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Underlying policy considerations for assigning the applicable substantive law in international commercial arbitration

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Abstract: In international commercial arbitration, when the parties do not choose any law to govern the substance of their disputes, arbitrators are responsible for doing so. The inherent flexibility of the arbitrator's discretion makes this task critical, as their decision can significantly impact the outcome of the arbitration. This article aims, to examine relevant policies that underlie an arbitrator's choice of the applicable substantive law in the absence of the parties' choice. It employs a comprehensive blend of secondary research and analytical methodologies, to identify and evaluate the nature of these policies, highlighting their possible extremes and, or irreconcilable elements. This article highlights the distinction between the direct and indirect methods used to assign the applicable substantive law and questions the practical application of these methods by arbitrators. It also explores relevant policies from three perspectives – a transnational perspective, a party perspective and a jurisprudential perspective. The findings suggest that specific, policy considerations influence the arbitrator's decision-making process, regardless of the method employed to assign the applicable substantive. By understanding and assessing these policy considerations, arbitrators can make informed decisions when assigning the applicable substantive law in international commercial arbitration.

Keywords: International Commercial Arbitration. Applicable Substantive Law. Arbitrator Discretion. Choice of Law. Policy Considerations.

1 Introduction

The national arbitration laws and the rules of most arbitration institutions, allow parties to freely choose not only the procedural provisions that will affect the conduct of their arbitration proceedings but also the law that will govern their

substantive rights and obligations.[1] Simultaneously, these national and institutional arbitration laws generally also grant arbitrators a wide margin of discretion to assign applicable substantive law[2] when the parties fail to select one.[3] Consequently, in international commercial arbitration, the applicable substantive law is identified in two distinct ways – parties choose the applicable substantive law, or arbitrators assign the governing law.[4]

Where arbitrators must assign applicable substantive law in the absence of the parties' choice, the methods they employ differ according to whether or not they are specifically required to apply conflict of law rules to make the determination.[5] The UNCITRAL Model Law on International Commercial Arbitration of 1985 (UNCITRAL Model Law)[6] for instance provides that the tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable".[7] In contrast, the UNCITRAL Arbitration Rules of 1976 (UNCITRAL Arbitration Rules)[8] do not mention conflict of laws and provide that when parties have not designated a governing law, the tribunal "shall apply the law or rules of law which it considers to be most appropriate".[9] The case of the former involves a two-step process. First, arbitrators must identify which conflict of laws rules they should use. Second, according to those rules, they must determine which law will govern the substance of the dispute. In the latter case, the language allows arbitrators to determine substantive law without first conducting a conflict of laws analysis. Determining the applicable substantive law without applying conflict of laws rules is considered a direct method (*voie directe*), whereas determining the applicable substantive law using a conflict of laws analysis is regarded as an indirect method (*voie indirecte*).

The distinction between the direct and indirect methods used to assign the law applicable to the merits of a dispute enjoys doctrinal prominence only in international arbitration.[10] One could argue successfully that the distinction between

1 GAILLARD, Emmanuel, SAVAGE, John. Fouchard, Gaillard, Goldman on International Commercial Arbitration. The Hague: Kluwer Law International, 1999, pp. 865-866; MOSES Margaret L. The Principles and Practice of International Commercial Arbitration. Cambridge: Cambridge University Press, 2008, pp. 76-77.

2 In this contribution the terms applicable substantive law and governing law may be used interchangeably.

3 Gaillard & Savage, supra note 1, at 865-866; Moses, supra note 1, at 76-77.

4 Each approach has its distinct processes, making the two means differ in nature. Whereas parties have the freedom to determine the terms and conditions of their agreement, allowing them to shape the contract according to their preferences and mutual consent, arbitrators would have to choose the applicable law, having regard for the parties' expectations and circumstances of each case. This contribution focuses on the instances where arbitrators must assign the applicable substantive law.

5 BELOHLAVEK, Alexander J. Substantive Law Applicable to the Merits in Arbitration. *Romanian Review of Arbitration,* vol. 30, no. 2, p. 1, 2014.

6 UNCITRAL Model Law on International Commercial Arbitration with amendments adopted in 2006 (1985).

7 Article 28(2) of the UNCITRAL Model Law 1985.

8 UNCITRAL Arbitration Rules with art 1, paragraph 4, as adopted in 2013 and art 1, para 5, as adopted in 2021, 1976.

9 Article 35(1) UNCITRAL Arbitration Rules, 1976.

10 BERMANN, George A. International Arbitration and Private International Law. Leiden: Brill, 2017, p. 341.

the two methods is predominantly artificial.[11] Assuming the arbitral tribunal is to apply the indirect method, one may wonder if they in practice follow the two-step system when assigning the applicable law or directly identify the applicable law without following the required steps. Conversely, assuming the direct method is to be followed in a particular scenario, it is improbable that arbitrators will choose the applicable law without any choice of law analysis. Though it would appear that the direct choice of the substantive law exists in an analytical vacuum, in practice, arbitrators may have referred to an unacknowledged choice of law rule.[12]

The reality is that, despite the method used by arbitrators to assign the applicable substantive law, some policy considerations are pertinent to the decision-making process. The flexibility inherent in arbitrator discretion rests on deeply entrenched, practical considerations.[13] In this contribution are some significant policies underlying the arbitrator's choice of the applicable substantive law in international commercial arbitration. The article identifies and evaluates the nature of such policies. The critical question is, what are the possible extremes and, or irreconcilable elements of these policy considerations, and how are they likely to shape the arbitrator's standard for assigning the applicable substantive law?

2 Methodology

This contribution is grounded in a desktop study that utilized a comprehensive blend of secondary research and analytical methodologies. The secondary research encompassed a thorough assessment of available literature, including books, journal articles, legislation, and regulations on international commercial arbitration. These sources facilitated the identification and examination of pertinent policies that could impact the arbitrators' selection of the applicable substantive law in international commercial arbitration. Furthermore, an analytical strategy was adopted to evaluate the relevant policies that may affect arbitrators' choice of the applicable substantive law in international commercial arbitration, with emphasis on potential extremes and, or irreconcilable elements.

3 Three perspectives on policy considerations

In international commercial arbitration, where an arbitrator must determine the applicable substantive law, there are three perspectives to consider in terms

[11] *Idem* at 342.

[12] Although the arbitrator must give reasons for their choice, they might not have indicated the specific choice of law rule they relied on but merely describe the process they followed.

[13] PARK, William W. The 2002 Freshfields Lecture - Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion. *Arbitration International*, vol. 2, no. 2, p. 285, 2003.

of policy considerations.[14] The first perspective is the transnational one. The transnational nature of international arbitration means that the dispute necessarily involves elements that are foreign vis-à-vis a particular country. Numerous factors may connect an arbitration to a specific jurisdiction – the parties, arbitrators, or the underlying contract itself.[15] For this contribution, transnational policy considerations are concerned with the extent to which one ought to consider the fact that an international arbitration dispute involves a range of legal systems and their collective and individual impact on the arbitration process. Although international commercial arbitration does not automatically have a direct link to any particular national legal system,[16] it is prudent for arbitrators to, for instance, take greater account of the involvement of the various jurisdictions that may have a connection to a dispute.[17] Here, arbitrators may consider questions such as which jurisdiction has a substantial connection to the dispute and in which jurisdiction may enforcement potentially be sought by parties. It is also essential to acknowledge that the collective adherence to norms and practices by countries underpins the validity and legitimacy of the international arbitration process.[18]

Second, there is the party perspective. Every arbitration case is inherently unique, differing in sets of facts, circumstances, arbitrators, and parties involved.[19] Party policy considerations, for this contribution, are concerned with the individuality of the facts of the arbitration and how they affect the ultimate result. The diverse needs and interests of the parties must be carefully considered when determining the applicable substantive law. The parties' intention to apply a non-national standard to their arbitration, for instance, can be deduced from the terms of their contract and, or their peculiar circumstances.[20] Also, what is just and fair in one case may be unjust and unfair in another. Arbitrators therefore must strive to select a rule that considers all case-specific factual connections. This is important because the choice of law can significantly affect the outcome of the arbitration, and the rights of the parties involved.

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14 GAILLARD, Emmanuel. International Arbitration as a Transnational System of Justice in Albert Jan van den Berg (ed.), In: Arbitration: The Next Fifty Years. The Hague: Kluwer Law International, 2012, pp. 66-73; CHEATHAM, Elliott E. Problems and Methods in Conflict of Laws. *Collected Courses of The Hague Academy of International Law*, vol. 99, pp. 291-307,1960. http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789028613621_04.

15 Gaillard & Savage, supra note 1, at 45-51.

16 Gaillard & Savage, supra note 1, at 868.

17 This is because the disputes that come before international arbitrators involve parties from different countries or regions, each of which may have its own laws and legal systems that could impact the outcome of the case.

18 Gaillard, supra note 14, at 67.

19 BORN, Gary B. International Commercial Arbitration. 3rd ed. The Hague: Kluwer Law International, 2021, pp. 4080-4081.

20 KÖNIG, Michal. Non-State Law in International Commercial Arbitration. *Polish Yearbook of International Law* pp. 265, 269-275, 2015.

Third, there is the jurisprudential perspective. Like any other rule, one can evaluate a choice of law rule used in international commercial arbitration based on its jurisprudential merits — it can be, for instance, praised for producing consistent and predictable results.[21] Conversely, it also can be criticized for the complexity it could introduce into the arbitration process.[22] In this contribution, jurisprudential policy considerations are concerned with identifying qualities that are most desirable for a choice of law rule used in international commercial arbitration and how the arbitrators' choice of the substantive law is likely to be influenced by prevailing jurisprudential expectations.

3.1 Transnational policy considerations

This section outlines two significant transnational policy considerations that may influence an arbitral tribunal's choice of applicable substantive law when the parties have failed to select one – dependence on sovereign support, and reliance on the collective actions of legal systems.

a. Dependence on sovereign support

The legality and effectiveness of international arbitration depend upon the support of different national systems of law, mainly, the arbitration laws of the country which is the seat of the arbitration and those of the country or potential countries within which recognition and enforcement of arbitral awards are to be sought.[23] Even a staunch contractual theorist will attest that international arbitration, to an extent, operates and, or exists due to sovereign benevolence.[24] An interplay between the private arbitration process and the different national legal systems is present and may manifest at almost any phase of the arbitration proceedings.

Often, national arbitration laws stipulate a category of disputes deemed incapable of resolution by arbitration, even if the parties have otherwise agreed to arbitrate such matters.[25] A country may legislate to make a subject matter non-arbitrable for various reasons – from the desire to protect the exclusive interests

[21] FAWCETT, James J. Policy Considerations in Tort Choice of Law. *Modern Law Review*, vol.47, no. 6, p. 650, 1984.

[22] Although arbitrating international disputes presents advantages over litigation in national courts, it can also give rise to the choice of law issues that can be just as complex as those encountered in litigation.

[23] REDFERN, Alan, HUNTER, Martin, BLACKABY, Nigel, & PARTASIDES, Constantine. Redfern and Hunter on International Arbitration: Student Version. 6th ed. New York: Oxford University Press, 2015 p. 58.

[24] BARRACLOUGH, Andrew, WAINCYMER, Jeff. Mandatory Rules of Law in International Commercial Arbitration. *Melbourne Journal of International Law*, vol. 6, p. 214, 2005.

[25] BORN, Gary B. International Arbitration: Law and Practice. The Hague: Kluwer Law International, 2012 pp. 1412, 1427-1429.

of parties, to safeguarding the parties deemed weak.[26] Regardless of the reasons for setting the boundaries of arbitrability, sovereign interests undeniably play a role in arbitration.

Furthermore, national courts are generally ready to aid the arbitration process once a dispute is arbitrable in a jurisdiction.[27] A party in the initial stages of arbitration may have to ask the relevant national court to enforce an agreement to arbitrate or, in some instances, ask the court to appoint the arbitral tribunal by instituting legal proceedings. During the arbitration, a court retains certain general statutory powers and functions, which it may exercise in support of arbitration proceedings at any time, on the application of any party.[28] Such powers and functions are facilitative and supervisory and are essential for the collaboration between the courts and arbitral tribunals in resolving disputes between parties. By supporting arbitration conducted within their territory, countries reasonably can claim some degree of control over it, ensuring that certain minimum standards of justice are met, especially in procedural matters.[29] After the arbitral tribunal renders a final award, it typically has nothing more to do with the dispute.[30] It is generally accepted that national courts may be called upon to recognize and enforce an international arbitral award. In this regard, national courts may have to determine whether the parties involved adhered to specific minimum standards of due process, whether the subject matter of the award was arbitrable in terms of its laws, and whether the award does not violate any public policies.[31]

When the arbitral tribunal must determine the applicable substantive law, it must take cognizance of the role played by national legal systems in the survival and development of international arbitration as an institution. Although arbitrators have no obligation to uphold the public policy interests or mandatory rules of any particular national legal system, they must take them into account when assigning the applicable substantive law.[32] An arbitrator's refusal to take cognizance of such interests imperils the arbitrability of disputes or enforceability of awards linked to those national interests.[33] Ideally, arbitrators should aim to find a correspondence between the actions taken by national legal systems, to safeguard their national or international commercial interests, and the parties' interests and reasonable expectations.

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26 Determining whether or not a specific type of dispute is arbitrable under a particular law is fundamentally a question of public policy that the respective legal system must address. Redfern et al., supra note 23, at 112.

27 Barraclough & Waincymer, supra note 24, at 214.

28 *Idem*.

29 Redfern et al., supra note 23, at 58-59.

30 *Idem* at 606.

31 *Idem*.

32 ELCIN, Mert. Lex Mercatoria in International Arbitration. Doctor of Laws thesis: European University Institute, 2012, p. 388.

33 *Idem*.

Acknowledging the significance of sovereign support for effective international arbitration is crucial, but it is essential not to exaggerate its importance.[34] It is imperative to acknowledge that the transnational nature of international commercial arbitration severs its mechanical connection to any specific national legal system. Presently, the effectiveness of international arbitration does not require that its binding effect stems from the national legal system of the country where an award happens to be issued.[35] The harmonization of the national laws that regulate the conduct of international arbitration and the recognition and enforcement of an award has created the potential for the recognition of arbitral awards in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered.[36]

b. Reliance on the collective actions of legal systems

The legitimacy of arbitration can also find its basis in the collective actions of legal systems.[37] Views developed collectively through instruments like the UNCITRAL Model Law, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)[38] and a variety of guidelines express common viewpoints held by national legal systems, on the proper conduct of arbitration to ensure its recognition as a legitimate adjudication method.[39] International arbitration does not promote a system of justice entirely divorced from national legal systems.[40] Rather, national legal orders through collective effort provide a relevant source of legitimacy for the arbitration agreement, the arbitration process, and the ensuing award.[41] Although an individual legal system may ultimately recognize an award on a territorial basis, it usually operates within a body of rules that numerous national legal orders have collectively agreed upon.[42]

Acknowledging that national legal systems collectively contribute to the validity and legitimacy of arbitration allows room for arbitrators to make evaluations that embrace international trends and standards.[43] Assuming the arbitral tribunal must determine the applicable law, they may consider international trends that reflect the consensus of nations to resolve the substantive issue. In such situations,

[34] Redfern et al., supra note 23, at 58.
[35] *Idem* at 59.
[36] PAULSSON, Jan. Arbitration Unbound: Award Detached from the Law of Its Country of Origin. *International and Comparative Law Quarterly,* vol. 30, p. 359, 1981.
[37] Gaillard, supra note 14, at 68; GAILLARD Emmanuel. The Representations of International Arbitration. *Journal of International Dispute Settlement,* vol. 1, no. 2, pp. 277-278, 2010.
[38] The New York Convention, *available at* www.newyorkconvention.org/ (accessed 22 June 2023).
[39] Gaillard, supra note 14, at 68.
[40] Gaillard, supra note 14, at 69.
[41] *Idem.*
[42] Redfern et al., supra note 23, at 58.
[43] Gaillard, supra note 14, at 68; Gaillard, supra note 37, at 278.

the arbitral tribunal may promote certainty in the arbitration process by endorsing majoritarian principles and rejecting outdated rules of law.[44] When the arbitral tribunal exercises its discretion based on laws and principles developed through a consensus among countries, it is unlikely that the legitimacy of the arbitrators' performance will be disputed.[45]

3.2 Party policy considerations

The section further highlights two crucial party policy considerations that may influence an arbitral tribunal's choice of the applicable substantive law when the parties fail to select one – party expectations, and justice and fairness.

a. Party expectations

Arguably, deliberation is one of the most crucial aspects of any arbitration process.[46] The term 'deliberation' connotes carefully considering or discussing something.[47] The broad nature of the term suggests that it does not confine itself to any specific stage within the arbitration process. It would therefore be erroneous to assume that only the final award is subject to arbitral deliberations.[48] It is more probable that the arbitral tribunal would render several decisions before reaching a final resolution in a case. Whether a decision qualifies as an award or is merely an act of procedural administration, it is subject to arbitral deliberations.[49]

In general, parties usually do not know how the arbitral tribunal ultimately arrives at and agrees on the various decisions they make within the arbitration process.[50] Apart from the totality of all arguments and motions put forward in the arbitration proceedings, the dispositive parts of the arbitral award and the reasons given for arbitration decisions, the deliberations of the arbitral tribunal generally remain obscured from the parties.[51] This, nevertheless, does not take away the obligation of arbitrators to make decisions that reflect party expectations and promote the integrity and legitimacy of international arbitration. Speaking of expectations may seem tenuous where parties have neglected to indicate the

[44] Gaillard, supra note 14, at 70.
[45] *Idem*.
[46] DERAINS, Yves. The Arbitrator's Deliberation. *American University International Law Review* vol. 27, no. 4, p. 911, 2012; MOSK, Richard M. Practising virtue inside international arbitration: Deliberations of Arbitration. 1st ed. New York: Oxford University Press, 2015, p. 486.
[47] GARNER, Bryan A., BLACK, Henry C. Black's Law Dictionary 9th ed. Minnesota: West, 2009, p. 492.
[48] Mosk, supra note 46, at 486; Derains supra note 46, at 911-912.
[49] Derains, supra note 46, at 912.
[50] PRINCE, Nathalie A., HOOKER, William, TURNER, David. How Can Arbitrators Best Protect Their Deliberations from Disclosure: New Challenges and Opportunities in England. *Journal of International Arbitration* vol. 36, p. 259, 2019. https://doi.org/10.54648/joia2019011.
[51] *Idem*.

applicable substantive law. Nevertheless, it is not surprising that these expectations and intentions guide arbitration proceedings.[52]

The question arises, therefore, what are party expectations of arbitration? Firstly, international arbitration itself has evolved from being viewed as a way of resolving relatively simple commercial disputes (or technical ones) by neutral third parties to a system that involves complex legal and factual issues, multiple jurisdictions and participants from diverse legal systems with varying levels of experience.[53] International commercial arbitration today is a significant legal business,[54] and it would be ignorant to assume that perceptions about it remain the same. Previously, parties primarily chose arbitration because they viewed it as a quick and efficient alternative to litigation.[55] Currently, it is simplistic to assume that parties choose international commercial arbitration merely to save costs and time.

International arbitration in the twenty-first century has become as formal, costly, time-consuming, and subject to uncompromising advocacy as litigation.[56] Parties engaging in international commercial arbitration today opt for this method over litigation for a multitude of reasons that extend beyond merely saving time and costs. These reasons include confidentiality, neutrality, privacy of process, finality of awards, utilization of decision-makers' expertise, and the ability to shape the arbitration proceedings.[57] The parties' decision to opt for arbitration signifies their expectation that a neutral, impartial, and independent decision-maker will resolve their dispute. In addition to these, commercial parties today are also increasingly attracted by the guarantee of fairness and justice in the arbitration process.[58] These virtues do not only attract parties to arbitration but also indicate what they expect from it as a dispute resolution mechanism.

Certainly, parties can have a contract that clearly outlines their desires and expectations from a dispute resolution mechanism. Yet, parties articulate minimal expectations about the proper role of arbitrators by merely selecting arbitration as their preferred dispute resolution mechanism.[59] Typically, it is their clear selection

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52 HAYWARD, Benjamin. Conflict of Laws and Arbitral Discretion - the Closest Connection Test. Oxford: Oxford University Press, 2017, p. 44.

53 GLUCK, George. Great Expectations: Meeting the Challenge of a New Arbitration Paradigm. *American Review of International Arbitration* vol. 23, p. 236, 2012; Redfern et al., supra note 23, pp. 2-5.

54 DEZALAY, Yves, GARTH, Bryant. Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes. *Law and Society Review*, vol. 29, pp. 27-64, 1995.

55 Gluck, supra note 53, at 236.

56 STIPANOWICH, Thomas J. Arbitration: The "New Litigation". *University of Illinois Law Review* vol. 2010, no. 1, pp. 8-9, 2010.

57 *Idem* at p. 53.

58 JAPARIDZE, Nana. Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration. *Hofstra Law Review* vol. 36, p. 1415, 2008.

59 FRANCK, Susan D. The Role of International Arbitrators. [2006] 12 *ILSA Journal of International & Comparative Law*, vol. 12, p. 502.

of particular institutional arbitration rules under which the arbitral tribunal must exercise its discretion, or their agreement to a specific national arbitration law, that indicates and manages, to an extent, party expectations about the appropriate role of arbitrators or arbitration.[60] Assuming a dispute is submitted to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules 2022[61] instead of the International Chamber of Commerce (ICC) Arbitration Rules 2021,[62] it gives some indication of the expectation of the parties about the appropriate role of arbitrators. In the case of the former, for example, it is reasonable to expect the arbitral tribunal to consider the principles of international law and the preferences of the relevant Contracting States parties when reaching their decisions. Whereas in the latter's case, one can expect the arbitral tribunal to consider the autonomy of the disputing parties and the significance of commercial expectations when making decisions.

It is trite that when adjudicating a case, the arbitral tribunal must treat parties equally, fairly, and impartially to reach a just solution.[63] To achieve this, the arbitral tribunal usually leans towards decisions they are convinced to be fair and balanced in the particular circumstance. In arriving at such decisions, the arbitral tribunal would typically invoke arguments based on the analysis of what objectively conforms to the reasonable expectations of the parties at the relevant time – either when they conclude a contractual agreement or at its termination, even if there were external factors such as third-party interventions or force *majeure*.[64] In other words, the arbitral tribunal considers what the parties would have reasonably anticipated in the given circumstances.

When the arbitral tribunal must determine the applicable substantive law, for instance, the parties' expectations also guide its decisions. In the initial stages, where the arbitrator has to determine the applicable substantive law because the parties have failed to select one, they may consider the hypothetical will or intention of the parties.[65] Here, to satisfy the parties' expectations, arbitrators,

[60] *Idem* at 502-503.

[61] World Bank Group, International Centre for Settlement of Investment Disputes – ICSID, *available at* www.icsid.worldbank.org/ (accessed 24 June 2023).

[62] ICC Arbitration Rules 2021, *available at* www.iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ (accessed 23 June 2023).

[63] FORTESE, Fabricio, HEMMI, Lotta. Procedural Fairness and Efficiency in International Arbitration. *Groningen Journal of International Law*, vol. 3, no.1, p. 112, 2015.

[64] NAIMARK, Richard W., KEER, Stephanie E. International Private Commercial Arbitration- Expectations and Perceptions of Attorneys and Businesspeople- A Forced-Rank Analysis. *International Business Lawyer*, pp. 203-209, 2002.

[65] Likely, this position would not be popular among common law jurisdictions arbitrators. An English arbitrator is unlikely to search for the applicable law using the hypothetical will of the parties. A tacit choice of law of law can only be inferred when it is reasonably clear that it is the genuine choice of the parties. BLESSING, Marc. Choice of Substantive Law in International Arbitration. *Journal of International Arbitration*, vol. 14, no. 2, p. 43, 1997.

when determining the governing law of the arbitration, are likely to remain as closely as possible within the parties' contractual intentions, whether tacitly or positively expressed. Instead of imposing extraneous concepts on the parties, it is preferable for the arbitral tribunal, as far as possible, to honor the genuine common intention of the parties in such situations.[66]

Also, in an instance where the arbitral tribunal merely takes notice of the absence of an express choice of law without considering the hypothetical will of the parties and then proceeds to determine the applicable law, party expectations may influence their ultimate choice of governing law.[67] In their search for the governing law, whether by applying appropriate conflict of laws rules or directly selecting the substantive law, the arbitral tribunal places significant emphasis on the parties' reasonable expectations during their deliberations. Assuming an established conflict of laws rule designates a particular national law as the governing law and the parties reasonably expected its application, the arbitral tribunal will presume the individual provisions of this national law are in line with the reasonable expectations of the parties in the context of their transaction. This presumption, however, may face rebuttal when one can demonstrate that the individual provisions of the national law conflict with the express or implied intentions of the parties, and thus no longer reflect the reasonable expectations of the parties to the dispute.[68]

The following two ICC cases illustrate the arbitrators' inclination to search for the mutual expectation of the parties either through the careful analysis of the correspondence exchange or by observing the parties' actions, reflecting what they hope to achieve or avoid. In these cases, the parties' instructions, even in the absence of their choice of governing law, were respected and valued to the same extent as if they had made a clear choice of law.

In the first case in point, ICC Case No 7375,[69] the dispute concerned a contract for the supply of goods (one of the nine contracts) concluded between an Iranian buyer (claimant) and an American seller (defendant). None of these contracts contained a choice of law clause. In this case, the defendant argued for the application of the law of Maryland, according to which the period specified by the statute of limitations had expired in their favor. They reasoned that the law of Maryland was applicable because Maryland was the place where significant contractual obligations were performed, specifically the manufacture of the goods. On the other hand, the claimants argued that Iranian law should apply and asserted

66 *Idem* at 44.
67 *Idem* at 43.
68 DOUG, Jones. Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties. *Singapore Academy of Law Journal,* vol. 26, pp. 926-927, 2014.
69 UNILEX, ICC Award No 7375, 1996, *available at* https://www.unilex.info/principles/case/625 (accessed 6 September 2023).

that there was no relevant limitation period under it. They argued that the law of Iran should apply since the contract was negotiated, and concluded, and its performance was closely connected to Iran.

Based on these arguments, the arbitral tribunal deduced that there was an implied negative choice[70] between the parties, and as such, the contract could not be subjected to the laws of either party.[71] The arbitral tribunal in this case considered the possibility of applying a neutral national law, the *tronc commun* doctrine,[72] or transnational rules of law and general principles of law. They ultimately decided to apply general principles of law and rules applicable to international contractual obligations that are recognized as legal standards and have gained widespread acceptance in the global community. In this case, the UNIDROIT Principles of International Commercial Contracts 2016 (UNIDROIT Principles)[73] were deemed to be the appropriate choice. Although the parties had not expressly chosen the governing law for their contracts, their conduct or silence indicated the laws they expected the arbitral tribunal to refrain from applying when resolving their case. The arbitral tribunal was empowered to select a governing law that was non-controversial and acceptable to all parties involved. The arbitral tribunal's ultimate decision to apply general principles of law and rules of law applicable to international contractual obligations, in this case, revolved around meeting the needs and expectations of the parties while respecting perceptions of sovereignty.[74]

The second case in point is ICC Case No 7110.[75] This was a case involving an Iranian government agency (claimant) and an English company (respondent). The parties entered several contracts relating to the sale, supply, modification, maintenance, and operation of specific equipment, and support services related to it. None of these contracts contained an express choice of law favoring a national law. However, some contracts contained provisions directing that the dispute settlement be conducted according to 'laws or rules of natural justice'. The claimant argued for the application of Iranian law since the contracts were signed

[70] An implied negative choice occurs when the arbitral tribunal reaches a negative inference, indicating that both parties sought to circumvent a specific national law. Blessing, supra note 65, at 45.

[71] In this sense, under no circumstances should the contracts be governed by the national law of either one of the parties.

[72] The *tronc commun* doctrine is based on the proposition that if parties to an international commercial transaction are free to choose, they would choose their national laws to establish a common consensus over international commercial arbitration. Redfern et al., supra note 23, at 201.

[73] UNIDROIT Principles of International Commercial Contracts of 2016, *available at* https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/ (accessed 10 October 2023).

[74] An analysis of the facts reveals that the Iranian claimant would probably not have entered the contracts if it had meant subjecting itself to the USA laws. Consequently, the arbitral tribunal's decision to apply general principles of law in this case helped maintain the claimant's sense of sovereignty. Blessing, supra note 65, at 45-74.

[75] UNILEX, ICC Award No 7110 1995, *available at* https://www.unilex.info/principles/case/713> (accessed 6 September 2023).

and performed there. They also later argued in the proceedings that, alternatively, the reference to 'natural justice' should be understood as an expression of the parties' intent for their dispute to find resolution through general principles of law. The respondent, however, argued that the arbitral tribunal should apply either English law or the general principles of law. As the party responsible for the characteristic performance, the respondents argued that English law had the closest connection with the contracts or that it was the place of habitual residence of the characteristic performer. In this case, the alternative claims of the parties both pointed to the applicability of the *lex mercatoria* to the substance of the case.

The majority of the arbitral tribunal held that the parties intended to exclude the application of any specific domestic law to their dispute.[76] In their view, the parties intended to have their contracts governed by the general principles and rules that are not enshrined in any specific national legal system. In this instance, the arbitral tribunal decided the UNIDROIT Principles reflected such general rules and principles that enjoy broad international consensus. To establish the applicable substantive law in this case, the arbitral tribunal did not consider the parties' contract in isolation. They analyzed the contracts considering the long-term relationship between the parties to infer the reasonable intentions and expectations of the parties regarding the governing law. The arbitral tribunal's mandate when establishing the applicable substantive law, in this case, considered the parties' concerns and expectations for the application of a neutral law, one that does not impose the law of one of the parties or any third-party country.[77] The authority of the arbitral tribunal stems from agreements between parties, underscoring the need to consider party intentions and expectations.

As will be demonstrated later in this contribution, regardless of the policies that might influence the arbitral tribunal's decisions, they typically consider party expectations when determining the applicable substantive law. Caution, however, is necessary when the arbitral tribunal considers party expectations. Specifically, arbitrators must take cognizance that many legal rules are designed to defeat the expectations of parties who, due to their dominant position, seek to take unfair advantage of others or, conversely, who require special protection.[78] Considering the expectations of the parties alone does not readily determine the range of application of such protective laws.[79] In such situations, the question of what substantive law is

[76] UNILEX, ICC Award No 7110, 1995, *available at* https://www.unilex.info/principles/case/713 (accessed 6 September 2023).

[77] UNILEX, ICC Award No 7110, 1995, *available at* https://www.unilex.info/principles/case/713 (accessed 6 September 2023).

[78] CHEATHAM, Elliott E., RESSE, Willis LM. Choice of the Applicable Law. *Columbia Law Review,* vol. 52, pp. 971-972, 1952.

[79] Party expectations have, for instance, been relied on to decide on the application of mandatory rules in international arbitration matters. However, it is essential to note that these expectations might conflict with the provisions of such regulations. Doug, supra note 68, at 928.

applicable must be determined by other considerations. Although the expectations of the parties are a valuable guide for determining the applicable substantive law, the arbitral tribunal may not always be able to accurately determine what these expectations are or what they were in the context of the contractual relationship.[80] In a complex multiparty international arbitration, for instance, establishing the common intention of parties may be impossible.

b. Justice and fairness

At an initial glance, one might have the impression that justice and fairness are the same concepts and that there is no need to distinguish between them.[81] The reality, however, is that these two concepts may be perceived and interpreted differently depending on the context in which they are employed. An all-encompassing definition of fairness or justice can thus not easily be given.[82] Nevertheless, by considering the variety of meanings and characteristics attached to fairness and justice, one would appreciate and comprehend the distinction between the concepts.

Fairness, in a broad sense, can be understood as a way of evaluating people or situations free from bias.[83] It ensures that every person within a group or situation is afforded an equal opportunity to benefit while guarding against the imposition of subjective views that could sway the outcome. Regardless, what may be fair to one person in a particular situation may not be perceived as fair to another. Fairness seeks to establish an equitable approach to handling decisions that impact others. In the context of a common law judicial system, fairness, in its broadest sense, includes the rules and procedures developed over the years which regulate how cases are conducted and the substantive results that the courts seek to attain.[84] In this sense, fairness, among other things, includes the right to be heard by an unbiased, independent court.[85] In other words, fairness deals with the impartiality of outcomes and the process by which the outcomes are achieved.[86] It may also include the fact that the court decided based only on the evidence and arguments before it. In legal settings, fairness refers to how people react to the law.[87] In a civilized society, fairness gives the justice system its moral force and acceptability.

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80 *Idem*.

81 RAWLS, John. Justice as Fairness. *Philosophical Review*, vol. 67, p. 164, 1958.

82 *Idem* at 64.

83 GOLDMAN, Barry, CROPANZANO, Russell. "Justice" and "Fairness" Are Not the Same Thing. *Journal of Organizational Behavior,* vol. 36, pp. 313-318, 2015.

84 TAVENDER, EDD. Considerations of Fairness in the Context of International Commercial Arbitrations. *Alberta Law Review,* vol. 34, pp. 509-510,1996.

85 *Idem*.

86 WAINCYMER, Jeffrey. Procedure and Evidence in International Arbitration. Alphen aan den Rijn: Kluwer Law International, 2012, pp. 13-14.

87 Goldman & Cropanzano, supra note 83, at 315.

Over the years, philosophers have among other things considered the nature of justice as a desirable quality of society,[88] a moral virtue of behavior,[89] as well as how it applies to ethical and social decision-making.[90] It has been described as the virtue by which all people are given what is their due.[91] Others have suggested that justice is what the broader social structure has determined to be legally or ethically fitting.[92] This should, however, not be confused with an all-inclusive vision of what society considers suitable; it is only a part of it.[93] Justice is a standard to which society must adhere, whether willingly or unwillingly. The laws of civil society are like artificial chains binding people to obey the sovereign authority of the state in the pursuit of justice.[94] The diverse perspectives on the nature of justice make it challenging to generalize the term easily. It shifts and changes depending on how the situations to which it is being applied change.[95]

Despite the differences between the terms, scholars have described justice as fairness.[96] Justice is a broad and encompassing term that provides a standard to which social institutions apply the concept of fairness to different situations.[97] It is a standard by which political and legal systems seek to achieve fair and equitable results.[98] Perceivers of fairness judge it according to its consistency with their understanding of justice. Adherence to the rules and principles of justice should ideally promote perceptions of fairness.[99]

Justice and fairness are significant to the participants in international commercial arbitration.[100] The aim of international arbitration as a dispute resolution mechanism is to create efficient solutions while ensuring that parties receive fair and equal treatment, at the same time providing them with a sense of justice. Typically, parties decide to use arbitration as a method of dispute resolution because arbitrators, unlike judges, can draw on external factors when making decisions without being restricted by law.[101] While courts are obliged to make just decisions,

88 KENT, Immanuel. Metaphysical Elements of Justice. 2nd ed. Cambridge: Hackett Publishing Company,1999.
89 MILL, JS. Utilitarianism, Liberty & Representative Government. London: Dent, 1910.
90 Rawls, supra note 81, at 164-194; RAWLS, John. A Theory of Justice. Cambridge: Belknap Press of Harvard University Press, 1971.
91 Plato, The Republic of Plato. vol 1, London: Cambridge University Press, 1902, pp. 5-11, 331b-335e.
92 Rawls, supra note 81, at 165.
93 *Idem.*
94 HOBBES, Thomas. Leviathan: Revised Student Edition. Cambridge: Cambridge University Press, 1996, p. 147.
95 Then, there is also the matter of the various types of justice that the term may encompass. It further complicates the matter. Some examples include social justice, descriptive justice, restorative justice, procedural justice, compensatory justice, and retributive justice. PARNAMI, Komal. Concept of Justice Difficulties in Defining Justice. *International Journal of Law Management & Humanities,* vol. 2, pp. 1-7, 2019.
96 Rawls, supra note 81, at 164-194.
97 Goldman & Cropanzano, supra note 83, at 313.
98 *Idem.*
99 *Idem* at 316.
100 Japaridze, supra note 58, at 1416.
101 Franck, supra note 59, at 507-513.

no imperative legal instruments prescribe that disputes settled through arbitration must be resolved fairly. Courts must strictly adhere to the law, precedents and evidence when making their decisions.[102] A litigating party who is invested in the outcome of a case expects the judge to be impartial and to correctly apply the law, without any subjective influences.

Meanwhile, in arbitration proceedings, arbitrators may potentially be influenced by personal values and principles of business when making decisions.[103] To arrive at an arbitration decision, the arbitral tribunal does not need to derive its conclusions from a consistent line of logical and legal arguments.[104] This is not to say that arbitrators do not take legal norms and their interpretation into account – to the contrary. To avoid challenges from the parties, it is essential for arbitrators to correctly apply the law and make decisions that do not violate public order.

In the arbitration process, arbitrators may have to find the correct balance between doing what is just and fair, either in the view of the parties who appointed them or the wider community. For instance, when establishing the applicable law, the arbitral tribunal may aim for a substantive law that guarantees private justice between the parties, unfettered by national interests. In this situation, it may be challenging to balance the public nature of justice and the necessarily private nature of international commercial arbitration. The guarantee of justice and fairness in the arbitration process may influence parties to select arbitration as their dispute resolution mechanism.[105] Participants in arbitration place a premium on justice and fairness of the process, above factors such as receipt of a monetary award, speed, cost, arbitrator expertise and finality.[106] When the arbitral tribunal must establish the applicable law, it is therefore only prudent that they analyze the extent to which the competing rules are consistent with a balance of fairness and justice between the parties to the dispute.

3.3 Jurisprudential policy considerations

This section identifies two essential jurisprudential policy considerations that may impact an arbitral tribunal's selection of the applicable substantive law in the absence of the parties' choice: consistency and predictability, the ease of assigning the applicable substantive law, and the simplicity of the arbitration task.

[102] *Idem.*
[103] MANIRUZZAMAN, Abul FM. The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration? *American University International Law Review,* vol. 14, pp. 717-719.
[104] *Idem* at 717-718.
[105] Naimark & Keer, supra note 64, at 203.
[106] *Idem* at 203-210.

a. Consistency and predictability

Consistency, as used here, describes the extent to which arbitrators align in their assessment of a specific case.[107] On the other hand, predictability, as used here, describes the level of convergence between the arbitrator's actual award for a particular case and the award others would expect the arbitrator to make in the given instance. Overall, consistency in arbitral decision-making engenders predictability, thereby contributing to the legitimacy and credibility of arbitration as a dispute resolution system.[108] The decision of parties to submit to an arbitration often depends on their ability to accurately predict the legal risk to their relative positions. Disputing parties can make such predictions when arbitration produces consistent outcomes upon which they can rely. However, the discretionary power exercised by the arbitral tribunal at various stages of the arbitration process complicates such predictions, especially when they must determine the applicable substantive law.

The arbitrators' preferences, advocated views or mental attitudes, for instance, may reflect in their legal reasoning when determining the governing law.[109] Unlike in court proceedings, in arbitration, the arbitrator often seriously considers subjective aspects when assigning the applicable substantive law, to facilitate its connection to the underlying contract.[110] Irrespective of the method ultimately used by the arbitral tribunal to determine the applicable law, they endeavor to identify with maximum precision, the expectation of the parties regarding the substantive law result. To do this, the arbitral tribunal strives to select an applicable law that reflects what the parties could have legitimately and reasonably expected as the result of a transaction at the time of the conclusion of the contract.[111] The selection of the applicable law relies on projecting the outcomes of applying various possible applicable legal systems and comparing them with each other. Arbitrators, acting as agents of the disputing parties, tend to focus on the intended purpose of the parties' contract when determining the applicable law. They are often motivated by the desire to select a law that provides relief that will work the least hardship on the parties as opposed to the stringent application of particular rules of law.[112]

[107] KAUFMANN-KOHLER, Gabrielle. Is Consistency a Myth?' in GAILLARD, Emmanuel, BANIFATEMI, Yas. (eds). In: Precedent in International Arbitration. Paris: Juris Publishing Incorporated 2007) pp. 137-147.

[108] Barraclough & Waincymer, supra note 24, at 212.

[109] This approach has been referred to as the arbitrators' psycho-legal approach to the choice of law process. Maniruzzaman. supra note 103, at 717.

[110] Belohlavek, supra note 5, at 1, 7.

[111] *Idem* at 5.

[112] CALKINS, Hugh, FISHER, Roger D. Predictability of Result in Commercial Arbitration *Harvard Law Review Association,* vol. 61, no. 6, p. 1026, 1948.

Arbitral tribunals may also disregard legal rules where ethical notions underlying rules of law have little or no appeal, particularly in business contexts.[113] In some cases, business ethics and trade usage influence the arbitrator's selection of the appropriate applicable law. The issue is that what is ethical in one case may not be so in another. Even within the same trade, certain practices may be peculiar to the disputing parties. The flexible nature of arbitration decision-making allows for tailor-made solutions to disputes.[114] Although arbitrators may refer to past arbitral awards in support of their arguments, the legal community commonly accepts that international arbitration has no system of legally binding precedents.[115] An inconsistent and incoherent set of arbitration decisions persists as there is no binding value for having an award based on precedent. Assuming controversy over the price of goods arises between a South African buyer and an Egyptian seller, and the arbitral tribunal is required to act as an appraiser to establish a fair price for the parties, there would be no legal reference points to aid such a determination. In this situation, any decision the arbitral tribunal renders would be peculiar to the dispute.

As Goode has opined, "The man of affairs wishes to have his cake and eat it; to be given predictability on the one hand and flexibility to accommodate new practices and developments on the other".[116] The reality is that flexibility is necessary in the arbitration process to empower arbitrators to reach a fair outcome that considers the facts and peculiarities of each case. Nevertheless, it is essential to acknowledge that predictable rules and outcomes play a crucial role in fostering a fair legal system. Consistency in arbitration decision-making is a fundamental factor in ensuring the fairness of the law.[117] In situations where the application of a legal rule is uncertain, a valid justification for such uncertainty must exist.[118] It is essential to question the necessity of this uncertainty and determine whether there are any compelling reasons to justify its existence within the legal framework.

Nevertheless, since predictability is a direct product of consistency, disputing parties require arbitration to produce consistent outcomes. If arbitration fails in this task, it is likely to increase the cost of dispute resolution generally and potentially even risk its extinction.[119] Although it is an oversimplification to link the extinction of arbitration to the inconsistencies present in arbitration decision-making,

[113] *Idem* at 1024.
[114] *Idem*.
[115] DHAWAN, Pulkit. Application of Precedents in International Arbitration. *International Journal of Arbitration, Mediation and Dispute Management,* p. 550, 2021.
[116] GOODE, Roy. The Codification of Commercial Law. *Monash University Law Review*, vol.14, p. 150, 1988.
[117] YAP, Ji Lian. Predictability, Certainty, and Party Autonomy in the Sale and Supply of Goods. *Common Law World Review,* vol. 46, p. 270, 2017.
[118] *Idem*.
[119] Barraclough & Waincymer, supra note 24, at 212.

consistency and predictability are still pertinent considerations that influence how arbitrators deal with the selection of the applicable substantive law.

b. Ease of assigning the applicable substantive law, simplicity of the arbitration task

Arbitration is essentially a straightforward method of dispute resolution.[120] It provides a system of resolving disputes far less complex than litigation. The arbitration procedure is relatively easy for parties of different nationalities to understand and apply. Over the years, the desire for straightforward and effective methods or procedures has driven many developments in arbitration law. Consider, for instance, the New York Convention, by contrast to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (1927 Convention),[121] which provides a much more straightforward and effective method for obtaining the recognition and enforcement of awards.[122] The text of the UNCITRAL Model Law also goes through the arbitration process from beginning to end, in a simple and readily understandable way.

When discussing how the arbitral tribunal assigns the substantive law, it is relevant to consider the simplicity and ease of the arbitration task.[123] Irrespective of the method used to assign the applicable substantive law, for instance, it is conceivable that arbitrators are likely to follow a simple approach that makes sense in a particular circumstance. They may resolve to do this because it makes determining the applicable law relatively straightforward in that instance. Assuming all the relevant conflict of law rules in a particular case led to the exact solution of the dispute, the arbitral tribunal is likely to apply that law directly.[124] Arbitral tribunals have also resorted to applying non-national rules to some of the complex issues that arise from transnational commercial relations because it was easier than applying national law.[125]

Simplicity and ease of application are not ends in themselves. Still, they are nevertheless desirable in a choice of law system.[126] The simplification of

[120] Redfern et al., supra note 23, at 2.

[121] United Nations, Geneva Convention for the Execution of Foreign Arbitral Awards of 1927, *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf. (accessed 10 September 2023).

[122] Redfern et al., at 14.

[123] Simplicity and flexibility are notable attributes of arbitration rules. They allow the parties to adjust dispute resolution to suit their particular relationship. TRACTENBERG, Craig R. Nuts and Bolts of International Arbitration. *Franchise Law Journal,* vol. 38, p. 456, 2019.

[124] In situations like this, a false conflict arises among the relevant conflict of laws rules. CROFF, Carlo. The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem. *International Lawyer,* p. 629, 1982.

[125] Arbitrators have relied on non-national rules such as the UNIDROIT Principles (2016) to supplement the governing law because it allowed them to find proper solutions. König, supra note 20, at 286.

[126] LEFLAR, Robert A. Choice-Influencing Considerations in Conflicts Law. *New York University Law Review,* vol.41, p. 288, 1966.

the arbitration task is for the convenience of the arbitration participants and not the arbitrators *per se*. The need for expedited and cost-effective arbitration, for instance, may be justification for an arbitral tribunal considering simple mechanical rules, such as the law of the place of the conclusion of the contract, the law of the place of performance or the law of the seat of arbitration, which may be easy to apply in a particular case. Although other considerations such as justice, fairness, and the parties' expectations may influence the arbitral tribunal's ultimate decision to apply one rule or the other, the simplicity and ease of the arbitration task remain relevant to the discussion.[127]

4 Attaching significance to the relevant policy considerations

As deduced from the discussion above, attempting to list every policy relevant to solving the various choice of law problems in international commercial arbitration is impractical. Nevertheless, in international commercial arbitration, undoubtedly, the above-identified transnational, party and jurisprudential policy considerations may, in one way or another, influence the choice of an appropriate substantive law. They will likely be evaluated before the arbitrator can intelligently decide which law to apply.

Usually, one's views on practical options and solutions in arbitration will inevitably reflect one's theoretical views on what arbitration is.[128] The essential nature of arbitration is vital to determining how different arbitrators approach contentious questions and exercise their discretionary powers. Assuming arbitration is fundamentally viewed as jurisdictional by nature, then procedural solutions consistent with the values of those very same national systems or consistent with transnational norms may be appealing. Conversely, if arbitration is considered a consent-based agreement, then the parties' expectations and intentions would be seen as the dominant means to resolve procedural questions.[129] It is essential to acknowledge that the theoretical views may affect the significance and order in which various procedural options are ranked.[130]

It is also important to note that very little can be said regarding which policy consideration, in case of conflict, should take precedence over the other since this necessarily depends upon the facts and the circumstance of the particular case.[131] As the applicable substantive law and the choice of law methodologies vary from case to case, so do the considerations that affect the arbitrators'

[127] *Idem*.
[128] Waincymer, supra note 86, at 7.
[129] *Idem*.
[130] *Idem* at 7, 26-30.
[131] Leflar, supra note 127, at 267-327.

decisions about the law applicable to the merits of the case. Neither policy is more dominant nor preferred when determining the applicable law. Regardless of this, the decision about the applicable substantive law in a particular case may involve a consideration of more than one of these policies.[132] Assuming parties expect a non-national law to govern the merits of their dispute, they would hope for the just and fair application of these rules in line with international standards, ensuring the enforceability of their ultimate award.

When identifying the substantive law, there will inevitably be some trade-offs between the above-identified policy considerations to arrive at a reasonable solution. General rules and procedures inherently involve compromises, and their application may seem biased toward or against one or both parties in a specific case.[133] In arbitration, evaluating the policies underlying procedural issues reveals that the rules reflect certain preferences.[134] Therefore, such rules may carry both advantages and drawbacks when they are applied. To manage the benefits and disadvantages of using these rules, arbitrators must be proactive and reactive in their application. To do this, arbitrators can, for instance, adopt a case-by-case solution informed by general principles or consider identifying different institutional rules and their different approaches to crucial elements and select according to the parties' preferences.[135] International arbitration faces difficulties in reconciling a range of potentially conflicting goals. These may include respect for party autonomy, fairness to disputing parties, predictability, neutrality considering the distinct values and norms of different legal cultures, and respect for the legitimate concerns of governments regarding the provision of the legal infrastructure for international arbitration. These challenges are crucial for developing an efficient procedural model essential for arbitration to meet the objectives set by its users.

5 Conclusion

The aim of this contribution is not to suggest a rigid formula that can always lead to optimal decisions regarding the applicable substantive law in all cases. For many aspects, it is crucial to rely on the insight and integrity of the arbitral tribunal involved. This contribution highlights the significant considerations that could influence the arbitrator's choice of the law applicable to the merits of a

[132] *Idem*; Fawcett, supra note 21, at 650-670.
[133] Waincymer, supra note 86, at 25-26.
[134] For instance, in Art 35(1) of the UNCITRAL Arbitration Rules, as revised in 2010, parties have a broader freedom to select any law, including non-national laws, to govern their contracts. Such privilege is not extended to the arbitrators when they are obliged to choose one. MA, Winnie Jo-Mei. The Law Applicable to the Substance of Arbitral Disputes: Arbitrators' Choice in the Absence of Parties' Choice. *Contemporary Asia Arbitration Journal,* vol. 8, no. 2, pp. 193-194, 2015.
[135] Waincymer, supra note 86, at 25.

dispute. In complex matters with multiple options, such as when arbitrators have to assign the applicable substantive law in international commercial arbitration, policy considerations will not always point to one solution.[136] As alluded to in this contribution, there may be the need to have some trade-offs between relevant considerations. It is vital for arbitrators to carefully consider the applicable policy considerations on a case-by-case basis to decipher the appropriate trade-offs for the particular circumstance. Such deliberation will ensure that the resulting award appears fair, equitable, and consistent with the expectations and needs of the parties.

Considerações políticas subjacentes para a atribuição do direito material aplicável na arbitragem comercial internacional

Resumo: Na arbitragem comercial internacional, quando as partes não escolhem nenhuma lei para reger a matéria de suas disputas, os árbitros são responsáveis por fazê-lo. A flexibilidade inerente à discrição do árbitro torna essa tarefa crítica, já que sua decisão pode impactar significativamente o resultado da arbitragem. Este artigo tem como objetivo examinar as políticas relevantes que fundamentam a escolha do direito material aplicável pelo árbitro na ausência da escolha das partes. Utilizando uma combinação abrangente de pesquisa secundária e metodologias analíticas, o artigo identifica e avalia a natureza dessas políticas, destacando seus possíveis extremos e elementos irreconciliáveis. O artigo ressalta a distinção entre os métodos diretos e indiretos utilizados para atribuir o direito material aplicável e questiona a aplicação prática desses métodos pelos árbitros. Além disso, explora as políticas relevantes de três perspectivas – uma perspectiva transnacional, uma perspectiva das partes e uma perspectiva jurisprudencial. Os resultados sugerem que considerações específicas de política influenciam o processo de tomada de decisão do árbitro, independentemente do método utilizado para atribuir o direito substancial aplicável. Ao compreender e avaliar essas considerações de política, os árbitros podem tomar decisões informadas ao atribuir o direito material aplicável na arbitragem comercial internacional.

Palavras-chave: Arbitragem Comercial Internacional. Direito Substancial Aplicável. Discrição do Árbitro. Escolha de Lei. Considerações Políticas.

References

BARRACLOUGH, Andrew, WAINCYMER, Jeff. Mandatory Rules of Law in International Commercial Arbitration. *Melbourne Journal of International Law*, vol. 6, p. 214, 2005.

BELOHLAVEK, Alexander J. Substantive Law Applicable to the Merits in Arbitration. *Romanian Review of Arbitration,* vol. 30, no. 2, p. 1, 2014.

BERMANN, George A. International Arbitration and Private International Law. Leiden: Brill, 2017, p. 341.

BLESSING, Marc. Choice of Substantive Law in International Arbitration. *Journal of International Arbitration,* vol. 14, no. 2, p. 43, 1997.

BORN, Gary B. International Arbitration: Law and Practice. The Hague: Kluwer Law International, 2012, pp. 1412, 1427-1429.

[136] *Idem* at 12-13.

BORN, Gary B. International Commercial Arbitration. 3rd ed. The Hague: Kluwer Law International, 2021, pp.4080-4081.

CALKINS, Hugh, FISHER, Roger D. Predictability of Result in Commercial Arbitration *Harvard Law Review Association,* vol. 61, no.6, p.1026, 1948.

CHEATHAM, Elliott E. Problems and Methods in Conflict of Laws. *Collected Courses of the Hague Academy of International Law*, vol. 99, pp. 291-307,1960. http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789028613621_04.

CHEATHAM, Elliott E., RESSE, Willis LM. Choice of the Applicable Law. *Columbia Law Review,* vol. 52, pp. 971-972, 1952.

CROFF, Carlo. The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem. *International Lawyer,* p. 629, 1982.

DERAINS, Yves. The Arbitrator's Deliberation. *American University International Law Review*, vol. 27, no. 4, p. 911, 2012.

DEZALAY, Yves, GARTH, Bryant. Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes. *Law and Society Review*, vol. 29, pp. 27-64, 1995.

DHAWAN, Pulkit. Application of Precedents in International Arbitration. *International Journal of Arbitration, Mediation and Dispute Management,* p. 550, 2021.

DOUG, Jones. Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties. *Singapore Academy of Law Journal,* vol. 26, pp. 926-927, 2014.

ELCIN, Mert. Lex Mercatoria in International Arbitration. Doctor of Laws thesis: European University Institute, 2012, p. 388.

FAWCETT, James J. Policy Considerations in Tort Choice of Law. *Modern Law Review*, vol. 47, no. 6, p. 650, 1984.

FORTESE, Fabricio, HEMMI, Lotta. Procedural Fairness and Efficiency in International Arbitration. *Groningen Journal of International Law*, vol. 3, no.1, p. 112, 2015.

FRANCK, Susan D. The Role of International Arbitrators. [2006] 12 *ILSA Journal of International & Comparative Law*, vol. 12, p. 502.

GAILLARD, Emmanuel. The Representations of International Arbitration. *Journal of International Dispute Settlement,* vol. 1, no. 2, pp. 277-278, 2010.

GAILLARD, Emmanuel. International Arbitration as a Transnational System of Justice. in Albert Jan van den Berg (ed.), In: Arbitration: The Next Fifty Years. The Hague: Kluwer Law International, 2012, pp. 66-73.

GAILLARD, Emmanuel, SAVAGE, John. Fouchard, Gaillard, Goldman on International Commercial Arbitration. The Hague: Kluwer Law International, 1999, pp. 865-866.

GARNER, Bryan A., BLACK, Henry C. Black's Law Dictionary 9th ed. Minnesota: West, 2009, p. 492.

GLUCK, George. Great Expectations: Meeting the Challenge of a New Arbitration Paradigm. *American Review of International Arbitration* vol. 23, p. 236, 2012.

GOLDMAN, Barry, CROPANZANO, Russell. "Justice" and "Fairness" Are Not the Same Thing. *Journal of Organizational Behavior,* vol. 36, pp. 313- 318, 2015.

GOODE, Roy. The Codification of Commercial Law. *Monash University Law Review* vol. 14, p. 150, 1988.

HAYWARD, Benjamin. Conflict of Laws and Arbitral Discretion – the Closest Connection Test. Oxford: Oxford University Press, 2017, p. 44.

HOBBES, Thomas. Leviathan: Revised Student Edition. Cambridge: Cambridge University Press, 1996, p. 147.

ICC. Arbitration Rules 2021, *available at* www.iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ (accessed 23 June 2023).

International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, 2022.

International Chamber of Commerce (ICC) Arbitration Rules, 2021.

JAPARIDZE, Nana. Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration. *Hofstra Law Review*, vol. 36, p. 1415, 2008.

KAUFMANN-KOHLER, Gabrielle. Is Consistency a Myth?' in GAILLARD, Emmanuel, BANIFATEMI, Yas. (eds.). In: Precedent in International Arbitration. Paris: Juris Publishing Incorporated 2007) pp. 137-147.

KENT, Immanuel. Metaphysical Elements of Justice. 2nd ed. Cambridge: Hackett Publishing Company,1999.

KÖNIG, Michal. Non-State Law in International Commercial Arbitration. *Polish Yearbook of International Law*, pp. 265, 269-275, 2015.

LEFLAR, Robert A. Choice-Influencing Considerations in Conflicts Law. *New York University Law Review*, vol. 41, p. 288, 1966.

MA, Winnie Jo-Mei. The Law Applicable to the Substance of Arbitral Disputes: Arbitrators' Choice in the Absence of Parties' Choice. *Contemporary Asia Arbitration Journal*, vol. 8, no. 2, pp. 193-194, 2015.

MANIRUZZAMAN, Abul FM. The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration? *American University International Law Review*, vol. 14, pp. 717-719.

MILL, JS. Utilitarianism, Liberty & Representative Government. London: Dent, 1910.

MOSES, Margaret L. The Principles and Practice of International Commercial Arbitration. Cambridge: Cambridge University Press, 2008, pp. 76-77.

MOSK, Richard M. Practising virtue inside international arbitration: Deliberations of Arbitration. 1st ed. New York: Oxford University Press, 2015, p. 486.

NAIMARK, Richard W., KEER, Stephanie E. International Private Commercial Arbitration- Expectations and Perceptions of Attorneys and Businesspeople- A Forced-Rank Analysis. *International Business Lawyer*, pp. 203-209, 2002.

PARK, William W. The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion. *Arbitration International*, vol. 2, no. 2, p. 285, 2003.

PARNAMI, Komal. Concept of Justice Difficulties in Defining Justice. *International Journal of Law Management & Humanities*, vol. 2, pp. 1-7, 2019.

PAULSSON, Jan. Arbitration Unbound: Award Detached from the Law of Its Country of Origin. *International and Comparative Law Quarterly*, vol. 30, p. 359, 1981.

PLATO, The Republic of Plato. vol. 1, London: Cambridge University Press, 1902, pp. 5-11, 331b-335e.

PRINCE, Nathalie A., HOOKER, William, TURNER, David. How Can Arbitrators Best Protect Their Deliberations from Disclosure: New Challenges and Opportunities in England. *Journal of International Arbitration*, vol. 36, p. 259, 2019. https://doi.org/10.54648/joia2019011.

RAWLS, John. A Theory of Justice. Cambridge: Belknap Press of Harvard University Press, 1971.

RAWLS, John. Justice as Fairness. *Philosophical Review*, vol. 67, p. 164, 1958.

REDFERN, Alan, HUNTER, Martin, BLACKABY, Nigel, & PARTASIDES, Constantine. Redfern and Hunter on International Arbitration: Student Version. 6th ed. New York: Oxford University Press, 2015, p. 58.

STIPANOWICH, Thomas J. Arbitration: The "New Litigation". *University of Illinois Law Review*, vol. 2010, no. 1, pp. 8-9, 2010.

TAVENDER, EDD. Considerations of Fairness in the Context of International Commercial Arbitrations. *Alberta Law Review,* vol. 34, pp. 509-510, 1996.

The New York Convention, *available at* www.newyorkconvention.org/ (accessed 22 June 2023).

TRACTENBERG, Craig R. Nuts and Bolts of International Arbitration. *Franchise Law Journal,* vol. 38, p. 456, 2019.

UNCITRAL Arbitration Rules with art 1, paragraph 4, as adopted in 2013 and art. 1, para 5, as adopted in 2021, 1976.

UNCITRAL Model Law on International Commercial Arbitration with amendments adopted in 2006, 1985.

UNIDROIT Principles of International Commercial Contracts of 2016, *available at* https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/ (accessed 10 October 2023).

UNILEX, ICC Award No 7110, 1995, *available at* https://www.unilex.info/principles/case/713 (accessed 6 September 2023).

UNILEX, ICC Award No 7375, 1996, *available at* https://www.unilex.info/principles/case/625 (accessed 6 September 2023).

United Nations, Geneva Convention for the Execution of Foreign Arbitral Awards of 1927, *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf. (accessed 10 September 2023).

WAINCYMER, Jeffrey. Procedure and Evidence in International Arbitration. Alphen aan den Rijn: Kluwer Law International, 2012, pp.13-14.

World Bank Group, International Centre for Settlement of Investment Disputes – ICSID, *available at* www.icsid.worldbank.org/ (accessed 24 June 2023).

YAP, Ji Lian. Predictability, Certainty, and Party Autonomy in the Sale and Supply of Goods. *Common Law World Review*, vol. 46, p. 270, 2017.

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