

DETERMINING THE LAW APPLICABLE TO THE
MERITS IN INTERNATIONAL ARBITRATION

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I. INTRODUCTION

As international arbitration has become an increasingly popular means of dispute resolution, scholars have favored a denationalized view of arbitration.¹ Instead of treating international arbitration as being inextricably attached to a particular national legal system, such scholars view international arbitration as “floating” and unencumbered by any national legal system. Arbitrators are seen as deriving their powers from the “sum of all the legal orders that recognize the validity of the

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1. JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 81 (1978); Arthur Taylor von Mehren, *To What Extent is International Commercial Arbitration Autonomous?*, in LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES: ETUDE OFFERTE À BERTHOLD GOLDMAN [THE LAW OF INTERNATIONAL ECONOMIC RELATIONS: STUDY OFFERED TO BERTHOLD GOLDMAN] 217, 217 (Berthold Goldman ed., 1982).

arbitration agreement and the award.”² This includes the New York Convention, the parties’ agreement, the tribunal itself, and national legislation.³

This commentary, however, favors the more traditional territorial view of international arbitration. Giving primacy to the seat is not only theoretically satisfying, but also provides a sensible answer to the difficult questions that arise in international arbitration. One such question is what the applicable conflict of law rules should be.

In adopting the territorial view of arbitration, this commentary will demonstrate that the conflict of law rules of the seat should determine the law governing the merits of the case. Part I addresses why conflict of law rules are important in international arbitration. Part II sets forth other possible conflict of law rules that could apply and explains why they fall short. Part III explains why using the conflict of law rules of the seat is the best solution. Part IV briefly concludes.

II. THE RELEVANCE OF CONFLICT OF LAW RULES IN INTERNATIONAL ARBITRATION

Given the primacy of party autonomy in international arbitration, it might seem natural that the parties’ choice of the governing law on the merits should be given effect. However, one simple reason why relying on the parties’ choice is inadequate is that sometimes parties forget to choose. A more complicated but fundamental reason is that the fact of the parties’ choice might be an insufficient reason to apply their choice of law. Even in national legal systems, not all jurisdictions recognize *complete* autonomy for parties to choose the governing law of the contract.

For instance, in the United States, the parties’ choice of law is restricted if “the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue” (e.g. the issue of capacity to con-

2. Iris Ng et al., *Five Recurring Problems in International Arbitration: The Relationship Between Courts and Arbitral Tribunals*, 8 INDIAN J. ARB. L. 19, 38 (2020).

3. Michael Dunmore, *A Brief Overview of the Key Sources of Power in International Arbitration*, 11 ASIAN INT’L ARB. J. 169, 180 (2015).

tract).⁴ In particular, the parties' choice will not be given effect if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice"⁵ or if applying the chosen law would be "contrary to the fundamental policy of a state which has a materially greater interest than the chosen state" and which would otherwise be the applicable law.⁶

The choice of law rules in certain jurisdictions may also mandate the application of their laws for certain issues notwithstanding the parties' explicit choice. For instance, in *Mitsubishi v. Soler Chrysler-Plymouth*,⁷ the U.S. Supreme Court referred the antitrust claims to arbitration presumably on the basis that the arbitrators would hear claims based on U.S. antitrust law, even though the contract provided for the application of Swiss law. Likewise, in the European Union, the Rome I Regulation acknowledges this and leaves open the possibility for overriding mandatory provisions to apply.⁸ Thus, the mere fact that parties have chosen a law to govern their dispute may be an insufficient reason to apply that chosen law to the merits of the dispute.

The question of which law applies to the merits of the case is of the utmost importance given that it could be determinative of the outcome of the case. Moreover, there are significant consequences if the tribunal were to get the choice of law wrong.⁹ The tribunal's decision on the merits is typically not subject to appeal and the New York Convention does not provide grounds to refuse enforcement of the award if the tribunal applies the wrong choice of law rules.¹⁰ Therefore, there is much at stake when the tribunal decides which law applies to the merits.

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (AM. L. INST. 1971).

5. *Id.* § 187(2)(a).

6. *Id.* § 187(2)(b).

7. *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

8. Council Regulation 593/2008, art. 9, 2008 O.J. (L 177) 6 (EC).

9. Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 257, 310–312 (Franco Ferrari & Stefan Kröll eds., 2019).

10. *Id.*

III. POSSIBLE CONFLICT OF LAW RULES IN INTERNATIONAL ARBITRATION

With that in mind, this commentary now turns to the possible conflict of law rules that could apply in international arbitration.

A. *Conflict of Law Rules of the State that Would Otherwise Have Jurisdiction Absent an Arbitration Clause*

One option is to apply the conflict of law rules of the state that would otherwise have jurisdiction absent an arbitration clause. This approach reflects a sovereignty-based approach to arbitration, wherein the courts of a state which would otherwise have jurisdiction over a dispute relinquish power to the arbitral tribunal in the presence of an arbitration clause. This seems to have its roots in the initial judicial reluctance to cede power to arbitral tribunals because such tribunals lacked the means to compel parties to participate in the proceedings.¹¹ The sovereign's cooperation in ceding power is essential to the tribunal's jurisdiction. The tribunal thus applies the conflict of law rules of the state that would otherwise have jurisdiction out of respect for the courts of that jurisdiction or as a trade-off for the court's relinquishment of power.

The practical defect of this option is that it is entirely possible for multiple states to claim jurisdiction in international arbitration cases. In such situations, the tribunal would still be faced with multiple competing conflict of law rules and no sensible way to choose one over another.¹²

B. *Conflict of Law Rules of the Arbitrator's Home State*

Some have proposed that arbitrators simply apply the conflict of law rules of their own home state because they are likely to be most familiar with such rules.¹³ This is untenable. As a practical matter, a tribunal of three could be composed of arbitrators from different jurisdictions and with different choice of law rules. Thus, it would not be possible to choose

11. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 40–46 (3d ed. 2021).

12. Silberman & Ferrari, *supra* note 9, at 397.

13. Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 *HASTINGS INT'L & COMP. L. REV.* 235, 261–62 (1986).

between the different choice of law rules. As a theoretical matter, there is simply no reason why the choice of law rules of the arbitrator's home state should apply. The arbitrator's home state is likely to have an attenuated or non-existent link to the parties and the dispute. As discussed above, given that the law applicable to the merits could be dispositive of the case, there is little reason why something as crucial as the choice of law rules should be chosen simply on the basis of the arbitrator's familiarity with them.

C. *Conflict of Law Rules of the Country where the Award will be Enforced*

A practical solution that focuses on the resolution of the arbitration process is the suggestion that the choice of law rules of the place where the award will be enforced should be applied. There is some merit to this suggestion given that the tribunal's award is likely to be enforced in court eventually. At that stage, the court may review the tribunal's award and refuse its enforcement. Thus, there is some sense in using the choice of law rules at the place of enforcement to ensure an enforceable award.

That being said, as noted above, there are no express grounds in the New York Convention that allow courts to refuse to enforce an award on the basis that the wrong choice of law had been applied. The only possible way that an award might be refused enforcement for applying the wrong law is under the public policy exception.

However, the public policy exception is generally held to a very high standard and must rise to the level of "international public policy." For instance, in *Ommium v. Hilmarton*,¹⁴ the court held that even if a tribunal applying English choice of law rules would apply Algerian law on the merits, it was irrelevant at the enforcement stage. Thus, the possibility of an award being refused enforcement via the public policy exception because of the application of the wrong choice of law rules should not be overstated. In most instances, when there is no mandatory law implicated, there is less reason to apply the choice of law rules of the place of enforcement.

14. *Ommium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146 (EWHC) (Eng.).

Additionally, at the time the award is issued, it may not be possible to foresee which party will need to seek enforcement of the award. This is further compounded by the fact that there may be multiple places where the winning party could seek enforcement of the award. Thus, it would be difficult for the tribunal to rationally select one place of enforcement to draw its choice of law rules from.

D. *Cumulative Approach*

An approach favored in the *Korean Seller v. Jordanian Buyer*¹⁵ case is the cumulative approach whereby the choice of law regimes of all the potentially relevant jurisdictions are considered. In *Korean Seller*, the tribunal considered the choice of law rules from Korea (which was the seller's place of incorporation and the place of contracting), Jordan (which was the buyer's place of incorporation), Iraq (which was the place of performance), and France (which was the seat of the arbitration). Miraculously, the choice of law rules of all four jurisdictions led to the conclusion that Korean law would apply to the merits.

While this comprehensive approach can account for the rules of all the jurisdictions with a possible interest in the dispute, it suffers from one glaring problem—it offers no solution in cases where the different choice of law rules would lead to the application of different laws to the merits.

E. *General Principles of Conflict of Laws*

Finally, another solution would be to avoid relying on a set of national choice of law rules, and instead adopt general principles of conflict of laws. For instance, general principles could include deference to the parties' chosen law and, in the absence of a choice, the law with the closest connection to the issue in dispute.

Developing a set of general principles specific to international arbitration would accord well with the denationalized view of international arbitration. Under this view, international arbitration is understood as an entirely different creature from litigation and is not tethered to any nation. Thus, it follows that international arbitration should develop its own

15. Case No. 6149 of 1995, XX Y.B. Comm. Arb. 41 (ICC Int'l Ct. Arb.).

set of conflict of laws principles distinct from those in national courts. However, this approach does not sit as well with the principle of territoriality, as will be argued below.

The main practical difficulty with adopting general principles of conflict of laws is that it is unclear what these general principles would even be. For instance, different jurisdictions deal differently with the issue of mandatory laws and when the parties' choice of law can be overridden. The lack of clarity of what these general principles are is also unlikely to improve with time given that arbitral awards are generally unpublished and thus, it is not possible to build a trove of case law.

The only realistic way to establish uniform and consistent general principles of conflict of laws would be for an international organization, such as the International Bar Association (IBA), to come up with a set of guidelines for tribunal members to consider. Given that the IBA has successfully developed numerous other guidelines (e.g., the Guidelines on the Taking of Evidence and the Guidelines on Conflict of Interests in International Arbitration), there is reason to believe that a set of guidelines setting out some general principles of conflict of laws could also be widely adopted by tribunal members as persuasive, even if not binding, authority. However, until an international organization actually attempts to coordinate efforts to develop general principles of conflict of laws, this is not a viable alternative. Even then, given the variation in approaches to conflict of laws across jurisdictions, devising such general principles will likely prove challenging.

IV. *Territoriality and the Seat*

The options presented thus far have all been unsatisfactory, principally for practical reasons but also for theoretical ones. There is, however, one final alternative which is both practically feasible and theoretically sound—applying the choice of law rules of the arbitral seat. These choice of law rules could be the standard choice of law rules which national courts at the seat apply or they could also be the choice of law rules crafted specially for arbitration seated in that state.

As a practical matter, applying the choice of law rules of the seat avoids the issue of there being multiple jurisdictions whose choice of law rules could be applicable. This approach creates certainty and predictability as to the choice of law rules

that would apply, and resolves an issue that plagues most of the alternatives discussed above. There would also be less uncertainty as to the content of these choice of law rules (as there would be with general principles of choice of law) since statutes or published judgements from the seat would provide clear guidance.¹⁶

Moreover, this approach is also theoretically sound. The principle of territoriality is a more accurate reflection of international arbitration than the denationalized view. Although, proponents of the denationalized view argue that international arbitral tribunals have no allegiance to any nation, this does not reflect the realities of international arbitration. International arbitration cannot survive independently and autonomously from any state. Some argue that, besides the state, there are other sources of legal power in international arbitration such as the parties' agreement, the New York Convention, and the tribunal.¹⁷ However, the reason why any of these "sources" of power have any weight at all is because of the state.

First, the parties' agreement is only valid insofar as states are willing to recognize and enforce the parties' contractual rights and obligations. In fact, the parties' agreements must conform to the requirements of municipal law; otherwise they will not be enforced. This "inevitably establishes the national character of arbitration that takes place in a country":¹⁸

"No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given State. No private person has the right or power to act on

16. Of course, it is possible that the choice of law rules of the seat are complicated and unclear. In any event, that would only create uncertainty as to the ultimate applicable law on the merits, but not the applicable choice of law rules.

17. Michael Dunmore, *A Brief Overview of the Key Sources of Power in International Arbitration*, 11 *ASIAN INT'L ARB. J.* 169, 180 (2015)

18. Abdul F. Munir Maniruzzaman, *State Contracts and Arbitral Choice-of-Law Process and Techniques*, 15 *J. INT'L ARB.* 65, 68 (1998).

any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori* . . . ”¹⁹

Second, the New York Convention is only effective as a source of power because states have chosen to ratify the Convention and to give it force under municipal law. It is no coincidence that at the heart of the success of international arbitration as a dispute resolution mechanism is a convention which regulates not international tribunals, but national courts. Without the cooperation of national courts in the (universal) enforcement of arbitral awards, such awards are no better than an unenforceable promise to the award creditor.

Finally, an international tribunal has no real bite without the support of national courts. Arbitral tribunals have no coercive force on their own. National courts are essential to compel parties to arbitrate in accordance with an arbitration agreement,²⁰ to grant provisional remedies,²¹ to take evidence in support of the arbitral proceedings,²² and finally, to enforce the award.²³

The principle of territoriality is also deeply entrenched in international arbitration. The concept of an arbitral seat has been a long-lasting and surviving concept in international arbitration which is viewed as essential.²⁴ Its role is so essential that some jurisdictions have found arbitration agreements to be deficient where they fail to provide for a seat.²⁵ Even in jurisdictions which allow arbitration to proceed in such situations, the court will still choose a seat for the parties or direct parties to make a choice before arbitration can proceed.²⁶

19. *Id.*

20. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

21. BORN, *supra* note 11, at 2728.

22. *Id.* at 2570.

23. New York Convention, *supra* note 20, art. IV.

24. RESTATEMENT OF U.S. L. OF INT’L COM. AND INVESTOR-STATE ARB. §1.3 Reporters’ Note (AM. L. INST. 2019).

25. BORN, *supra* note 11, at 827.

26. *Id.*

Once one accepts that international arbitration must be tethered to a state, it follows that the choice of law rules of the seat should apply. Understood through the lens of territoriality and sovereignty, the arbitral tribunal's authority to decide the parties' dispute emanates from the arbitral seat's court. In essence, the arbitral tribunal becomes an instrument of the state and sits as a quasi-judiciary to the parties' dispute, subject to the supervision of the seat's national court.

Therefore, the tribunal should apply the choice of law rules that a national court at the seat would apply. In the context of litigation, national courts apply the choice of law rules of the forum to determine the applicable law to the merits. Therefore, the arbitrator, sitting like a judge,²⁷ should likewise apply the seat's choice of law rules.

At present, it is readily accepted that the *lex arbitri* is the arbitration law at the parties' chosen seat. In fact, if the *lex arbitri* provides for a choice of law regime, the tribunal and enforcing courts will have no qualms giving effect to it.²⁸ It is therefore not a far stretch to expect the tribunal to apply the choice of law rules at the seat.

Some may argue that parties never intended to choose the choice of law rules of the seat when selecting the seat and may be blindsided if the choice of law rules of the seat were to be applied. However, what parties expect depends on what the practice of international arbitration is. If tribunals were to regularly and uniformly apply the choice of law rules at the seat, then parties will eventually come to expect that when they choose the arbitral seat, they choose with it the seat's choice of law rules, and parties will be able to make the relevant decisions accordingly.

Finally, applying the choice of law rules of the seat promotes party autonomy, a central tenet of international arbitration. The other options for determining the choice of law

27. M Pierre Mayer, *The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator*, in *IS ARBITRATION ONLY AS GOOD AS THE ARBITRATOR? STATUS, POWERS AND ROLE OF THE ARBITRATOR* 47, 49 (Yves Derains & Laurent Lévy eds, 2011).

28. See *BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG]* [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 187 (Switz.) (providing that in the absence of a choice of law, the arbitral tribunal shall decide according to the rules of law which have the closest connection with the case).

rules do not accord parties with the choice of which choice of law rules to apply. For instance, under the general principles of conflict of laws approach, parties must simply accept whatever the content of these general rules are. Under the cumulative approach, parties cannot choose in advance which are the relevant jurisdictions with interest. Party autonomy has always been integral to arbitration. This autonomy has usually extended to the law governing the contract and the dispute. It would be consistent with party autonomy to also allow parties to choose the choice of law rules governing their arbitration. This choice can be reflected in the parties' choice of the seat.

If parties were not allowed to choose the choice of law rules applicable to them, then their ability to choose the law governing the merits of the dispute would be significantly undermined. It is hypothetically possible for the choice of law rules *imposed* on the parties to refuse to give effect to their choice of the governing law. Indeed, while the mandatory laws of interested jurisdictions should apply occasionally, they should only override party autonomy when they rise to the level of international public policy. The public policy exception in the New York Convention suffices to account for the interests of states with a strong public policy toward a specific issue. In all other instances, parties should be allowed to choose the law governing their agreement and to do so effectively, they must also be allowed to choose the choice of law rules applicable.

Admittedly, in cases where parties have not expressly chosen the governing law of the contract, it is unlikely that parties would have paid any attention to the choice of law rules. Nevertheless, designating the seat as the source of the choice of law rules gives parties the autonomy to make a choice about the choice of law rules should they be of mind to do so.

V. CONCLUSION

Applying the choice of law rules at the seat of the arbitration is not only practical, but also consistent with the principles underlying international arbitration. Unlike the alternative options, there is no problem of multiple sets of choice of law rules being potentially applicable or leading to potentially different results. Adopting the choice of law rules of the seat provides a simple and straightforward solution, which leaves

no room for confusion. However, more than its practical benefits, applying the choice of law rules at the seat is also theoretically satisfying because it conforms with the principles of territoriality and promotes party autonomy, which is a pillar of arbitration. While the denationalized view of arbitration has become increasingly popular, the principle of territoriality still remains the more accurate view of international arbitration. Applying the choice of law rules of the seat is a natural consequence of territoriality. Moreover, in order to give effect to the parties' choice of governing law, parties must also have the incidental ability to choose the choice of law rules. Parties will have this choice if the choice of law rules are also tied to the seat of arbitration.