shall be treated as *lex mercatoria* with similar reservations<sup>7</sup>. Furthermore, the parties are free to vary the law applicable to the dispute normally by a subsequent agreement<sup>8</sup>. On the other hand, to ensure predictability of a choice of “law” it is generally accepted that, unless otherwise specifically agreed by the parties, a choice of law clause referring to a particular law does not comprise its conflict of laws rules including *renvoi*.<sup>9</sup>

In regard to party autonomy, the innovation of arbitration, unlike ordinary litigation before national courts, lies primarily in the freedom of the parties to choose not a single law but also a-national rules and other conflict methods, enabling a choice of law appropriate for the case at hand. Departing from this concept, modern arbitral laws empower both the parties

---

<sup>4</sup> *Ibid.*

<sup>5</sup> It was declared in a resolution Article 2.

<sup>6</sup> Article 6 and Article 2.1.

<sup>7</sup> Matti Pellonpää-David D.Caron: “*The UNCITRAL Arbitration Rules As Interpreted And Applied*”, at page 88.

<sup>8</sup> Redfern/ Hunter: “*Law and Practice in International Commercial Arbitration*”, London 1999, para 2-24: This is so inferred by the Rome Convention Article 3.

<sup>9</sup> Unlike the Rome Convention and other private international law texts, to this effect has purported Section 46 (2) of the EAA of 1996.

and the arbitrator to choose “rules of law” which may not have a state origin.<sup>10</sup> They can be an autonomous system or part of a specific national law.

In the first place, the English legislator in the EAA of 1996 Section 46(1) preferred the more ambiguous and flexible wording of “other considerations” to the expression “rules of law” in order to close the door to a-national rules. Having allowed the parties in sub-section a to choose “a law” it is nowadays accepted that sub-section b allows them to choose “rules” of law, amiable composition or equity. In Switzerland the freedom of choice of law is enunciated in Article 187 of the *LDIP*. Para 2 of this article allows the parties to choose “rules of law” by authorising the arbitrator to decide on equity. This is a restrictive provision not influenced by other criteria of private international law.<sup>11</sup>

Party autonomy is broad enough to allow a choice of neutral law. Whatever the motivations of the parties, the choice of a neutral law is valid under all arbitral systems. Lord Wright in the *Vita Food* case had ruled that: “Familiar principles of English commercial law have gained a worldwide importance which make it reasonable for parties to commercial contracts to subject their transactions to English law, although there has nothing to do with the facts of the particular case”.<sup>12</sup> Nevertheless, the freedom of choice allowing the parties to choose a neutral law was treated differently in the past. Private international law subjected the validity of the choice of law made by the parties to an “objective” connection with the economy of the contract. For the purposes of modernising private international law theory and practice this theory has been abandoned. This is also reflected by the combined effect of Article 1(1) and 3(1) of the Rome Convention<sup>13</sup>: the parties may choose the law of another country, even a non member one, and the Courts of contracting states must, subject to the mandatory rules of Article 3(3), give effect to this choice.<sup>14</sup> While the Rome Convention does

---

<sup>10</sup> Article 22.3 of the LCIA Arb. Rules, Article 17.1 of the ICC Arb. Rules, Article 1496 of the French NCPC.

<sup>11</sup> Andreas Bucher: “*Le nouvel arbitrage international en Suisse*”, Bâle 1988, at page 83.

<sup>12</sup> *Vita Food Products v. Unus Shipping Co.*, [1939] AC 277, at page 290.

<sup>13</sup> The EC Convention on the Law Applicable to Contractual Obligations (Rome 1980) was entered into force in England by the Contracts (Applicable Law) Act 1990.

<sup>14</sup> Dicey and Morris on “*The Conflict of Laws*”, Volume 2, London 2000, at pages 1216-1217

not apply to arbitration agreements by virtue of Section 1. para 2(d), an English arbitrator is provided with consistent solutions offered by the above convention in choice of law issues.

## 1.2 Ascertaining the applicable law- English Background: From the development of “Proper Law” to the Rome Convention.

**1.2.1 Proper Law - Express choice of law:** The doctrine of proper law of the contract which is attached to the principle of party autonomy has mainly evolved in England and countries which follow similar legal systems while continental European legal systems have followed the concept of applicable-governing law.<sup>15</sup> Professor *Lalive*, sitting in an ICC arbitration has affirmed that: “There are few principles more universally admitted in private international law than that referred to by the standard terms of the “proper law of the contract”.”<sup>16</sup>

In English legal tradition the solutions offered by the *lex loci contractus* (law of the place where the contract was made) and the *lex loci solutionis* (the law of the place where the contract was to be performed) fell short of meeting new standards in the field of private international law.<sup>17</sup> Departing from this position, every international contract has its proper law which has been expressly or impliedly chosen by the parties to govern their contractual relations. Even in the absence of choice, the court has to impute an intention or determine the proper law which the parties would have intended to govern their dispute.<sup>18</sup> English scholars, relying on previous case law, have given a simple interpretation to the term: “the law governing many of the matters affecting the contract.”<sup>19</sup> Lord Diplock in *Compagnie Tunisienne* stated that: “*Proper law* means the system of law which governs the interpretation and the validity of the contract and the mode of performance and the consequences of

---

<sup>15</sup>The concept of proper law was more restrictively construed than the term “applicable law”, in a sense that it is confined to a legal system *per se* and does not freely accommodate something less than a legal system i.e. legal rules or rules other than a legal system.

<sup>16</sup> ICC 1512/1971, C. of ICC Aw. 1974-1985, at pages 3-5.

<sup>17</sup>[http://users.ox.ac.uk/~alls0104/IDS13\\_arbitralprocess3.htm](http://users.ox.ac.uk/~alls0104/IDS13_arbitralprocess3.htm). The *lex loci contractus* was criticised on validating an otherwise invalid contract and the *lex loci solutionis* on the difficulties in ascertaining the law in a “bilateral” contract, namely a contract where each party has to perform its obligations to a different country.

<sup>18</sup> *Mount Albert Borough Council v Australasian Temperance and General Assurance Society* [1938] AC 224, at page 240. The expression “proper law of the contract includes the legal order governing the transaction according to the willing of the parties or, when the intention of the parties in this respect are non-existent or cannot be derived from the surrounding circumstances to the legal order showing the closest and most real connection with the transaction”.

<sup>19</sup> Chesire and North: “*Private International Law*”, Butterworths (1999), at page 534.



breaches of the contract”.<sup>20</sup> Furthermore, Lord Willberforce in the *Amin Rasheed*<sup>21</sup> case defined it as “the law which governs the contract and the parties obligations under it”.

It has been observed that the autonomy principle affords the parties the right to a free choice of law. In the past decades, scholars were divided as to the extent of these powers.<sup>22</sup> The above principle is examined in conjunction with the common intentions of the parties when inserting the arbitration clause into a contract.<sup>23</sup> In England, until the passing of the Rome Convention, lawyers and judges had followed two views.<sup>24</sup> Relying on the *Vita Food*<sup>25</sup> case, the fundamental rule of conflict of laws is that the intention of the parties is the “general test” of what law is to apply and consequently an express choice of law is “conclusive”. Lord Wright asserted that: “ The express statement by the parties of their intention to select English law as the law of the contract should be conclusive provided that the intention expressed is *bona fide* and legal, and provided that there is no reason for avoiding the choice on the ground of public policy ”. The second view treats an express choice of law as merely being an element pointing to the proper law or “ only *prima facie* evidence ”, or only “ one of the factors to be taken into account ” or “ one but by no means the only ”, matter to be taken into consideration.<sup>26</sup>

In the context of arbitration, it is common ground that the arbitrator does not have the power to substitute the parties’ choice with his own when there is an express choice of law,

---

<sup>20</sup> *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572, at page 603. Lord Diplock stipulated that: “The first stage to trace proper law is to determine whether the parties have intended by their contract to exercise any choice of law at all and if they did to determine what was the system of law which they selected, by applying ordinary rules of English law relating to the construction of the contracts. In the case where the Court finds that no such choice has been made, the second stage shall be to determine itself what the proper law is by using the “closest and most real connection test ”. The same principle was spelt out by Lord Morris who asserted that: “The general rule is that the proper law of a contract is that law by which the parties intended that their rights should be determined”.

<sup>21</sup> *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* [1984] AC 50, at page 69.

<sup>22</sup> A.F.M. Maniruzzaman: “ *Choice of Law in International Contracts-Some Conflict of Laws Issues* ”, J.I.A. Vol.16 (1999), at page 164.

<sup>23</sup> ICC 6379/1990, C. of ICC Aw. 1974-1985, at pages 134-142.

<sup>24</sup> Dicey and Morris on “ *The Conflict of Laws* ”, Volume 2, London 2000, at pages 1216-1217.

<sup>25</sup> *Vita Food Products v Unus Shipping Co.*, [1939] AC 277, at page 290. Lord Diplock has stated as follows: “ The proper law of the contract was English law since the provisions of the policy taken as a whole by necessary implication led to the inevitable conclusion that it was the parties’ intention that their mutual rights and obligations under it should be determined in accordance with the English law of Marine Insurance ”.

<sup>26</sup> *Op.cit.*, *supra* n. 24.

which is clear and unambiguous, and when no valid reason has been invoked to deny him the right to give effect to such a choice. However surprising a choice of law may seem, the arbitrator must respect it. This is in accordance with Article 3(1) which provides that the choice must be expressed or demonstrated with “reasonable certainty” by the terms of the contract or the circumstances of the case otherwise regard shall be given to Article 4 of the above Convention.<sup>27</sup> *Blessing*<sup>28</sup> draws an effective distinction between certain limitations that should apply to the parties’ choice namely a) a choice *in fraudem legis* will not be recognised: “A party who, on purpose makes a choice of law so as to circumvent the applicability of an undesired law, will not deserve protection” and b) even where the parties have chosen a “particular national law” there will be foreign laws that tend to claim extra-territorial application.

In the final analysis, the arbitrator is called to honour the legitimate expectations of the parties in the formation of an international contract. Arbitral theory and practice point to the effect of the binding force of the proper law which, as a principle of conflicts of laws, lies in the parties’ autonomy. In this sense, even the place where the award is made is bound to give effect to the agreement of the parties.

### **1.2.2 Dépeçage:**

This is the French term for what is known as “split proper law” method. The Institute of International Law has set out adequate definitions of the terms in Basle resolution in 1991.<sup>29</sup> International Conventions such as the ICSID Convention of 1965<sup>30</sup> favour the “operational relationship between the applicable Contracting State law and such rules of international law

---

<sup>27</sup>J.H.C. Morris “*The Conflict of Law*”, London 2000, at page 329. It is also possible that although an express choice of law is omitted, the terms of the contract i.e. standard forms or practices of a particular market may be properly interpreted as pointing clearly to the parties’ assumption that the law of a particular country shall govern.

<sup>28</sup> *Op.cit.,supra* n. 3.

<sup>29</sup> Article 7.

<sup>30</sup> Article 42(1).

as may be applicable”. Professor *Fouchard*<sup>31</sup> invoking the *Aramco* case asserts that since from the wording of Article 1496 of the French NCPC “rules of law” are allowed, this provision validates *dépeçage* without it being necessary to justify and isolate every part of the contract. This view is also complemented by the Rome Convention in Article 3 (1) which, although it refers to the whole or part of the contract, allows the parties to select two or more laws to govern different parts of the contract. It is observed that this method gives the parties a wide range of choice and even opponents of the use of a-national law have conceded that through *dépeçage* parties can free themselves from national restrictions.<sup>32</sup> Generally, *dépeçage* represents the frontier of party autonomy, signifying the legal pluralism within the context of the same contract.<sup>33</sup> Private international law experts have stressed<sup>34</sup> that in the case where the parties have chosen different laws for different parts of the contract this choice must be logically consistent.<sup>35</sup>

However welcome the application of *dépeçage* may be, it should be applied with caution. Arbitrators often exercise certain discretion in complex commercial contracts to determine the relationship of different laws in an arbitration clause. In the *Liamco* case the sole arbitrator has addressed the issue on an appropriate basis. He applied one system of law as the “principal proper law” and treated the others as subsidiary.<sup>36</sup> By doing so, he sought to preserve the “unity” of the proper law by subordinating the “split” laws as incorporation to the principal proper law.

---

<sup>31</sup> Fouchard, Gaillard, Goldman “*Traité de l’arbitrage commercial international*”, Paris 1996, at page 806.

<sup>32</sup> Peter Nygh “*Autonomy in International Contracts*” (1999), at page 176.

<sup>33</sup> Dicey and Morris “*The Conflict of Laws*” 10<sup>th</sup> ed. (1980), at page 749.

<sup>34</sup> *Op.cit.,supra* n. 19, at page 553. Two situations are distinguished: a) when the different laws cannot be reconciled, both choices fail and the criterion to determine the applicable law is the conflict of rules in the absence of choice and b) when for the remainder of the contract no choice of law has been made it will again be treated as an absence of choice.

<sup>35</sup> Peter Nygh: “*Autonomy in International Contracts*”, Oxford 1999, at page 133. The author insists that if no express choice has been made as to the remainder of the contract, the *objective default test* clearly becomes applicable to the whole of the contract.

<sup>36</sup> *LIAMCO v. Libya*, 62 ILR 140, 1980.

### 1.2.3 Implied choice in the context of Private International Law.

Having abandoned the old fashioned doctrine of “presumed intention of the parties”, the new test at common law is to ascertain whether the parties have made an implied choice of law through a clear indication of the intention drawn from the terms of the contract and the surrounding circumstances. This is known as the “inferred intention test”.<sup>37</sup> *Morris* has sketched the intention criteria specifically referring to the ‘language’<sup>38</sup> of the contract and the ‘surrounding circumstances’<sup>39</sup> at the time of making it. By citing a case, he identified the concept of common law in the true intention of the parties in accordance with sound ideas of business and reasons of convenience.<sup>40</sup> For many years English law has treated the parties’ choice of the place of arbitration as a “conclusive presumption”. This presumption in turn pointed to the respective *lex fori* as the law applicable to their dispute as illustrated by the learned judge in the *Tzortzis* case.<sup>41</sup> This theory is now disputed and does not constitute good law. It was further argued in the case of *Compagnie Tunisienne* by Lord Wilberforce that “an arbitration clause is an indication to be considered together with the rest of the contract and the relevant surrounding facts”.<sup>42</sup> In arbitral practice a choice of an arbitral forum is rarely

<sup>37</sup> *Op.cit.*, *supra* n.35, at page 105.

<sup>38</sup> In an ICC award 6560/ 1991, C. of ICC Aw. 1974-1985, at pages 148-151, the arbitrator connected the terminology to the language used in a contract and stated as follows: “In the context of international arbitration under an international contract there is no need to place any substantial reliance on the fact that the English language was used. It is nowadays the lingua franca of all trade and in my own experience is frequently used between nationals of the same non English speaking country”.

<sup>39</sup> Dicey and Morris on “*The Conflict of Laws*”, Volume 2, London 2000, at page 1215. The authors invoke two respective cases. 1. *Amin Rasheed Shipping Corp. v Kuwait Insurance Co.* [1984] AC 50 and 2. *Whitworth Street Estates (Manchester) Ltd. v James Miller and Partners Ltd* [1985] AC 583. The latter case concerned an implied choice of law as a result of the use of a RIBA standard form. The question was one of construction of the contract. In construing the contract it was permissible to take into account the surrounding circumstances at the conclusion of the contract.

<sup>40</sup> J.H.C. Morris: “*The Conflict of Laws*”, London 2000, at page 323. *Jacobs v Crédit Lyonnais* [1884] 12 Q.B.D. 589.

<sup>41</sup> *Tzortzis and Sykias v Monark Line A/B* [1968] 1 W.L.R. 406. Lord Denning had stated as follows at page 411: “The circumstance that parties agree that any differences are to be settled by arbitration in a certain country will lead to an inference that they intend the law of that country to apply”. Lord Justice Salmon stated at page 413: “Although the contract was most closely connected to Swedish law, the presumption in favour of English law arising from the arbitration clause was “irresistible”. The principle was *qui elegit iudicem elegit jus*. An express choice of Tribunal was treated as an implied choice of English as the proper law.

<sup>42</sup> *Compagnie Tunisienne de Navigation SA v Compagnie d’Armement Maritime SA* [1971] AC 572, at page 596. In this case there was an arbitration clause for arbitration to be held in London. However, French law applied as

equated with a choice of law. It is believed that an implied choice of law should be restricted to instances where the parties' contractual provisions *clearly* and *unequivocally* manifest a preference for a particular law, i.e. a standard Lloyd's policy of marine insurance, as was the reasoning in *Whitworth Street Estates*.<sup>43</sup>

The Rome Convention of 1980 sought to highlight the issue of an implied choice of law. Article 3(1) reads that an implied choice is one "demonstrated with reasonable certainty" by the terms of the contract or the circumstances of the case. The Court may hold that, in the light of all the facts, the parties made a real choice of law although this is not expressly stated in the contract.<sup>44</sup> Furthermore the Guiliano-Lagarde Report states that "in no case shall the Court infer a choice of law that the parties might have made where they had no clear intention of making such a choice". This report sets forth a number of examples.<sup>45</sup>

#### **1.2.4 Special case-Observation of implied choice of law in institutional arbitration:**

An implied choice of law may be established by the choice of the parties to submit to institutional arbitration. This conduct is also known as an indirect choice of law. Moreover, an institutional arbitration rule may explicitly mention further recourse for the designation of the applicable law. To the extent that the respective arbitration law contains imperative provisions, the above designation will be considerably restricted.<sup>46</sup> Notably, some institutional rules as Article 4 (2) of the ZCC arbitration rules allow the arbitrator to resort to national private international law provisions, namely the Swiss *LDIP*. But some authors have criticised

---

the proper law of the contract.

<sup>43</sup> *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] A.C. 583

<sup>44</sup> *Op.cit.,supra* no 24, at page 1227.

<sup>45</sup> *Ibid.*A) a standard form of contract as in *Amin Rasheed*,B) a previous course of dealing between the parties under contracts containing an express choice of law or "an express choice of law in related transactions between the same parties". C) a choice of law may be reasonably inferred from the choice of the Courts of a particular country to determine a dispute: "qui elegit iudicem elegit ius". This approach was also encompassed in *Egon Oldendorff v Libera Corporation*(No 2)[1996] 1 Lloyd's Rep 380 .

<sup>46</sup> Article 17 of the ICC Rules provides that the parties' autonomy may be restricted but not limited to one law as in Article VII para 1 of the Geneva Convention of 1961.

this provision which is a *réglement dispositif*, in the sense that it may constitute an “indirect derogation” of otherwise applicable arbitration rules.<sup>47</sup> Such modifications may validate an initially null clause with regard to the applicable law. Accordingly, the parties’ conduct in submitting different parts of their contract for resolution by several arbitral institutions may infer an attempt for *forum shopping*.

Finally the theory of implied choice of law has been criticised for uncertainty and unpredictability because it is difficult to ascertain one’s intention at a given time. However, the application of certain presumptions may still provide sufficient clarity.

---

<sup>47</sup> Jean-François Poudret- Sébastien Besson : “*Droit Comparé de l’ arbitrage international*”, Bruxelles 2002, page 612. With the exception of contrary indication these material dispositions (*dispositions matérielles*) of a national law and not its conflict rules do not allow for the application of *renvoi*. This does not imply that dépeçage is excluded.

## **Section II: Mandatory Rules**

### **2.1 Two theories:**

To the extent that party autonomy is still perceived within the realm of national or international interest, it shall be limited by considerations of mandatory rules and public policy of the forum or a third country. In the context of arbitration practice, two relevant approaches have been developed:

1. Traditional-Legalistic approach: The concept is that the arbitrator has to take mandatory rules into account. This is mirrored in Article 7(1) of the Rome Convention and Article 19 of the *LDIP*.<sup>48</sup> The arbitrator, although he is not a national judge, may invoke mandatory rules and should not be passive to the parties' conducts. Deviating from this task, arbitration would be a means of *fraude à la loi*.<sup>49</sup>

2. Delocalisation: Given that arbitration agreements are usually entered into between parties of relatively equal bargaining power, the operation of mandatory rules in this area may be limited in practice. A narrow interpretation of such statutory rules would enhance possibilities of enforcement and not undermine the international arbitral process.<sup>50</sup> Modern arbitral practice is orientated to the exclusion of overriding mandatory rules in favour of the parties' autonomy, which should not be limited by such exclusions.<sup>51</sup>

### **2.2 Categories of mandatory rules:**

#### **2.2.1 Legal order of a third Country:**

*Lois de police*, as the French term is used preferentially in international commercial arbitration. An arbitrator is called to take into account the rules forming part of another

---

<sup>48</sup> However in international arbitration Article 187 applies as *lex specialis*.

<sup>49</sup> Jean-Baptiste Racine: " *L'Arbitrage Commercial International et l' Ordre Public* ", Bibl. de Dr. Pr. Tome 309, 1997, at page 238.

<sup>50</sup> Richard Garnett: " *A practical guide to international commercial arbitration* ", Oceana Publications, U.S. 2000, at page 24.

<sup>51</sup> ICC 1512/ 1971, C. of ICC Aw. 1974-1985, at pages 3-5.

judicial system from that chosen by the parties to govern the dispute. At the same time he shall not deviate from his task in making a strict application of the law chosen by the parties. The rationale of their application dovetails with their aim to serve public policy independently of any rule of conflict. A close connection between the subject-matter of the parties' contract and the jurisdiction area or State that has promulgated the mandatory rule must be established.<sup>5253</sup> Growing significance has been attached by some scholars to a functional approach which has developed to prevent any choice of law which in turn would avoid their application. In that sense, the mandatory rules are imposed irrespective of the applicable law.<sup>54</sup> The latter approach necessitates the application of private and public law rules aiming to protect the weaker party for example a consumer, an employee or vital public interests such as tax law.<sup>55</sup>

The latter approach is also encompassed by the Rome Convention which poses two requirements in Article 7: The rule in question must not only be incapable of being derogated from by the contract as Article 3(3) requires but it must also be regarded by the State enacting the rule as applicable whatever law applies to the contract as a whole.<sup>56</sup> Until the early 1980's mandatory rules of a third country was an unfamiliar concept to English lawyers. Upon ratifying the Rome Convention of 1980 the United Kingdom relied on Article 22 and did not permit the application of Article 7 (1) which gives effect of foreign *lois de police* or international mandatory rules to the forum.<sup>57</sup> Exceptionally the English Court of Appeal has allowed consideration of foreign mandatory rules in *Ralli Bros*.<sup>58</sup> On the other side of the

---

<sup>52</sup> Stephen V. Berti: "*International Arbitration in Switzerland*", Kluwer Law International, London 2000, at page 251. The author further stresses that the result of their application must in all circumstances qualify as an "appropriate result".

<sup>53</sup> ICC 4462/1985, C. of ICC Aw. 1974-1985, at pages 3-29. The dispute arose between the Libyan National Oil Company and a US oil Company. The law applicable to the contract was Libyan law. Under US law the contract could not be performed by virtue of *force majeure*. However a close connection of the dispute with US law was not established and therefore the arbitral tribunal applied Libyan law which did not establish *force majeure*.

<sup>54</sup> Guiditta Cordero Moss, Tano Aschehoug: "*International Commercial Arbitration*", Rome 1999, at page 338.

<sup>55</sup> Article 5 para 2 and Article 6 para 1 of the Rome Convention.

<sup>56</sup> J.H.C. Morris: "*The Conflict of Laws*", London 2000, at page 347. \_

<sup>57</sup> Horacio A. Grigera Naón: "*Choice-of-law problems in international commercial arbitration*", Tübingen 1992, at page 167. The author suggests that case law in England that in the absence of statutes or treaty provisions English Courts may allow the application of such rule

<sup>58</sup> *Ralli Bros v Compania Naviera Sota y Aznar* [\[1920\] 1 K.B. 614](#)



English Channel, France, unlike the UK, has ratified Article 7(1)<sup>59</sup> of the Rome Convention. This country follows the legalistic approach by allowing foreign mandatory rules to apply where they have a close connection with the dispute.

In some ICC awards foreign mandatory rules will be considered in the case of an embargo as laws of *force majeure*.<sup>60</sup> The performance will become illegal and the aggrieved party may plead a *force majeure* situation, unless mandatory rules are not recognised by the arbitral tribunal. This is often the case in some state contracts. But the characterisation of some contracts as contracts of “immorality” on the grounds that foreign mandatory rules are not taken into consideration, requires caution.<sup>61</sup> Consequently, a contract should not be void due to illegality because of the sole fact that it permits a party to conclude a transaction abroad which is illegal under local law.

### **2.2.2 Mandatory rules of the proper law of the contract (*lex causae*):**

It has been argued that once a choice of law has crystallised, the dispute is subject to this law, including its mandatory rules. In a recent ICC award<sup>62</sup> which examined the application of Articles 85 and 86 of the Rome Treaty in Competition issues, the arbitral tribunal has applied mandatory rules *ex officio* in the same way as a national judge would do. Generally, respect for the mandatory rules of the *lex causae* is imposed both on the arbitrator and the *amiable compositeur*.<sup>63</sup> Swiss practitioners however have subjected their application to an

<sup>59</sup>The Rome Convention has come into force in France on the 1<sup>st</sup> of April 1991. N° loi: 82-523- date of publication on JO : 03.03.1991.

<sup>60</sup> Stephen V. Berti: “ *International Arbitration in Switzerland* ”, Kluwer Law International, London 2000, at page 253. *Blessing* mentions a ZCC case namely *Krupp v Kopex* where the arbitral tribunal had to consider carefully international trade sanctions since it might have to declare a contract terminated or extinct due to its suspension over a longer period of time and determine the consequences thereof.

<sup>61</sup> Generally contracts of “immorality” are subject to annulment. It shall be recalled that the ICC case no 1399/1967 C. of ICC Aw. 1974-1985, at page 18 concerned this issue. The facts briefly consisted of a contract which was concluded between a french and mexican party, subject to foreign law and aiming at escaping customs laws of Mexico. Taking into consideration that French law does not take into account customs laws abroad the Judge refused to nullify the contract for “illicit cause”. The justification was on the grounds that “there is nothing immoral or illicit in not respecting a law which is not of competent application”.

<sup>62</sup> ICC 7181/ 1992, C. of ICC Aw. 1991-1995, at page 55.

<sup>63</sup> Jean-Baptiste Racine: “*L’Arbitrage Commercial International et l’ Ordre Public*”, Bibl. de Dr. Pr. Tome 309, 1997, at page 240.

“application-worthiness” test (*Anwendungswürdigkeit*), whether the choice of law was made by the parties or the arbitrator, otherwise such rules should be scrutinised “as pertaining to an extraneous legal order”.<sup>64</sup> The arbitrator should test the legitimacy of the particular norm to impose itself on the parties. Interestingly, the issue emerging is whether the parties intend to submit to rules of public policy of the *lex causae* and whether then the question of nullity of a contract arises, recourse should be made to the *lex causae* for what is not regulated in the contract. Ultimately, the arbitrator should focus on a contract *favour validatis* without being restricted at the same time<sup>65</sup>.

### **2.2.3 Mandatory rules of the place of arbitration (*lex fori*):**

*Bucher*<sup>66</sup> commenting on *ad hoc* arbitration justified the application of mandatory rules of the place of arbitration as having “*des liens étroits avec le litige*”. When the parties intentionally purport to derogate from mandatory rules of the *lex loci arbitri* or the arbitrator for the above grounds independently applies a conflict rule, mandatory norms of the private international law of the *lex loci arbitri* shall in any case apply. Remarkably, in regard to institutional arbitration the arbitral tribunal has to respect the mandatory provisions of the Arbitration Act prevailing at the place of the arbitration which in turn prevails over institutional provisions<sup>67</sup>. But, the *LDIP* in the arbitration chapter establishes only one imperative rule. This is Article 182(3) of the *LDIP* which refers to the equal treatment of the parties.

---

<sup>64</sup> *Op.cit.*, *supra* no 59, at page 220. Furthermore he cites the following case: *In Re Banco Nacional de Cuba v Banco Central de Chile* ATF II 348. The Swiss Federal Supreme Court had ruled that in general mandatory rules that only aim at protecting a state’s financial, fiscal or political interests in most cases have not been regarded as meeting the “application-worthiness test”, unless there exist very particular circumstances or connecting factors justifying their application.

<sup>65</sup> Jean-Baptiste Racine: “*L’Arbitrage Commercial International et l’Ordre Public*”, *Bibl. de Dr. Pr.*, Tome 309, 1997, at page 241.

<sup>66</sup> Andreas Bucher: “*Le nouvel arbitrage international en Suisse*”, Bâle 1988, at page 81.

<sup>67</sup> Article 3(a) of the WIPO Arbitration Rules.

In England the position was clarified early in the case of *Liverpool Borough Bank v Turner*.<sup>68</sup> Upon ratifying the Rome Convention, regard was shown to Article 7(2): The general principle is that a UK Statute does not normally apply to a contract unless the governing law of the contract is the law of some part of the UK or unless it is an overriding statute in the sense that it must be applied irrespective of the rules of conflict of laws. This does not automatically render an express choice of law totally invalid for purposes not related to the statute. The Court shall apply the governing law of the contract as selected by the parties<sup>69</sup>.

But arbitration has gone down the path to further progress. Additionally, the concept of mandatory rules of the *lex loci arbitri* is not reconciled with the modern “de-localisation theory” which fully supports that the forum may be chosen purely for reasons of neutrality. An arbitrator should disregard a national legal order, its substantive rules and principles including private international law if it is disconnected from the dispute to be settled. The arbitrator is not a national judge. He does not award justice in the name of a state because he lacks *lex fori*. He is not a guardian of public policy of the host state, although he is substitute for the national judge. On the other hand, he should never act as an “obedient servant” of the parties.<sup>70</sup>

#### **2.2.4 Public Policy of the *lex causae*:**

There is no general public policy exception in the EAA. Assuming the arbitrator applies English conflict of laws rules he may refuse to apply foreign law by virtue of Article 16 of the

<sup>68</sup> 2 De G.F. & J 502, at page 507. Lord Campbell had stated that “It is the duty of the courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. In that case the Court shall make a careful examination of the object of the Act and the public importance of compliance with it”.

<sup>69</sup> Dicey and Morris on “*The Conflict of Laws*”, Volume 2, London 2000, at page 1221.

<sup>70</sup> Stephen V. Berti : “*International Arbitration in Switzerland*”, Kluwer Law International, London 2000, at page 220. One ICC case however was criticised by *Blessing* as a wrong and unconvincing judgment, namely No 5946/1990, C. of ICC Aw. 1991-1995, at page 97. on the grounds that an arbitral tribunal sitting in Switzerland thought that it should not for reasons of swiss public policy allow a claim for exemplary damages in the amount of \$100,000.

Rome Convention. In Swiss law Article 187 does not refer to general dispositions of public policy, distinguishing between dispositions for domestic (Articles 17 and 18) and foreign public policy (Article 19). An arbitrator is even less obliged to give consideration to economic policy rules of a State whose law was not chosen by the parties.<sup>71</sup>

Article 19 has been highly controversial and subject to debate. However it allows the arbitrator to take account of an imperative disposition of another law, other than that designated by a rule of conflict or a choice of law by the parties. This occurs where there is a close connection with the dispute and legitimate and major interests impose it. The Federal Tribunal has ruled that an arbitrator in Switzerland does not have, in case of an express choice of law, to apply foreign imperative rules if their non application is not a ground of appeal under Article 190 para 2.<sup>72</sup> In another case<sup>73</sup> the Federal Tribunal asserted that: “The law of a country posing an unbearable impediment to invalidate a contract subject to Swiss law in order to protect the financial policy of the state and not the protection of private interests of the parties should not be taken into account”. Nonetheless, the same Tribunal in the celebrated case of *Hilmarton v OTV* allowed the application of foreign mandatory rules on the basis that they aimed “not only to protect the state but to also reassure a commercial loyalty which is also respected by principal European legislative systems”.<sup>74</sup>

A crucial question in Swiss practice is: “Does Article 19 apply to international arbitration and if yes, what is the relationship between Article 19 and 187?”. Two different views have been taken:<sup>75</sup>

1. *Wenger* believes that Article 19 has a binding effect on the arbitrator by stating that “the arbitral tribunal has to respect the international public policy of such third countries (other

---

<sup>71</sup> Bul ASA, 1992, Vol.1, at page 56.

<sup>72</sup> Bul. ASA 1995, at page 217, spéc 217, c.2c. Furthermore Article 190 para 2 public policy is not distinguished between Swiss and foreign. This article introduces a restrictive list with regard to an appeal on the grounds of violation of public policy.

<sup>73</sup> Bul ASA 1988, at page 136, spéc 141-142. This decision was the beginning of contradictory decisions in Switzerland and France.

<sup>74</sup> *Op.cit.*, *supra* no. 69.

<sup>75</sup> Daniel Hochstrasser: “Choice of law and “Foreign” Mandatory Rules in International Arbitration ”, J.I.A., Vol 11, March 1994, No 1, at page 61.

than the one whose law is applicable) who have a close connection to the matter<sup>76</sup>”. *Bucher*<sup>77</sup> emphasises that although Article 19 is not applicable to international arbitration, a Swiss arbitrator as a matter of important concept of Swiss legal theory and *discretion may* give effect to it.

2. *Lalive* departs from the *sui generis* character of Article 187 as *lex specialis* for arbitration and pronounced its resulting independence from the provisions containing the conflict rules for contracts ( Articles 112 to 126 ) and the general provisions in Articles 13 to Article 19.<sup>78</sup>

## 2.2.5 Alternatives:

**2.2.5.1** International public policy features both the international public policy of a given state and international public policy common to all states interested in a dispute.<sup>79</sup> *Lalive* has triggered a distinction between positive and negative public policy. Positive public policy requires the application of strictly imperative norms, namely *lois de police* as previously examined. It is irrelevant whether this law was chosen by the parties.<sup>80</sup> Consequently, a French scholar has viewed international public policy as a less restrictive concept from its domestic counterpart<sup>81</sup> since it requires conformity only with these legal provisions deemed to be absolutely fundamental to the domestic legal order. Negative public policy (*ordre public d’ éviction*) obliges the arbitrator to directly apply an imperative substantive rule. It excludes

---

<sup>76</sup> *Op.cit.*, *supra* no. 73. To the words of the practitioner: “ Toward the law declared applicable by the parties or the arbitral tribunal, a public policy reservation exists: the arbitral tribunal has to respect fundamental principles of law like *pacta sunt servanda*, “*bona fides*” and “no expropriation without compensation” which are valid in the sense of transnational public policy, independent of the relation of the facts of the case to a special State. Article 19 expresses, *mutatis mutandis*, the deliberations that an international arbitral tribunal has to make when it is faced with the mandatory competition law of the EC, with import and export restrictions or with currency regulations of a third State ”.

<sup>77</sup> Andreas Bucher: “ *Le nouvel arbitrage international en Suisse* ”, Bâle 1988, at page 83.

<sup>78</sup> *Op.cit.*, *supra* no. 69.

<sup>79</sup> L’Arrêt de la *Banque Ottomane* de 1984., *Révue Critique du Droit International Privé* 1985, at page 526. The public policies of three states were involved: England, France and Turkey.

<sup>80</sup> Frank-Bernd Weigang: “*Practitioner’s Handbook on International Arbitration*”, at page 1072.

<sup>81</sup> Jean Robert: “*The French Law of Arbitration*”, Matthew Bender Pub. 1983, New York, II: 9-6.

the application of the otherwise applicable law in cases where such application leads to a result repugnant to fundamental notions.<sup>82</sup> Strictly speaking, the incorporation of a certain rule into international public policy shall depend on its acceptance as such by international conventions as a legal principle “common to civilised nations”.

This criterion was suggested by *Derains* to designate the scope of “truly international public policy”.<sup>83</sup> It is acknowledged that an arbitrator should not agree to be an “accomplice” in a deliberate fraud on a mandatory rule that he considers to have the right to be applied. As a minimum, he has to guarantee the respect of mandatory rules of the place of the performance of the contract. Normally the arbitrator shall consider their application, on the basis of whether the parties have chosen a *lex contractus*. The will and intentions of the parties shall deserve justified appraisal unless they endeavour to evade mandatory rules in violation of international public policy. The right method for the arbitrator is to weigh objective interests between the different laws, because to him all laws are of equal value. This in conformity with an objective test of the foreseeability of the application of international mandatory rules.<sup>84</sup> Nonetheless a restrictive interpretation of national public policy may be preferable to international public policy in the international arbitral justice.

**2.2.5.2** Transnational public policy invites the arbitrator, when faced with an argument of the possible illegality of a contract, not to give effect to his discretionary appreciation but to search for “values largely accepted by the international community”. These values are traditionally associated with cases of corruption affairs, violation of customs laws, embargoes etc. The criterion to apply for the qualification of an imperative norm as part of transnational

---

<sup>82</sup> These fundamental notions are different from those mentioned in Articles 17-19 of the *LDIP* and must be understood to be of a truly transnational nature.

<sup>83</sup> Yves Derains: “*Public Policy and the Law Applicable to the Dispute in International Arbitration*”, ICCA New York Arbitration Congress 1986, at page 254. On the other hand Jean Robert: “*The French Law of Arbitration*”, Matthew Bender Pub. 1983, New York, II: 9-8 has used the delicate wording: “A point of mediation between public and private law”.

<sup>84</sup> Horacio A. Grigera Naón: “*Choice-of-law problems in international commercial arbitration*”, Tübingen 1992, at page 69. The mere fact that any international mandatory rule or the national legal order to which it belongs has some relevant connection with the issue in controversy should render its application foreseeable by the parties. Therefore arbitrators should always apply international mandatory rules if, according to the legal orders from which they originate, their conditions of application have been met.

public policy is to test its legitimacy. In other words, whether it is in line with the needs of international commerce and whether it is considered to have a universal validity as such.<sup>85</sup> Nevertheless, the qualification of a rule as transnational does not have to be accepted by judicial systems in full. Transnational public policy is different and independent from a particular state national or international public policy or from a particular state's public policy in international matters. It arises out of fundamental rules recognised by the majority of the states and not from a sole state.<sup>86</sup> It traces the limit of the agreed tolerance of the states to self regulate the merchant society which is however free to regulate its relations and conflicts. A state should intervene when the limit of such tolerance is overreached.

#### **2.2.6 Legal order concerning the potential place of enforcement:**

The critical question is: "Should the arbitrator, for concerns of enforceability, render a "wrong decision" which however promises to be easily enforceable or should he render a "right" decision the enforcement of which might however be less certain?". The arbitrator's essential duty is to make a correct award which shall not be attacked at the place where enforcement is sought. The concern of enforcement is a valid one, but in the overall hierarchy of "lesser" value and may create a "vicious circle".<sup>87</sup>

Even so, enforcement will be likely if the arbitrator is inclined to boost the application of mandatory rules of the place where enforcement will be sought. This was anticipated by the drafters of institutional arbitration rules who allowed the insertion of express provisions for the place of enforcement.<sup>88</sup> As stressed by *Bucher*, by doing so the arbitrator avoids the risk of annulment in the place of the seat of arbitration or the recognition of the arbitral award as

---

<sup>85</sup> ICC 6248/ 1990, C. of ICC Aw. 1991-1995, at page 124.

<sup>86</sup> Jean-François Poudret- Sébastien Besson : "*Droit Comparé de l' arbitrage international*", Bruxelles 2002, at page 651.

<sup>87</sup> Jean-Baptiste Racine: "*L' Arbitrage Commercial International et l' Ordre Public* ", Bibl. de Dr. Pr. Tome 309, 1997, at page 278.

<sup>88</sup> Article 35 of the ICC and Article 32.2 of the LCIA Arbitration Rules.

“*exequatur*” in the foreign countries whose public policy would be violated. He asserts that the arbitrator must produce an award susceptible to “legal sanction” and “enforcement”.<sup>89</sup> Departing from Article V.1.e.<sup>90</sup> of the New York Convention of 1958 it is believed that, since the arbitrator lacks the *imperium* of a national judge, he should respect mandatory rules foreign to the *lex causae* if he accounts for his award to have the power of *exequatur*<sup>91</sup>. However, the sole fact that an arbitrator does not have a *lex fori* is not a liberty but a restriction because his award, unlike the national judge’s decision, must be reasoned to acquire a power of *exequatur*.

---

<sup>89</sup> Andreas Bucher: “*Le nouvel arbitrage international en Suisse*”, Bâle 1988, at page 87.

<sup>90</sup> This Article provides that when an arbitral award is refused an *exequatur* in one country it shall not be recognised by other signatory countries. However the Geneva Convention in Article IX allows such an award to be recognised by other countries.

<sup>91</sup> Jean-Baptiste Racine: “*L’Arbitrage Commercial International et l’Ordre Public*”, *Bibl. de Dr. Pr.* Tome 309, 1997, at page 273.



### **Section III: Possible Choices of Substantive law**

#### **3.1 National law:**

By choosing national law to govern their dispute, the parties seem to have opted to safeguard their rights and obligations and aimed to protect themselves against possible risks of a-national rules. Parties may have more confidence in a national legal system which may also be more suitable to a particular contract, have better connections with the parties or be totally neutral. Experienced arbitration practitioners do not sympathise with the choice of national law as applicable to the substance of the dispute. They concede that national law may be outdated in a sense that it does not follow major changes in international commercial transactions and may be fragmentary to the extent that it does not address all relevant issues. Nevertheless the arbitrator normally does not sympathise with a choice of national law because he is likely to avoid applying national mandatory rules and secure the arbitral process from any unexpected and undesired solutions for the parties.

#### **3.2 State Contracts and Public International Law:**

Public international law is not only applied in disputes between States but also when a State and a private party are involved. The internationalisation of state contracts is mainly found in the operated nationalisations on behalf of the Libyan government and its concessions on public international law in the course of the years 1973-1974. In the *Texaco* case the sole arbitrator R.J. Dupuy qualified these concessions as “*accords du développement économique*” which form a new category of international contracts governed exclusively by public international law.<sup>92</sup>

---

<sup>92</sup> *Texaco v. Libya* (1987) 58 Brit.YB Int'lL 39.

To enhance the credibility of such a choice, the principle of effectiveness (as established in public international law) demands that the above law be objectively adapted to the realities to which it is addressed, so that it can be recognised *erga omnes* without disrupting expectations or attempting to artificially extend its application to situations that are factually out of reach.<sup>93</sup> Effectiveness requires harmony between legal norms, their interpretation and the social reality falling within their scope. Public international law should not be passively receptive to the factual situations it regulates. Its underlying thrust is to confer on the rule of law the maximum possibility of practical enforcement by ensuring that it adequately responds to the social realities to which it is addressed. In this case a fair minded arbitrator is called to balance interests between public international law and private international law notwithstanding that in the Libyan arbitrations political considerations were at stake.

### **3.3 Trunc commun-combined laws:**

The starting point of this doctrine is that the parties wish to apply the common part of their respective legislations to their dispute. The parties may wish to exclude any disposition foreign to their respective laws, and this method allows the arbitrator to apply provisions of laws which are common to one another.<sup>94</sup> It applies to both material and common conflict rules. *Trunc Commun* was used in the celebrated *Channel Tunnel*<sup>95</sup> case where it was agreed that “ the construction, validity and performance of the contract shall be governed by and interpreted with the principles common to both English and French law”. In default of such principles the arbitrator shall be inspired by the legal principles and trade usages.<sup>96</sup> In previous

---

<sup>93</sup> Horacio A. Grigera Naón: “*Choice-of-law problems in international commercial arbitration*”, Tübingen 1992, at page 106.

<sup>94</sup> This conduct may also be of assistance in an implied negative choice of law. As previously seen the autonomy principle extends to the parties’ tacit choice of law. In arbitral practice, parties’ silence may be interpreted as a negative choice of law i.e. not to apply the respective national laws of the parties and not to be subject to any national laws.

<sup>95</sup> *The Channel Tunnel Group Ltd and France Manche SA. V Balfour Beatty Construction Ltd et al.* 10 J.I.A.3, 59.

<sup>96</sup> Mauro Rubino-Sammartano, Kluwer Law Publishers, Boston 1990, 1<sup>st</sup> edition, page 275.

ICC case law *trunc commun* was treated as a means of identifying a tacit choice of law or filling possible *lacunae* in the absence of choice with regard to the parties' interests and expectations.<sup>97</sup> Its relationship to the *lex mercatoria* lies in the subsidiary application of the latter when for some reason *trunc commun* is not applicable. *Trunc Commun* ensures a satisfactory previsibility. This method is criticised as complicated and impractical on a possible choice of law such as: "Common principles of European laws".

### 3.4 Concurrent Laws:

Concurrent laws are often applied in international commercial contracts involving states or state entities as a party to the contract. The concurrent laws method allows some balance between state law and international law – it recognises the national sovereignty of the state party and yet also provides some protection to the private party to the contract. The arbitrator shall apply the law of the State and "such rules of international law as may be applicable"<sup>98</sup>. Concurrence of national law with international law indicated by the choice of law clause as a subsidiary option was the case in the three different oil concession agreements, namely the Texaco, BP and Liamco Arbitrations.<sup>99</sup> This was also the case in the ICC 7754/ 1995 award where the arbitral tribunal had ruled that even though French domestic law often applied, reference by the parties to the CISG would supplement the operation of the national law<sup>100</sup>.

---

<sup>97</sup> ICC 3540/1980 C. of ICC Aw. 1974-1985, at pages 105-115, ICC 2886/1977, C. of ICC Aw. 1974-1985, at page 332.

<sup>98</sup> ICSID Convention, Art 42.

<sup>99</sup> *Kuwait v. AMINOIL* 66 ILR, at page 518: "This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principle of law, including such of those principles as may have been applied by international tribunals."

<sup>100</sup> Bull XI/2/ 2000 : [ICC International Court of Arbitration Bulletin](#) JDI, at page 47.

### 3. Transnational laws:

### 3. Denationalisation of applicable substantive law-General Principles of law:

The concept of denationalisation of applicable substantive law and the application of general principles was encompassed in several cases. The *Sheikh of Abu Dhabi*<sup>101</sup> and the *Aramco*<sup>102</sup> cases are fairly good examples of the above theory. In *Sapphire International*<sup>103</sup> the arbitral tribunal made reference to the rules of good faith and decided that the parties did not intend to apply the strict rules of a particular national system but to rely on the “rules of law common to civilised nations”. In the 1970s Libyan arbitrations with British Petroleum, the arbitrator fell back on the precise wording of the concession. He held it did not provide that public international law applied and even if there were no principles common to Libyan and international law, the general principles of law would still apply.<sup>104</sup> In *DST v Rakoil*<sup>105</sup> the Tribunal held the applicable law would be “*internationally accepted principles of law governing contractual relations*”.

---

<sup>101</sup> *Petroleum Development Ltd v Sheikh of Abu Dhabi*. (1952) 1 ICLQ 247 Invoking [Article 17](#) of the agreement between the parties the arbitrator held that it would apply general principles of English law and not municipal English law. In his words: “The application of such principles rooted in the good sense and practice and common practice of civilised nations”.

<sup>102</sup> *Saudi Arabia v Aramco* (1963) 27 ILR 117

<sup>103</sup> *Sapphire International Petroleum v NIOC Libya*, (1973), 53 ILR 297.

<sup>104</sup> The concession provided that it would be governed by principles of the law of Libya common to the principles of international law and in the absence of such principles then by general principles of law, including those principles applied by international tribunals. The arbitrator noted that this excludes any single municipal legal system and rejected BP’s argument that a legal principle would be applied only if supported by both Libyan law and international law or that public international law applied.

<sup>105</sup> *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Ras Al-Khaimah National Oil Co* [\[1990\] 1 A.C. 295](#). The previous arbitral panel held that it would be inappropriate to apply the law under which any of the companies were organised or the law of the State that is party to the agreements.

### 3.5.1.2 Nature of General Principles of law:

General principles of international law are created through the comparison of national laws and international resources, namely interstate conventions. They seek to free the determination of applicable law from the conflict rules of any particular national jurisdiction, and locate in it rules that are common to most jurisdictions or embodied in generally accepted conventions and international commerce practice. The alignment of national conflict rules with international conventions contributes to the evolution of uniform rules and practices in determining the applicable law. They are not a-national principles (which extract their existence from non national rules) but they are transnational conflict rules which apply regardless of the nationality of the parties or their residence and are not limited to the territory of one or more countries. It does not matter whether they are recognised by all states or in other terms. It suffices that they have a universal nature and provide for dominant solutions in the field of international commerce.<sup>106</sup> Being conceived as principles accepted by the international community they are not a positive law imposed on the arbitrator. In the ICC case no 6527/ 1991<sup>107</sup> the arbitral tribunal, relying on the Hague Convention of 1955 on International Sales deemed it “more appropriate” to apply general principles of international private law as stated in international conventions. In another ICC award, no 1422/ 1986 the arbitral tribunal delivered the following award: “ General principles do not derive from the usages and practices of the merchant community but from civilised nations, that is, from national legal systems”.

*Kahn*, taking a more realistic approach, believes that these rules are devised by financially developed countries with a prospered economy.<sup>108</sup> In arbitral practice their

---

<sup>106</sup> In the ICC 3380/ 1980, C. of ICC Aw. 1974-1985, at pages 96-100, the arbitrator ruled as follows:“*General Principles prima facie include principles which arise from international arbitral precedents and one may not exclude that they partly coincide with “trade usages” which the arbitrator must take into account in any event take into account in compliance with (the old) ICC Article 13.5.*

<sup>107</sup> C. of ICC Aw. 1974-1985, at pages 185-194.

<sup>108</sup> Jean-François Poudret, Sébastien Besson: “*Droit Comparé de l’arbitrage international*”, Bruxelles 2002, at page 627.

growing significance derives from their corrective or supplementary effect. Their corrective effect lies in their assistance, as a matter of interpretation, in determining whether in essence the contract should be governed by national law, unless it is in contradiction with general principles. Their supplementary effect allows them to step in insofar as national law is silent. In any case it is the responsibility of the arbitrator to deliver a reasoned award.<sup>109</sup>

Nevertheless, the arbitrator may experience difficulties in applying them. He will have to compare a variety of answers provided in different national legal systems and will have to reflect on those with the utmost care, when forming his decision (higher standard of authority) whereas in applying national law he just finds the relevant national provision. General principles are not a “carte blanche” in the sense that an arbitrator should have an “easy ride”.<sup>110</sup>

### **3.5.2.1 Lex Mercatoria:**

A French analyst referring to *lex mercatoria* has given a very elaborate definition: “The progressive elimination of national law (hindrance to effective commercial relations) and the creation of special groups of international traders led to the spontaneous elaboration of a network of rules by which to regulate their activities as well as form contracts by which to describe and document them<sup>111</sup>”. This is generally a body of a-national law which affords a measure of stability and predictability despite changes in circumstances i.e. *force majeure*.

English lawyers have been very sceptical about *lex mercatoria* since little relevant case law exists in England. Nowadays it is welcomed under the “other considerations” of Section 46 (1)(b) of the EAA of 1996. In drafting the above section the English legislator was not prepared to specifically refer to “rules of law”. Previous case law viewed that a-national

---

<sup>109</sup> Stephen V. Berti :“*Choice of Substantive Law in International Arbitration*”, J.I.A. Vol.14, No 2, 1997, at page 42.

<sup>110</sup> *Ibid.*

<sup>111</sup> Jean Robert:“*The French Law of Arbitration*”, Matthew Bender Pub. New York, para II :4- 19.

rules create ambiguities and inconsistencies and allow recourse to equity or amiable composition. Through the passing of time the acceptance of *lex mercatoria* in English law was celebrated by the *DST*<sup>112</sup> case in the late 1980's where the Court of Appeal ruled that an award rendered in Switzerland on the grounds of "internationally accepted principles of law governing contract relations" would be enforceable in England.

*Lex mercatoria* is not incompatible with positive law such as arbitral law. Article 28 of the Model Law provides that only the parties may authorise the arbitrator to apply *lex mercatoria*, otherwise the arbitrator has to apply one law. This proposition was also strengthened by the International Law Association Resolution in Cairo in 1992 where (even in the absence of choice of law) it was stated: "The fact that an international arbitrator has based his award on transnational rules rather than a national law should not itself affect the validity and the executive character of the award since the parties have authorised the arbitrator to *apply such rules*".<sup>113</sup> Earlier the International Law Institute in its Santiago de Compostela session in 1989 expressed the following: "To the extent that the parties have left such issues open, the Tribunal shall supply the necessary rules and principles drawing on the sources indicated in Article 4".

Although the position is far from clear it is suggested that *lex mercatoria* for many years has fallen within the ambit of amiable composition. *Bucher* has speculated that the arbitrator in applying *lex mercatoria*, without being so authorised by the parties, risks being judged for excess of power and acting as an *amiable compositeur*.<sup>114</sup> Nonetheless the arbitrator in an ICC award<sup>115</sup> although acting as an *amiable compositeur* directly applied *lex mercatoria* without express authorisation by the parties.

---

<sup>112</sup> *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co* [1990] 1 A.C. 295

<sup>113</sup> <http://www.unidroit.org/english/publications/review/articles/2000-2.htm>, at page 4.

<sup>114</sup> Andreas Bucher: "Le nouvel arbitrage international en Suisse", Bâle 1988, at page 102.

<sup>115</sup> ICC 3131/ 1979 C. of ICC Aw. 1974-1985, at pages 122-124.

The ICC and UNCITRAL Arbitration Rules are innovative in allowing the arbitrator to apply a-national rules.<sup>116</sup> In any case the parties may have directly<sup>117</sup> or indirectly provided for *lex mercatoria* to be applied. The latter method is described as a negative choice of law: an implicit choice through contractual analysis.<sup>118</sup> From the surrounding circumstances it may be proved that the parties did not opt for a national law, thus wishing *lex mercatoria* to be applied. Regard shall then be made to the real wish of the parties.

In Switzerland the federal legislator has admitted the application of a-national or transnational rules by allowing the parties to choose *lex mercatoria*. The arbitral tribunal shall apply it as the “rules of law” with which the dispute has the closest connection (Article 187(1)). Much controversy has evolved though with regard to the absence of choice:

1. *Bucher* has adopted a restrictive view in that only the parties can have recourse to transnational law and the arbitrator should attempt to establish an “objective link” pointing to a national law, since transnational law does not have a territorial dimension.<sup>119</sup> He virtually suggests that if the parties have not designed any applicable law, the arbitrator should not directly invoke *lex mercatoria* but primarily focus on applying a “national law”. This is a factual situation of a “false conflict” between *lex mercatoria* and national laws and therefore one should not exclusively reason it without illustrating its conformity to national laws.<sup>120</sup> In the ICC 3131/ 1984<sup>121</sup> case the arbitrator reasoned that the application of *lex mercatoria* does not lead to solutions which could not have been achieved through direct application of the relevant national legal orders. A functional approach analyst went even further by stating that: “*Arbitrators must follow a comparative law analysis encompassing a functional evaluation of*

---

<sup>116</sup> Article 17.1 and Article 28.1 respectively.

<sup>117</sup> ICC 5314/1988, C. of ICC Aw. 1974-1985, at pages 309-314 . The parties have chosen for a specific law with reference also to *lex mercatoria* as supplementary method to fill contractual gaps.

<sup>118</sup> Implied negative choice of law: As seen the autonomy principle extends to the parties’ tacit choice of law. In arbitral practice parties’ silence may be interpreted as a negative choice of law i.e. not to apply the respective national laws of the parties and not to be subject to any national laws.

<sup>119</sup> Andreas Bucher: “*Le nouvel arbitrage international en Suisse*”, Bâle 1988, at page 101

<sup>120</sup> Horacio A. Grigera Naòn: “*Choice-of-law problems in international commercial arbitration*”, Tübingen 1992, at page 80.

<sup>121</sup> This case concerned a contract of distributorship between a French and a Turkish party. The arbitrator indicated that *lex mercatoria* led to a solution to be found on the principle of “good faith”. However this principle was common to both French and Turkish law.



*private international laws and national substantive laws concerned with the dispute. Thus lex mercatoria becomes positive law*".<sup>122</sup>

2. Nonetheless it has been objected that the "closest connection" condition of Article 187 does not necessarily refer to territorial links.<sup>123</sup> From the application of the Federal *LDIP* and onwards the Federal Tribunal has traditionally ruled that an award reasoned on *lex mercatoria* will not be a ground for its annulment. Professor *Lalive* characterised *lex mercatoria* as "the private international law of the arbitrator"<sup>124</sup> Its origin dates back to the Roman *pacta sunt servanda* principles that are common to a majority of national legal systems. In the absence of choice an arbitrator applying *lex mercatoria* shall not be bound to justify his choice by reference to any national conflict rule. An example of this is the ICC *Palbalk v Norsolor*<sup>125</sup> award where the arbitrator did not make any reference to specific legislation and directly applied *lex mercatoria* and the *Portland*<sup>126</sup> case where the Parisian *Cour de Justice* refused to annul the arbitral award on the grounds that the arbitrator had directly applied *lex mercatoria* in the absence of choice by the parties.

Criticism on *lex mercatoria* 1. In view of its incomplete nature *lex mercatoria* is not a comprehensive body of law. As previously examined English practitioners do not sympathise with it as they do not consider it a source of English law such as a-national rules.<sup>127</sup> It has been ironically stated that: "Only these principles that are so general and useless are common to the legislations".<sup>128</sup> Notions of *lex mercatoria* are too vague and very generally conceived

---

<sup>122</sup> *Op.cit.*, *supra* n.128, at page 84.

<sup>123</sup> Jean-François Poudret, Sébastien Besson: "Droit Comparé de l' arbitrage international", Bruxelles 2002, at page 641.

<sup>124</sup> Jean- François Poudret, Sébastien Besson: "Droit Comparé de l' arbitrage international ", Bruxelles 2002, page 642.

<sup>125</sup> ICC 3131/1979 C. of ICC Aw. 1974-1985, at pages 122-124. The arbitrator faced with a difficulty in applying national law and despite the parties' silence applied *lex mercatoria* in accordance with the principle of good faith.

<sup>126</sup> *Compania Portland v Primary Coal Inc* [1991] 16 Y.Comm.Arb. 142. The *Cour de Justice* ruled as follows: "The arbitrator applied these principle and determined the most characteristic factor connecting the dispute to a body of rules of substantive law, taking into consideration the nature of the dispute. He examined the connecting factors invoked, rendered a final decision that none of them justified the application of a national law and decided to apply the body of principles and trade usages called *lex mercatoria* i.e. international norms that can apply to the solution of such a dispute in the absence of a determined [national] jurisdiction".

<sup>127</sup> *Bank Mellat v Helliniki Techniki SA* [1983] 3 W.L.R., page 783.

<sup>128</sup> *Op.cit.*, *supra* n. 131.

and drafted in a sense that it cannot be uniform and remains fragmented. Fragmentation of *lex mercatoria* implies that *lex mercatoria* shall regulate the legal relationship of the parties within the framework of applicable law.<sup>129</sup> It has also been observed that arbitrators are covered behind a “prestigious umbrella” of *lex mercatoria* for not seriously and responsibly investigating the applicable rules and justifying their choice. Therefore the question is: “Is *lex mercatoria* a way of facility or even worse the mask of ignorance?”<sup>130</sup>

2. *Contrat sans loi*: The freedom of the parties to choose rules of laws applicable to the substance of the dispute may lead them to stipulate that the contract should be interpreted according to any rule of law. This should not be confused with *lex mercatoria*, though pertaining to minimise or exclude the need for supplementary national law or amiable composition. Briefly examined these clauses lead to a contract with no governing law known with a French term as *contrat sans loi* and aim to remove the contract from any control of superior norm. The French position is that one should not condemn the function of such contracts. *Fouchard* believes that these contracts appear to admit the application of general principles.<sup>131</sup> They may fall within the scope of Article 1496 of the NCPC in a sense that these clauses do not prevent the arbitrator from submitting the contract to the rules of law offered by the above article.

### 3.5.2.2 Self regulation of *lex mercatoria*:

Arbitration is probably the sole autonomous legal regime to boast about evolution of *lex mercatoria* through years of countless decisions. The latter self regulated coherent normative body is suitable for international trade and is referred in international conventions on

---

<sup>129</sup> *Infra*.

<sup>130</sup> Guiditta Cordero Moss, Tano Aschehoug: “*International Commercial Arbitration*”, Rome 1999, at page 272, However favouring *lex mercatoria* the author contends that arbitrators using this method are “social engineers” in the sense that they are highly qualified and experienced in tracing principles and values of the international business community.

<sup>131</sup> Fouchard, Gaillard, Goldman “*Traité de l’arbitrage commercial international*”, Kluwer Law International, Paris 1996, at page 816.

arbitration. The persuasive force of arbitral precedents on *lex mercatoria* has rendered a substantive review of arbitral awards by national courts non-existent.<sup>132</sup> Self-regulation of *lex mercatoria* was the outcome of the attempt by some arbitrators to detach international commercial transactions from rigid national laws. To achieve this goal the arbitrator used flexible and rational techniques and comparative methods. It is also hoped by the parties that he will avoid such rules that are unfit to govern an international contract and affect the quality of the award.

### **3.5.3 Trade Usages-Codified Terms:**

Typical clauses are the INCOTERMS of the ICC which give guidance to the interpretation of the contract. The codification of such usages by a professional organisation does not modify their nature but rather aims to define the obligations of the parties when incorporated into a contract. They are habitual conducts and practices generally followed by a field of commerce and do not have an obligatory force<sup>133</sup> as customs. They are not a source of law and have no force of norms unless a specific law refers to them. Their mission consists of filling gaps that a law may have created but they should not be considered as equal instruments with other sources of law. The Geneva Convention Article VII para 1 and the UNCITRAL Model Law Article 28 para 4 both stipulate that in any case, whether it concerns an ordinary arbitration in law or an amiable composition, the arbitrator shall take into account the contractual stipulations and trade usages. The Vienna and Hague Conventions along with previous arbitral awards on international trade may serve as a *dues ex machine* for the arbitrator to make a predictable choice in default.<sup>134</sup>

### **3.5.4 UNIDROIT Principles:**

---

<sup>132</sup> ICC 4131/ 1982 C. of ICC Aw. 1974-1985, at pages 146-153.

<sup>133</sup> The presumption of submission by the parties to such usages operates in favour of their obligatory nature as Article 9 para 2 of the Vienna Convention provides.

<sup>134</sup> Jean-François Poudret, Sébastien Besson : “*Droit Comparé de l’arbitrage international*”, Bruxelles 2002, at page 628.

They were agreed in Rome in 1994. Their aim was to establish a “neutral set of rules that may be used throughout the world without any particular bias to one system of law as opposed to the other”.<sup>135</sup> In the preamble it is stated that they shall apply in the case where the parties have so stipulated i.e. for UNIDROIT principles to apply, the parties should have agreed to apply general principles of law otherwise they are not applicable. Remarkably these principles are principles related to the interpretation of contracts as stated in Article 1.6 (1), according to the principle of “good faith” which is illustrated in Article 1.7(2). The UNIDROIT Principles aim to ensure fairness in international commercial relations by expressly stating in Article 1.7 that the general duty of the parties is to act in accordance with good faith and fair dealing<sup>136</sup> and in a number of instances, imposing standards of reasonable behaviour. Bad faith is not defined by the restrictive or extensive character of interpretation. Only the conflict of will of the parties existing at the time of conclusion of the contract, and the interpretation expressed at the time of the dispute, are an expression of bad faith. The technique of these principles is not limited to an exhaustive list but allows to free these principles from principles of comparative law.

### **3.5.5 Ex aequo et bono:**

For reasons of simplicity the English legislator avoided the use of the Latin and French expressions “ex aequo et bono” and “amiable compositeur” in the EAA deeming that the such concepts did not historically develop in English law and English arbitral practice.

In international commercial contracts, it is quite common that the parties may opt for their dispute to be decided not under a recognised system of law but under what is often

---

<sup>135</sup> Redfern/ Hunter: “Law and Practice of International Commercial Arbitration”, 3<sup>rd</sup> edition, London Sweet & Maxwell, 1999, at para 2-66.

<sup>136</sup> These standards of fairness shall be taken into account only to the extent that they are shown to be generally accepted among the various legal systems. This is so explained by the fact that standards of business practice may indeed vary considerably from one trade sector to another.

referred as “equity clauses”. Equity clauses are not positively viewed by English scholars since they exclude recourse against violation in point of law. English law until 1996 had no flexibility with regard to an arbitration clause with a provision for equity or amiable composition. Nowadays the parties’ contractual choice plays a significant role and the arbitrator shall not apply equity unless so authorised by the parties.<sup>137</sup> Nonetheless the new EAA implicitly allows for the application of equity by virtue of Section 46(1)(b) of the EAA which empowers the arbitrator to decide on any basis at all, including his own personal impression of what is “fair” in the circumstances.

Thus, the critical question is whether the arbitrator, deciding on equity, may derogate from contractual stipulations. The exact nature of the powers of the arbitrator deciding on equity was ambiguous. The position of English law was illustrated in the *Mentor* case<sup>138</sup> where an “honourable engagement” clause did not entitle the arbitrator to decide on his own notion of what is fair.<sup>139</sup> In a previous case, namely *Orion Compania Espanola*<sup>140</sup> the Court was of the opinion that such a clause should be invalid because the arbitrator should decide according to ordinary rules of law, otherwise his award could be set aside. However, a deviation from the standard stance of English law regarding equity was permitted in the *Eagle Star* case.<sup>141</sup> Lord Denning stated that: “ It is the clause which is common in treaties of reinsurance providing that the arbitrators are not bound by the strict rules of law but are enjoined to decide according to an equitable rather than a strictly legal interpretation of the provisions of the agreement”.

Swiss law departs from the concept that the arbitrator is tied to the contract.<sup>142</sup> The provision of Article 31 para 3 of the previous *Concordat* of 1969 was retained in its

---

<sup>137</sup> This is so inferred by ( Section 5(1)) of the EAA.

<sup>138</sup> *Home and Overseas Insurance Co Ltd v Mentor Insurance Ltd* [1990] 1 W.L.R.153.

<sup>139</sup> The clause as the learned judge stated did no more than give the arbitrators the liberty to depart from the ordinary or literal meaning of the words used in the clause.

<sup>140</sup> *Orion Compania Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekering* [1962] 2 Lloyd’s Rep 257.

<sup>141</sup> *Eagle Star Insurance Co. V Yuval Insurance Co Ltd* [1978] 1 Lloyd’s Rep 357, at page 361.

<sup>142</sup> Bul ASA 1990, page 179.

successor *LDIP* in Article 187(2). The latter provision allows the parties to authorise the arbitral tribunal to decide the case *ex aequo et bono* but they must do so unequivocally, otherwise para (1) applies and the case shall be decided according to “rules of law”. It has been conceded that the principle “*pacta sunt servanda*” should not lead to an inequitable result since Swiss law allows for judicial adaptation of the contract in some cases.<sup>143</sup> Article 5 of the ZCC distinguishes between *ex aequo et bono* arbitration and arbitration in equity. Equity is distinguished from amiable composition in that it is a broader concept and applies a solution based on the case in point without taking account of general pre-existing norms, whereas amiable composition allows the arbitrator to moderate the effects of the application of law only by referring to that law.<sup>144</sup> The expression *ex aequo et bono* is better attached to arbitration in equity rather than amiable composition. However, Swiss law is more relaxed and treats these notions equally. This distinction seems purely artificial since the arbitrator in both cases may use his own sense of justice and fairness.

To continue, in some cases these two expressions may be synonymous. According to Article 28(3), the parties may authorise the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeurs*. Amiable composition is currently not known or used in all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal.<sup>145</sup> When parties anticipate an uncertainty in this respect, they may seek a clarification in the arbitration agreement by a more specific authorization to the arbitral tribunal. Paragraph (4) is more restrictive than the analogous provision of Article

---

<sup>143</sup> *Ibid.*n. 151.

<sup>144</sup> Fouchard, Gaillard, Goldman “*Traité de l’arbitrage commercial international*”, Paris 1996, at page 848.

<sup>145</sup> Before the enactment of the EAA of 1996 the particularity of English law with regard to amiable composition was explained through case law. In the *Czarnikow Ltd v Roth Schmidt & Co* case [1922] 2 KB 478, it was stated at page 491 that: “The amiable compositeur and the arbitrator-non judge in general are not to be trusted. As long as the Courts of this country have a statutory supervisory jurisdiction over arbitrators in England, it must remain a firm principle of the law governing arbitrations that that which is, in English law, a question of law shall remain in all aspects and for all purposes a question of law”. Otherwise the decision risks to be objected on the grounds of public policy. b) *David Taylor & Son v Barnett Trading Co* case [1953] 1 Lloyd’s 181, at page 187 Lord Denning ruled: “There is not one law for the arbitrator and another for the Court. There is one law for all”. c) *Orion Compania Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekering* [1962] 2 Lloyd’s Rep 257, at page 266 : “By virtue of English public policy the arbitrator must apply a defined and recognised legal system”.

1497 of the French NCPC and makes clear that in all cases, i.e including an arbitration *ex aequo et bono*, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. To avoid terminological confusions the arbitrator is advised to have recourse to the will of the parties (*volonté réelle*).

In any case, the *amiable compositeur* remains bound to apply contractual provisions<sup>146</sup> and may disregard a party's legal or contractual rights only when the enforcement of such rights amounts to an abuse thereof. In several cases, *La Cour de Paris* defined amiable composition in a negative way: "The clause of amiable composition is the giving up of the contractual provisions to the effects and benefit of the rules of law. The parties lose the prerogative to demand the strict application of contractual provisions and the arbitrator gets correlatively the power to modify or moderate these provisions to the extent that equity and common interests of the parties demand it".<sup>147</sup>

---

<sup>146</sup>This position was espoused by the ICC 3938/ 1984 case C. of ICC Aw. 1974-1985, at pages 501-507. The arbitrator ruled as follows: "According to the dominant doctrine and the practice of international commercial arbitration, the amiable compositeur remains tied to the contract".

<sup>147</sup> Jean-François Poudret, Sébastien Besson: "*Droit Comparé de l' arbitrage international*", Bruxelles 2002, at page 653.

## **Section IV: Absence of choice:**

### **4. CONFLICT RULES**

#### **4.1.1 Objective approach: Applying the closest connection test:**

In response to the problem of an absence of choice of law, English law has set forth the basic criterion of the objective test<sup>148</sup> of closest and most real connection.<sup>149</sup> A subjective theory comprising a general question of “was proper law intended by the parties” prevailed for a specific period of time. In conjunction, the new test at common law has introduced more objective parameters for ascertaining a choice of proper law when the intention of the parties with regard to the law applicable to the contract was not expressed and could not be inferred from the circumstances. This shall comprise considerations of the place of contracting, place of performance<sup>150</sup>, place of residence or business and the nature<sup>151</sup> and subject-matter of the contract which constitute strong presumptions.<sup>152</sup>

Previous common law offered a broad flexibility through a range of presumptions. As already mentioned in Section 1, Article 3 (1) presupposes that the choice must be either "express" or "demonstrated with reasonable certainty" by the terms of the contract or the circumstances of the case. If either of these requirements are not fulfilled, then resort is made to the provisions of Article 4 (1), i.e. the law of the country with which the contact is most closely connected. The presumption of Article 4(2) is of limited effect and does not apply when the characteristic performance cannot be found. Still, none of these presumptions is

---

<sup>148</sup> Dicey and Morris on “*The Conflict of Laws*”, Volume 2, London 2000, at page 1215.

<sup>149</sup> *Amin Rasheed Corp v Kuwait Insurance Co*, [1984] AC 50. To define the system of law a contract has its closest and most real connection, the only factual circumstances which could be taken into account were *contemporary* surrounding circumstances and events subsequent to the conclusion of the contract were not relevant.

<sup>150</sup> *The Assunzione* [1954] P.150. The decisive factor was that both parties had to perform in one country, namely Italy.

<sup>151</sup> *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52, page 91.

<sup>152</sup> *Compagnie Tunisienne de Navigation SA v Compagnie d’Armement Maritime SA* [1971] AC 572 and *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583.



conclusive. For, according to Article 4 (5), the presumptions are to be disregarded, if it appears from the circumstances as a whole that the contract is more closely connected with another country (one resorts back to Article 4 (1)). The Guiliano-Lagarde Report<sup>153</sup> extracts some examples from the Swiss practice<sup>154</sup> which has traditionally followed the test of closest-most characteristic performance, namely that the contractual relationship shall be governed by the law applicable to at the place of business or habitual residence of that particular party which has to perform the characteristic performance.

#### **4. Conflict Rules of the place of arbitration: Applying an entire conflict system-“Legalistic Approach”:**

The Institute of International law in its Amsterdam session of 1957 declared that: “The rules of choice 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>155</sup>. Furthermore relevant provisions are found in the Geneva Convention<sup>156</sup> and the ZCC Rules.<sup>157</sup> While the judge has to apply the private international law of the forum, so does the arbitrator. In support of this view, the arbitrator in two ICC awards, namely Nos 1598/ 1971<sup>158</sup> and 1455/ 1967,<sup>159</sup> for the sake of convenience and predictability, ruled that: “the law in force at the seat of arbitration must be followed”.

This single conflict factor, which is easy to identify, is also selected by the arbitrators, when

---

<sup>153</sup> Dicey and Morris on “*The Conflict of Laws*”, Volume 2, London 2000, at page 1216. The Guiliano-Lagarde Report has discussed that in order to determine the country with which the contract is most closely connected it is also possible to take into account factors which supervened after the conclusion of the contract. The presumptions of Article 4 of the R.C. are only “rebuttable” and the Court has a “margin of discretion” in disregarding them. No further guidance is given as to what material will be sufficient to rebut these presumptions. This rebuttable presumption is also found in Article 117 III of the *LDIP*.

<sup>154</sup> *Ibid*, at page 1237. Unilateral contracts do not create any implications. Payment of money is not the characteristic performance but it is the performance for which the payment is due which is characteristic of the contract.

<sup>155</sup> Article 11.

<sup>156</sup> Article VII allows not only the parties but also the arbitrator to design the applicable law by recouring to the conflict rule he deems appropriate.

<sup>157</sup> Article 4 of the ZCC Rules of Arbitration: “The choice of law rules found in the *LDIP* apply unless the choice of law rules of the domicile or habitual residence of each party coincide”.

<sup>158</sup> C. of ICC Aw. 1974-1985, at page 19.

<sup>159</sup> C. of ICC Aw. 1974-1985, at page 215.

the private international law systems connected with the dispute do not provide clear solutions, or lead to contradictory solutions<sup>160</sup>.

In England, the position of common law before the enactment of the EAA was that in the absence of choice, the law applicable to the dispute would be inferred by the seat of arbitration. The arbitrator, even in the case where the arbitration rules were silent, was bound by the private international law choice of law rules of the place of arbitration.<sup>161</sup> This method is in line with the localisation theory which furnishes the arbitrator with the duty of the legal characterisation of the dispute and the allocation of governing law on the basis of the principle “*qui elegit iudicem elegit ius*”. In *Compagnie d’ Armement*<sup>162</sup>, a contractual clause for arbitration to take place in London at first instance was not a choice of English law but a strong indication. This strong indication in favour of the *lex loci arbitri* doctrine (*indice sérieux*) was enunciated in several English cases.<sup>163</sup> Generally, an English arbitrator is likely to apply the conflict rules of the seat of arbitration. But Section 46(3) has paved the way of de-localisation and has freed the English arbitrator from any restriction to apply English private international law and particularly the Rome Convention provisions.

In institutional arbitration it is believed that when it comes down to a contract between the arbitrants and an arbitral institution, the law of the seat of the institution should be the governing law.<sup>164</sup> Nevertheless, this presumption is rebutted for obvious reasons in the case of *ad hoc* arbitration. The home law of an arbitrator may be relatively difficult to apply since an

---

<sup>160</sup> ICC 2637/ 1977, C. of ICC Aw. 1974-1985, at page 13. This case concerned a dispute between a French seller and a Spanish buyer. France ( like Switzerland, the seat of the arbitral court ) had ratified the Convention on Conflict of Laws (1995) concerning international sales which provides for the application of the law of the seller’ s country. Spain had not ratified the above Convention. The arbitral Tribunal considering the disadvantages of applying the private international law of the country where arbitration takes place found it correct to resort to it in view of the discrepancies between the laws of the parties’ respective countries of residence.

<sup>161</sup> *Czarnikow Ltd v Roth Schmidt & Co* [1922] 2 K.B. 478.

<sup>162</sup> *Compagnie Tunisienne de Navigation SA v Compagnie d’ Armement Maritime SA* [1971] AC 572,

<sup>163</sup> *The SLS Everest*[1981] 2 Lloyd’s Rep 389, *The Mariannina* [1983] 1 Lloyd’s Rep 12. *Egon Oldendorff*[1996] 1 Lloyd’s Rep 380.

<sup>164</sup> Patrick Scheldstoerm:“*The Arbitrator’s Mandate*”, Stockholm 1998, at page 430.

ordinary *ad hoc* arbitration is held by a panel of three arbitrators who may be of different national backgrounds. This raises the question: “Whose law shall apply?”

By strictly applying the *lex loci arbitri*, the arbitrator seems to derive his power from national law and not the arbitration agreement. This is a *territorial sovereign* concept since the *lex fori* purports to replace the parties’ agreement. Lack of the appropriate certainty which other conflict of laws rules and rules of the *lex causae* offer,<sup>165</sup> and foreseeability of the result of this method lead to its abandonment by contemporaneous international arbitration practice in favour of the de-localisation principle.

#### **4.1.3 Another method: Cumulative application of relevant conflict rules:**

This method, developed in the U.S. conflict of laws system, concerns the cumulative application of conflict rules of the legal systems interested in the dispute. Its objective is to ascertain whether the relevant conflict rules connected to the dispute all point<sup>166</sup> to the same substantive law. At the same time, he is not charged with determining which among these systems shall apply. If they indeed point to one law the arbitrator has to specify which particular conflict rule he deems applicable.<sup>167</sup> This method is also availed in “false conflict” situations. Factors to be taken into account consist of a set of standards from the conflict rules of the parties’ residence, seat of arbitration and those where the contract is to be performed. Alternatively, the arbitrator shall also have recourse to previous arbitral practice.

This method is better suited to the parties’ expectations and does not treat them as rigidly as the arbitral seat theory. The arbitrator’s goal is to connect the choice of law with the contractual agreement. However, it has been argued that conflict of rules may point to

---

<sup>165</sup> Jean-François Poudret, Sébastien Besson: “*Droit Comparé de l’arbitrage international*”, Bruxelles 2002, at page 607.

<sup>166</sup> Mauro Rubino Sammartano: “*International Arbitration Law*”, 1<sup>st</sup> edition, Kluwer Law Pub., Boston, 1990, at page 264. The author states the ICC 5118/ 1986, C. of ICC Aw. 1974-1985, at page 318, where both Tunisian and Italian law pointed to the application of the law of the place of the formation of the contract which lead to the application of Tunisian law.

<sup>167</sup> ICC 6283/ 1989, C. of ICC Aw. 1991-1995, at page 178.

different substantive laws. To avoid such inconsistencies the arbitrator shall interpret some rules in a flexible way, in order to reconcile all the rules and avoid making a choice as to which system of private international law is applicable.<sup>168</sup>

#### **4.1.4 General principles of private international law:**

A criterion to test whether a principle is generally recognised is to presume that it should be identified within the ambit of international conventions. However, if a state has not yet ratified the respective Convention and is not willing to be bound in future, then the above presumption shall not apply.<sup>169</sup> Examples of such general principles are the Rome and Hague Conventions. Generally this method is based on a “comparative approach” and is of great assistance<sup>170</sup> where private international law rules of the national systems connected with the dispute do not coincide<sup>171</sup>. An example is to determine the law closely connected with the dispute.

### **4. Determination by the arbitrator:**

#### **4.2.1 Delocalisation:**

This principle lies in the entire detachment of international commercial arbitration from any control by the law of the place in which it is held. However arbitration will probably still be subject to possible provisions of the law of the place of enforcement. International

---

<sup>168</sup> ICC 5314/1988, C. of ICC Aw. 1974-1985, at pages 309-314.

<sup>169</sup> Giuditta Cordero, Moss-Tano Aschehoug: “*International Commercial Arbitration-Party Autonomy and Mandatory Rules*”, Rome 1999, at page 257. The author states an Italian case ( Dec. 08.02.1982, No 722, *Rivista del Diritto Internazionale e Processuale*, 1982, 829 ff.) where the Italian Supreme Court refused to enforce an English award without being reasoned, though valid under English law, on the basis that the Geneva Convention was applicable even if not ratified by the UK as the expression of general principles required the awards to be reasoned.

<sup>170</sup> *Kuwait v. AMINOIL*, 66 ILR 518, 21 ILM 976. In this case the Court was not engaged with issues of internationalisation of state contracts and applied private international law and especially general principles of private international law.

<sup>171</sup> Ana M. López Rodríguez: “*Lex Mercatoria and Harmonization of Contract Law in the EU*”, DJØF Publishing, 2003, at page 77.

commercial arbitration is sufficiently regulated by its own rules which are either adopted by the parties or drawn up by the arbitral tribunal itself.<sup>172</sup>

*Bucher* has emphasised that the autonomy of the private international law of arbitration implies that the arbitrator does not have a *lex fori* from which he can borrow conflict of laws rules so as to be bound by them as the national judge.<sup>173</sup> He is not an instrument of a state's judicial process in the same way as national courts are. In contemporary arbitral practice the private international law suitable to arbitration should be positively expressed as the prolongation/ extension of the autonomy and will of the parties to the autonomy of the arbitrator. This is described as the "taking of the principle of party autonomy to its extreme".<sup>174</sup> The autonomy of the arbitrator shall also depend on its recognition by the national legal systems and is always subject to public policy considerations. This is in compliance with the concept that delocalisation is subject to the *lex loci arbitri*. In pursuance of this view Professor *Lalive* has commented as follows: "The arbitrator exercises a private mission, conferred contractually and it is only by a rather artificial interpretation that one can say that his powers arise from-and even then very indirectly- a tolerance of the State of the place of arbitration, or rather of the various states involved which accept the institution of arbitration, or of the community of nations, notably those which have ratified international treaties in the matter".<sup>175</sup>

#### **4.2.2 English rule:**

The application of a conflict rule is reflected by Article VII para 1 of the Geneva Convention of 1961, Article 28 para 2 of the UNCITRAL Model Law and Section 46(3) of the EAA.

Article VII para 1 of the Geneva Convention, which the UK has not yet signed, was viewed as

<sup>172</sup> Redfern/ Hunter: "Law and Practice of International Commercial Arbitration", 3<sup>rd</sup> edition, London Sweet & Maxwell, 1999, at para 2-19.

<sup>173</sup> Andreas Bucher: "Le nouvel arbitrage international en Suisse", Bâle 1988, at page 79.

<sup>174</sup> Jean Robert: "The French Law of Arbitration", Matthew Bender Pub., New York, II:4-12.

<sup>175</sup> Okezie: "Choice of Law in International Commercial Arbitration", CT-USA 1994, at page 124.

extremely innovative at the time of its entry into force, as it conferred on the arbitrator even a limited discretion to indicate a conflict rule which in turn leads to the designation of the governing law. These laws preferred to retain the reference to a conflict rule in order not to diminish the predictability of the outcome of the use of “rules of law”. With regard to English law an arbitrator is allowed to choose a “law” or a “rule of conflict”. As seen under a previous heading, Section 46(3) opened the path for the arbitrator to apply foreign conflict of law rules, notwithstanding that, in practice, he is challenged to apply English conflict of laws rules.<sup>176</sup> In the first place, the English legislator, contrary to the Swiss one, did not intend to award the arbitrator powers to decide the applicable law according to a “rule of law” in Section 46 (3). This was viewed as a concept foreign to the English legal tradition. Until recently, “rules of law” were criticised for possible ambivalent outcomes, in the sense that their extensive use would contradict the parties’ contractual expectations and favour the application of such “rules” without the parties’ consent.<sup>177</sup>

#### **4.2.3 Swiss Rule-Contractual analysis method:**

In Switzerland, in the absence of choice, the arbitrator shall decide the case according to rules of law with which the dispute has the closest connection ( Article 187(1)). This method is regarded as a particular *voie directe* differing from the *voie directe* of French law and the ICC Rules in that the *LDIP* specifies the rules of law with which the dispute has the closest connection.<sup>178</sup> The above article does not give explicit directives to the arbitrator but provides an element of the *liens les plus étroits*. The criterion gives effect to the principle of proximity, centre of gravity and closest connection from which inspired the drafters of the Rome

---

<sup>176</sup> English law, unlike the Swiss *LDIP* ( Article 190 ) allows an appeal in Section 69 where an erroneous choice of law has been made by the arbitrator even in the case he applies English conflict of laws rules.

<sup>177</sup> Jean-François Poudret- Sébastien Besson : « *Droit Comparé de l' arbitrage international* », Bruxelles 2002, at page 612.

<sup>178</sup> The closest connection should be established on a case by case basis, not following the contract-type formula of Article 117.

Convention (Article 4 para 1) and bears some resemblance to the common law concept of “proper law of the contract”. This method concerns a conflict of rule for international arbitration and not an ordinary application of private international law of the forum.<sup>179</sup> It is also apparent from the “closest connection rule” otherwise known as “centre of gravity” or “most significant relationship” wording of Article 4(2)<sup>180</sup> and (5) of the Rome Convention and Article 187 of the *LDIP* that the arbitrator shall not be confined to apply a specific conflict of law system or a conflict of law rule. On the other hand, he shall not have a “carte blanche” to apply any kind of law he fancies.<sup>181</sup> The term rules of law makes it clear that the arbitral tribunal shall not be bound to determine the applicability of one specific law but has the freedom to base its award on “rules of law” (including a-national or transnational rules of law).

The above approach was termed by *Blessing* as “substantive law autonomy”.<sup>182</sup> In contrast with the analogous rigid Section 46(3) of the EAA, Article 187(1) is an innovation of Swiss law. It acknowledges the arbitral tribunal’s same degree of autonomy as the parties, in that it can declare “rules of law” and not just “a law” applicable. Practically, Article 187 should rarely give rise to serious discussion in Swiss arbitration.

The progressive tendency in Switzerland is that the arbitrator shall primarily give precedence to the application of the contract underlying the dispute and sometimes proceed to interpret it.<sup>183</sup> Therefore, in the majority of cases, contractual provisions prevail over an applicable (national) law (which in many cases is not familiar to the parties). Rarely do arbitrators strive to investigate appropriate conflict rules. They normally examine the parties’ contractual provisions and whether they are consistent with the principle of the parties’

---

<sup>179</sup> Article 187(1) departs from that principle by supporting an independent conflict of laws rule making, chapters 1 to 11 of the *LDIP* are inapplicable either directly or per analogiam.

<sup>180</sup> A recent English case on the issue was *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd’s Rep 87.

<sup>181</sup> *Infra* no 174.

<sup>182</sup> Stephen V. Berti : « International Arbitration in Switzerland », Kluwer Law International, London 2000, at page 189.

<sup>183</sup> *Ibid.* no 174.

autonomy, for the contract is in the final analysis an embodiment of the parties' expectations on how their transaction should be executed.

At this point, the ICC 1990/ 1977<sup>184</sup> case is noteworthy. The arbitrator, to the extent that the provisions of the contract are sufficiently detailed to enable resolution of the dispute at hand, and do not infringe the provisions of mandatory rules, usually applies them without having to determine the applicable law. But the application of contractual provisions is not a substitute in all cases to making a positive choice of law. In certain cases, the arbitrator shall exercise his discretion to select a governing law. Nonetheless, following the contractual method, a careful weighing, guided by international standards and taking into account fair and reasonable expectations of the parties, seems very promising and reliable.

#### **4.3 French Rule:**

A direct choice method (*voie directe*) is encompassed in Article 1496(1) of the French NCPC of 1981, Article 1054 of the Dutch Code of Civil Procedure of 1986 and Article 17.1 of the ICC and Article 22.3 of the LCIA institutional Rules. France has enacted the most liberal arbitral system by entirely freeing the arbitrator from any particular conflict of rules method. Article 1496 para 1 of the NCPC does not confine the arbitrator within sharp limits and therefore allows him to decide the dispute in accordance with “rules of law” and not just “a law” by choosing directly the “rules of law” he “considers appropriate”. Virtually nothing obstructs him from applying a choice of law rule or using any other method of selecting the applicable law as he sees fit.<sup>185</sup> The distinction between “the law” and “rules of law” mainly

---

<sup>184</sup> C. of ICC Aw. 1974-1985, at page 217.

<sup>185</sup> Fouchard, Gaillard, Goldman “*Traité de l' arbitrage commercial international*“, Paris 1996, at page 870. The author notes making a comparison with Swiss law that although Article 187 of the *LDIP* is said to be restrictive on the powers of the arbitrator and in practice it is flexible. He invokes an ICC case, namely no 7154/ 1994, C. of ICC Aw. 1991-1995, at page 555, where it was held that the contract in dispute had closer connections with the law «which preserves» its existence than with the law which denies it. Therefore the arbitrator is not deterred from measuring on a case by case basis the strength of the links between the various laws and the case being heard.



lies in the fact that when the arbitrator chooses “the law” he has to designate one particular national law, as being the law applicable to the contractual relationship. Other sources of law or supra-national principles also qualify as rules of law.

French law envisaged any reference to a conflict rule as useless because the arbitrator is not restricted to rule according to a national law. The whole process added a needless and complicated step in the process of reaching a determination.<sup>186</sup> The concept is that in the absence of a choice by the parties the arbitrator is given the same power and freedom as the parties to consider a wide variety of sources when determining the applicable law.

To elaborate on the process, the *voie directe* leads, as in the choice of law method, to a law which is based on the connections between the case and the chosen law. However the arbitrator is free to choose the law more suited to the disputed contract by considering how the contract is drafted or the concepts to which it refers. Though not obliged to provide a reasoning, the arbitrator shall have to go through a consistent thinking process. *Berger*<sup>187</sup> reasonably holds that even by using a *voie directe* the arbitrator shall have to justify his choice by stating sources and means which led to that choice. Practically the *voie directe* does not differ much from the *closest connection* criterion of Article 187 of the *LDIP* since it requires justifications. His decision should correspond to the “objective” expectations of the parties by measuring policies of globalisation and harmonisation of laws in the commercial, financial, banking and competition fields.

#### **4.4 Alternative method: Functional analysis:**

---

<sup>186</sup> Jean Robert: “*The French Law of Arbitration*”, Matthew Bender Pub., New York, II:4-17.

<sup>187</sup> Jean-François Poudret- Sébastien Besson : «*Droit Comparé de l' arbitrage international*», Bruxelles 2002, at page 622.

In the landmark ICC case 1422/ 1966<sup>188</sup> the arbitrator followed a two step process. He invoked private international law conventions and with a certain “discretion” applied a conflict of laws method by balancing contractual terms with national legal systems’ considerations. This is a feature of a “multi-aspect method” which is also described as a “functional analysis”. Outside the field of arbitration, the same method is known as a “false conflict” technique and followed by the national judge. Normally, the process consists of: a) the leaving aside of considerations of irrelevant private international law systems, b) the absence of incompatible solutions among the relevant ones and c) the functional comparison among the solutions currently offered by the latter and those by the private international law system the arbitrator chooses.<sup>189</sup> Thus, the arbitrator shall compare the private international laws connected with the dispute and the policies of the substantive laws designated by them. In reality, this reflects a tendency to look behind the legal formalities and penetrates legal structures and institutions in order to attain the best solution in terms of fairness-justice. The operation of the functional analysis<sup>190</sup> is associated with a *prima facie* rebuttable presumption that the law chosen by the parties is to apply, unless the mandatory norms indicated by the connected conflict of laws systems should be applied to debate their underlying policies.

---

<sup>188</sup> In this case, there was a contract between a Swiss company and an Italian company under which the former undertook to distribute in the US and Mexico products manufactured by the latter. The arbitral tribunal was called upon deciding on the applicable law, as the parties have not designated it. By considering a grouping of connecting factors instead of an independent conflict of laws rule, the arbitrator applied Italian law which did not run contrary to the “general principles common to all civilised nations”. Both French law (*lex loci arbitri*) and Swiss law (law of domicile of the one party) concurred in designating Italian law as *lex fori*.

<sup>189</sup> Giuditta Cordero Moss-Tano Aschehoug: “*International Commercial Arbitration-Party Autonomy and Mandatory Rules*”, Rome 1999, at page 252.

<sup>190</sup> Horacio A. Grigera Naón: “*Choice-of-law problems in international commercial arbitration*”, Tübingen 1992, at page 65. The author describes it as a “mixed approach”.

## Conclusion

This essay examined an overview of the legal framework of a choice of law. Issues of choice of law arise not only in the absence of choice but also in an express and implied choice of law. The arbitrator is entrusted to trigger a preliminary evaluation of all three situations and cast a decision as to what law or rules of law he shall apply. The particularity of this autonomous regime is that, unlike a national judge, the arbitrator is not bound to deliver an award according to a national law. This is also supported by the change in delivering awards on the grounds of a-national rules. *Lex mercatoria* is nowadays invoked by the arbitrator not only when faced with an absence of choice of law but also in an express choice of law. Being a sensitive tool in the hands of the arbitrator, the above trend seems to be a convenient solution for the arbitrator, notwithstanding that ruling on *lex mercatoria* requires an extensive reasoning and provides a ground of appeal in point of law at the forum where enforcement is sought. However in most cases he shall have regard to arbitral precedents and use his own experience in commercial disputes.

National arbitral legislations throughout developed countries in Western Europe have increasingly encompassed new trends in this field of private international law, and institutional rules have achieved their primary goals. However issues of applicable law are still at stake. In later decades, distinguished practitioners have led arbitrations whose very nature was problematic from scratch because the parties failed to specifically refer to an applicable law or their lawyers negotiators were irresponsible in procuring the parties with professional advice. Furthermore complicated business transactions gave rise to concerns of the law applicable to the substance of the dispute and ended up being resolved before an arbitral panel rather than before a national judge. It was felt that an arbitrator is more trustworthy in providing tailored solutions to the problem. His awards, reflecting the reality in business, may be more delicate and produce a better law than an award rendered by a national judge.

Undoubtedly conferring justice should be independent of commercial expectations. But this paper endeavoured to assess current arbitral strategies and radical business practice. Commencing the analysis from the less relaxed English system and passing through the Swiss one which is more liberal, a generous attempt was made to bolster the French system, the only one to take the first legislative step to ensure the greatest liberty and integrity on the arbitrator to choose the applicable law. To go beyond common experience, even the French system does not deserve full support since the arbitrator shall practically still follow a conflict method. To be realistic, arbitrators nowadays follow a contractual approach. This entails an appropriate and responsible interpretation of the contract through an intimate look at current market practices. This is an empirical approach which leaves aside considerations of conflict methods. In due course, the contractual analysis shall assist the arbitrator in sketching an overview of the legal framework of the question at hand.

I shall now turn back to public policy and mandatory rules considerations. *Knoepfler* has for years stood against any detachment of arbitration from public policy. He has strongly argued that parties who have chosen arbitration should not be treated differently from those who have not by using the following wording<sup>191</sup>: “The parties do not leave the world entirely”. He probably took such a stance to anticipate that in the final analysis they have to return to a national court for enforcement issues. Additionally, lack of a common approach even within decisions rendered by expert arbitrators of the ICC makes a consensus on public policy even more difficult. This paper endeavoured to generate a primary discussion of how the contract between the parties is to be affected by any kind of mandatory rules or public policy. Due considerations were given to the parties expectations and how an invoked mandatory rule would disadvantage any of them. At this point, an arbitrator should be attentive in penetrating into the core of the dispute. He should also predict and discern any existing or subsequent

---

<sup>191</sup> Daniel Hochstrasser: “Choice of law and “Foreign” Mandatory Rules in International Arbitration”, J.I.A., Vol 11, March 1994, No 1, at page 61.

conduct of the losing party to invoke a mandatory rule in order to be discharged from his contractual obligations.

Consequently, the arbitrator shall take account of conceptions of each national legal order and define which rules and principles are to be considered mandatory and elective when dealing with an international transaction. It will be his task to evaluate, in the light of other policies, the degree to which the public policy underlying general conflict rules of concerned fora should prevail when the decision of the specific issue in dispute is at stake. Therefore, although enforcement is normally unpredictable, the arbitrator is at least able to identify the national legal systems showing contacts with the dispute.

Assuming the arbitrator is a fair minded lawyer and businessman, he will observe any technicalities and formalities and procure an award which will not be contested in the forum of enforcement. Generally, to reconcile this wide freedom of the arbitrator in choosing a law or a-national rules with national interests disguised under the mask of public policy and mandatory rules and the parties' right in challenging the award, the place of enforcement seems practically to be the only limitation. Before delivering an award, he shall abstain from contradicting any mandatory rules or public policy practically at the place where enforcement is sought. A functional analysis enhances rationality, comprehensibility and possibilities of the enforcement of the award.

Fundamentally arbitration is constantly undermined. Although the idea of pushing arbitration forward has gained ground over the years, national legislators are not really enthusiastic about it. Being the matrix of professional litigation, arbitration has pioneered new trends in every field of commercial law. Entrenched by old fashioned and outdated ideas national judges rarely admit the supremacy of this regime.