DISPUTE RESOLUTION IN INTERNATIONAL TRADE
The Question of the Law Applicable in the Arbitrations

BY

KASANGA MULWA

UNITED STATES INTERNATIONAL UNIVERSITY, NAIROBI
April 2003
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A Research Project Presented to the Graduate Faculty of the School of Business, United States International University in Nairobi in Partial Fulfillment of the Requirements for the Degree of Master of International Business Administration (MIBA)

UNITED STATES INTERNATIONAL UNIVERSITY, NAIROBI
April 2003
DECLARATION

I hereby declare that this project is my original work and has not been submitted, either in the same or in different form to this or any other university or institution for a degree.

Signed: .............................................. Date: 15.4.2003
Kasanga Mulwa

This project has been submitted for examination with my approval as the supervisor.

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DEDICATION

This work is dedicated to my family who allowed me to take a sabbatical leave to complete the MIBA at the USIU. As most of the classes were scheduled in the evenings and weekends, the family stepped in timely to cover my fatherly duties and any other issues that were wanting. In appreciation, I dedicate the end product of the fruitful venture to them.
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<td>ABC</td>
<td>African Banking Corporation</td>
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>AG</td>
<td>Attorney General</td>
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<td>AIK</td>
<td>Association of Kenya Insurers</td>
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<td>Criminal Investigation Department</td>
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ABSTRACT

Commercial disputes have great potential for damaging international trade with adverse consequences on the economic growth of the respective nations. Appropriate legal frameworks thus need to be established to expeditiously resolve the disputes as and when they do arise. While disputes in home trade are normally settled through litigation by state courts, many partners in international trade appear to be shifting towards arbitrations based on various global conventions and treaties. Even then, the shifts in preference is yet to be evinced, while many issues remain unclear in the framework, for instance, the law applicable where the parties have not made such a provision in their agreement, the appropriate laws that govern the arbitration agreements; whether or not the Procedural (Curial) Law is applicable and in what circumstances; the substantive law applicable and intended by the parties. Against this background, the study sought to bridge the gap by addressing these issues.

Using an exploratory approach, the study considered both secondary and primary data gathered on decided international and local arbitration cases and informal interviews with local and foreign judges. More formal approaches were also adopted viz. in-depth interviews, focus group discussions, projective methods, case studies and pilot studies with the key informants. Qualitative analysis provided the main base of our analysis.

Our findings demonstrate that,

a) International arbitration is now widely accepted in preference to litigation as the best method for resolving international trade disputes.

b) Despite the enforcement of the Unicitral model law, it has not adequately provided a uniform law which transcends national boundaries with regard to the criteria to be used by the Arbitral Tribunal in deciding the applicable law in the absence of choice by the parties.

c) There is yet no agreement among the nations as to whether or not an Arbitral Tribunal making its choice should follow the rules of conflict or the seat of the arbitration.

In view of the findings it is concluded that:-

a) International arbitration remains the best mechanism for resolving international disputes between business persons engaged in international trade.

b) The new model law (UNICITRAL) and its rules have gone a long way towards providing a uniform international arbitration regime

c) Because of the continued use of the conflict of law, rules which differ from one country to another resulting into uncertainty and lack of uniformity
in deciding the applicable law, there is need to re-examine the usefulness of employing conflict of law rules as a criteria.

The study recommends that,

1) The arbitral tribunal should have liberty to determine the law applicable in the absence of choice by the parties without reference to the conflict of law rules.

2) There should be an effort by the United Nations to encourage member countries to enact local laws permitting delocalisation when necessary by providing a provision in the Unictral rules.

3) In all, our study shows that international arbitration has a promising future provided that members of the international arbitration community both (arbitrators and institutions) shall improve their productivity and service by adopting cost effectiveness measures which will popularize international arbitration. More concerted efforts should however, be undertaken towards harmonizing the laws in the problem.
CHAPTER ONE
INTRODUCTION

1.0 Introduction

Businesses, especially those relating to international trade, require practical and commercially sensible solutions to the myriad and economically significant disputes that they spawn. Arbitration has often been chosen by the parties to resolve such disputes, due to its perceived relative advantages of flexibility and speed in resolving the dispute. For the parties involved, arbitration provides a single, neutral procedural framework and a more stable substantive legal regime. Arguably, in the context of international trade, these features are important owing to the variations between the national laws and procedures.

Against this background this study examines: (i) the advantages of using arbitration in resolving disputes as opposed to the traditional method of litigation, (ii) the law governing the arbitration agreement, (iii) the application of the procedural law (curial law) in arbitrations, (iv) the substantive law applicable and that intended by the parties for application in the event of a dispute, (v) Applicability of a national law (Lex Marcatoria).

The study adopts an exploratory approach in addressing the study objectives, relying on data obtained from both secondary and primary sources. More specifically, the study uses data gathered from court decisions, based on arbitral awards from the United Kingdom, Canada, Australia, France and Switzerland -- Countries that are deemed to be International Centers for arbitration. Additionally, data was gathered from awards based on arbitration cases that did not end up in court and papers presented in international arbitration seminars and workshops. Additionally, efforts were made to probe specific professionals

through the telephone, faxes, and e-mail. Qualitative analysis provided the major tool for analysis to answer our study questions, notably determining the most suitable method(s) of resolving commercial disputes in international trade.

Our findings are presented in five parts. After the introduction, we examine in chapter two the choice of law, which arise in international commercial arbitrations, focusing on the law governing arbitration agreements. This is followed by Chapter three which analyses the effects of the procedural law on the choice of the applicable law. In chapter four, we focus on the law governing the substantive liability of the contract. Chapter five addresses the emerging concept of delocalisation, primarily espousing the theory that the freedom of the parties to select an applicable law, includes even a right for the parties to select a system of law or legal rules, which may or may not be based on any national law. The concluding chapter draws on the efficacy of the choice of law, which can possibly arise in international arbitration, whether or not, they help in promoting the arbitration process.

1.1 The Problem

Commercial disputes have great potential for damaging international trade with adverse consequences on the economic growth of the respective nations. Thus, appropriate legal frameworks need to be established to expeditiously resolve the disputes as and when they do arise. While many disputes in home trade are resolved through litigation by state courts, many partners in international trade are wary of using such a system. This is because of, among others: unfamiliarity with the state courts including the legal systems, perceived delays, lengthy and bureaucratic procedures and language problems. For these reasons, arbitrations based on various global conventions and treaties -- as opposed to the traditional litigations – are becoming more popular in international trade. Even then, the
shifts in preference are yet to be evinced. Still, several issues remain unclear in the international arbitrations: the law applicable where the parties have not made such a provision in their agreement, the appropriate laws that govern the arbitration agreements; whether or not the procedural (curial) law is applicable and in what circumstances; the substantive law applicable and intended by the parties, among others. Out of necessity, these issues need to be resolved to promote trade amongst different states. This study sought to bridge the gap by addressing these issues.

1.2 Study Objectives

The overall objective of the study is to determine the law that is applicable in resolving disputes arising from international trade transactions, particularly where the parties have not made any provisions in their agreement.

The specific objectives were to determine:

1. The use of the transnational rules and equitability in international arbitrations.

2. What law is applicable where the parties have not designated the law to be applied in an international arbitration?

3. Whether or not the use of transnational rules and equitability in international arbitration would provide a solution where parties did not make a provision for the law to be applied.
1.3 Research Questions

Chapter Two
a) What law is to be used in international arbitration?
b) What criteria is to be employed in deciding the choice of law?

Chapter Three
a) What role is played by the doctrine of separability in determining the choice of the applicable law?
b) How is the choice of law to govern the procedure of the arbitration determined where the parties have not made express choice of law?

Chapter Four
a) What is the difference between the law governing the substantive liability and the procedural law?
b) How does the substantive law affect the choice of law where there is no express choice by the parties?

Chapter Five
a) What is party autonomy in international arbitration and what role does it play in the determination of the choice of law?
b) What is meant by delocalization and what role does it play in the determination of the choice of law?

1.4 Research Methodology

1.4.1 Research Approach

This study was exploratory in nature given that the real scope of the problem is as yet unclear. Notwithstanding the researcher’s familiarity with the subject
being a Fellow of the Chartered Institute of Arbitrators, a Judge of the High Court in Kenya and having participated much in arbitration before, the researcher had to familiarize himself with the problem being studied as the study progressed. More specifically, in testing certain key concepts in international arbitrations before they become law.

1.4.2. Data Collection Methods

The study was quite informal, relying on secondary data obtained from a review of literature on international arbitration cases and, qualitative approaches such as informal discussions with local and foreign judges personally or through the internet and faxes and/or other electronic media. More formal approaches were also adopted such as: in-depth interviews, focus group discussions, projective methods, case studies and pilot studies with the informants.

Secondary Data

Secondary data was sourced from a review of the literature in magazines and periodicals on the subject, focusing on already decided cases. A Research Assistant was engaged in collating the views and opinions from the various arbitration cases.

Primary Data

Primary data was gathered through less structured research instruments, making greater use of open-ended questions. This approach was meant to provide detailed results and to allow the researcher much more flexibility in probing as he had greater latitude to do so. Because of the professional nature of the study and the requirement to interact with high-ranking judges, the researcher administered bulk of the instruments individually as the level of expertise
required was quite high. Additionally, efforts were made to probe specific professionals through the telephone, faxes, and e-mail.

Participation in seminars and workshops relating to international arbitration provided yet another source of data as the researcher had another opportunity to effect self-administered questionnaires to participants. The most resourceful forums in this regard included: (i) The Judges conference on ADR Mombasa 1999, (ii) The conference on ADR and case management with Canadian judges 2001 in Nairobi and, (iii) the judges conference on ADR Toronto, Canada 2002.

The researcher obtained additional information on the study questions from two key groups: (i) Canadian Judges who had come to run a course for Judicial Officers for Kenya and, (i) the Judges of the newly set up court of East African Court of Justice. These groups, some of whom, are experienced in teaching Alternative Dispute Resolution (ADR), which include International Arbitration, were able to assist in clearly identifying the problem areas in International Arbitration and addressing the key research questions. The exploratory nature of the study based on dialogue, proved to be very helpful as every participant was a facilitator and a learner at the same time. This was by getting exposure to the practices in arbitration and the other methods of Alternative Dispute Resolutions (ADR) that are being practiced in many countries.

During specific seminars, the researcher interacted with the foreign judges to assess the suitability of the Kenyan Law enacted in 1995 as “The Arbitration Act 1995,” which combines both international and domestic arbitration. This helped in revisiting the art and science of enhancing the quality of awards given by International Arbitration Tribunals which would, in turn, enhance its acceptability as a method of resolving trade disputes against litigation. Participatory methods of evaluation was basically used to determine whether or
not some of the solutions suggested could be applied universally, particularly
the suggestion that International Arbitration should not be pegged to a domestic
legislation. This evaluation promoted an in-depth understanding of the
important point why over the years it was thought that international arbitration
unlike the domestic arbitration must be based on municipal law of a state.

1.4.3. Sampling Procedures

In selecting the cases for analysis from secondary sources, a list of all the
arbitration cases was initially compiled from the indexes of the law reports.
From this, the researcher relied heavily on the All England Law Reports, which
have well documented cases going back to 1936 and, the reported cases in USA
and Canada and on International Law Reports particularly the London Court of
International Arbitration (LCIA) Journal on International Arbitration. These
sources were easily accessible to the researcher being a founder member of LCIA.
In all, 50 cases were identified for the analysis. These were later trimmed down
to 20 cases from (Kenya = 2); UK = 13; USA = 3; and Australia = 2. This is by
doing away with cases dealing with disputes outside jurisdictional problems.
The cases initially examined were those dealing with jurisdiction of Arbitral
Tribunal. The next stage in the sampling process involved stratification of the
identified cases, which enabled the researcher to separate those cases whose
decisions remain within the jurisdiction of international tribunals.

1.4.4. Data Analysis

In the analysis, the qualitative data obtained from the participatory approaches
was summarized and analyzed as follows. In the first instance, the field notes
from the respective sources were summarized into briefs on a daily basis by the
researcher with the help of the research assistant. In this regard, analyses were
made of each case by extracting the ratio decided and making notes relevant to
the subject. Most of the court decisions were on Arbitral Awards from United
Kingdom, Canada, Australia, France and Switzerland, countries that have had strong international centers for arbitration. A number of awards from arbitration cases that did not end up in court and those presented in seminars and workshops were also considered.

The next step involved the construction summary sheets containing information on the international arbitration cases by the respective countries and institutions. This assisted the researcher in identifying gaps in the existing law. The interim case summary sheets were thereafter prepared to communicate the findings on the respective aspects of the survey per case and country. Finally, from the summary sheets of the study areas, sequential analysis was undertaken to provide a much deeper insight into the qualitative data collected. The emerging themes on international arbitration cases were thereafter being put together.

1.4.5. Study Limitations

In this study the major problem was the unavailability of locally decided cases on international arbitration in the Kenyan courts. In spite of the move to set up an International Center in Nairobi for arbitration to cater for the African Region South of the Sahara, little has been done to implement the initiative. Despite this handicap, it was possible to focus on key study areas using international arbitration practices in other countries, specifically those renown to be global centers for Arbitration. The fact that more and more countries have accepted the use of International arbitration facilitated the research owing to the availability of many commentaries on the model law. The limitations notwithstanding, the study results were not impaired in any way as extra care was taken to reduce the likely effect of the drawbacks to the study. In any event, the limitations as evidenced were minor and unlikely to bias the results of the study.
CHAPTER TWO

THE EFFECT OF THE LAW GOVERNING THE ARBITRATION AGREEMENT

A fundamental pillar of arbitration, especially international arbitration\(^2\) is the concept of party autonomy, the freedom of the contracting parties to designate a particular system of law or legal rules to govern their contractual relationships, or particular aspects of it.\(^3\) The law or legal system so chosen can be designated to be applicable to particular aspects of the contract\(^4\) or to the procedure for the determination of the dispute through arbitration by the arbitral tribunal.

In domestic arbitrations, which either involve nationals of one state, or where the parties are resident in one state, it is well settled that the laws of the state where the arbitration is being conducted is to apply.\(^5\) In this setting therefore, the arbitral tribunal administers the proceedings in accordance with the laws or legal

\(^2\) International arbitration is defined under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law), Art.1(3) in terms of its features. Thus an arbitration is international if (a) the parties to the agreement have at the time of conclusion of that agreement their places of business in different states, (b) the place of the arbitration and/or the place where substantial part of the obligations in the contract is to be performed or the place with which the subject matter of the dispute is most closely connected are outside the state where the parties have their places of business, (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. This definition is adopted by most countries, see Kenya Arbitration Act, and the Indian Arbitration and Conciliation Act, 1996, s.2(1), and in this paper, reference to international arbitration, international commercial arbitration and arbitration, except where specifically expressed otherwise, refers to arbitrations exhibiting these features.

\(^3\) The concept of party autonomy recognizes the inherent freedom of the parties to enter into a contract, and in particular, to enter into a contract detailing the law or legal system upon which the underlying contract is to be governed. This concept can be seen in Article 28 of the UNCITRAL Model Law, Article VII (I) of the European Convention on International Commercial Arbitration, Article 6 of the Convention on International Sale of Goods, and Article V(I)(d) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), which can be said to recognize international practice. On municipal recognition of this concept, see S.29(I) of the Kenya Arbitration Act, 1995.

\(^4\) For example the interpretation of the terms of the contract can be in accordance with a particular legal system, whereas matters such as the capacity of the parties to enter into contractual relations can be determined by another system of law.

\(^5\) In this regard concerning legal persons, its central management and/or control must be at the place where the arbitration is being conducted.
rules, of the place where it conducts the arbitration, which often leads to a procedure more or less like a judicial determination by the courts.

This simplicity however is not replicated in international commercial arbitration, for:

"Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined".6

Thus, "it is firmly established that more than one national system of law may bear upon an international arbitration"7. A theoretical illustration will show the complexity of this confluence of national laws or legal systems.8 A contract containing a Kenyan jurisdiction clause, made in Nigeria between a South African buyer and an Egyptian seller for Egyptian fish products c.i.f. Freetown, the price being payable in Cairo in Egyptian pounds. A dispute takes place and an action is brought in Kenya. It is found that a crucial witness lives in London, and steps are initiated to have his evidence taken by an examiner of the London Court. Then after the litigation is over, and the loser has failed to satisfy the award, the winner takes steps to enforce it against the loser in the loser's home country. He also discovers that the loser has credit balances with a bank in New York, which he seeks to attach.9

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6 Lord Herschell, L.C. in Hamlyn & Co. v. Talisker Distillery, (1897) AC 202 at pp.207
8 This illustration is derived from "The Goff Lecture, Hong Kong 1996: Too Many Laws," by Lord Justice Mustill, in (1997) 63 Arb. J.C.I. Arb. 247, and only the settings have been changed.
9 Lord Mustill, infra, at p.249
A cursory look at this illustration reveals that almost eight systems of national law are potentially relevant for the determination of this dispute. However, a closer look will reveal that these national laws are relevant in more than one particular way.

The exact magnitude of choice of law issues in international commercial arbitration is unclear but in practice, the following legal systems may have a bearing:

a) The law governing the parties, capacity to enter into an arbitration agreement.

b) The law governing the arbitration agreement and the performance of the agreement.

c) The law governing the existence and proceedings of the arbitral tribunal.

d) The law, or relevant legal rules, governing the substantive issues in dispute.

e) The law governing recognition and enforcement of the award.

f) The choice of law rules to be applied to identifying each of the system above.\textsuperscript{10}

Questions requiring analysis of the legal systems, and rules can arise before, during or after the arbitration or where a party may, in breach of the arbitration agreement brings proceedings in a court, and the other party may seek to enforce the arbitration agreement by applying for a stay or in proceedings for recognition and enforcement of the awards.\textsuperscript{11}

An arbitration agreement is essential to arbitration because the arbitrator derives his jurisdiction from the agreement, and primarily that it is by this agreement


that the parties have agreed to arbitration as a method of settling their disputes or differences arising out of the contract. Thus the validity of the arbitration agreement is a matter of great importance.

The law applicable to the arbitration agreement should be distinguished from the law governing the capacity of the parties to arbitrate, and the amenability of the subject matter of a dispute to arbitration. In the context of an international arbitration, the law governing the arbitration agreement, considered separate from the underlying contract, is usually regarded as applicable to the agreement, to the agreement’s validity, effect and interpretation. In theory therefore, it is possible for different laws to govern each of these issues.

Theoretically, the choice of law governing the party’s arbitration agreement is complex. This is because an arbitration agreement is regarded under most nations’ laws, as separate from the underlying contract to which it relates.

The question arising in the context of an international arbitration is which law governs the arbitration agreement, and such a question can arise before a national court either before or during an arbitration, where a jurisdictional objection is raised before an arbitral tribunal, or where an application is made to a court to set aside or enforce an award. It is necessary to examine each.

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12 Pryles, M., Choice of Law Issues in International Arbitration, (1997) Arb 200 at 201
13 Bansal, Supra at 177. Amenability, could import public policy considerations.
15 Redfern, A and Hunter, M, Law and Practice of International Commercial Arbitration, London; Sweet and Maxwell; 1986 at 212. This separability could imply that separate/different sets of laws and/or conflict of law rules could apply to the arbitration agreement as opposed to the underlying substantive agreement.
2.2.1 **Question Arising before or during an Arbitration before a National Court**

Where the question arises before a national court either before or during an arbitration, the issue is whether the national law applied by the court is the standard by which to measure the validity, effect and interpretation of the arbitration agreement or it is the law which the parties have expressly or impliedly subjected the underlying contract. Further question can abound as to whether a separate set of law or legal system or rules is applicable to the arbitration agreement as to the underlying contract, given the respect to which should be accorded to the freedom of the parties to subject the agreement to any law.

The disputes over the law applicable to the validity, effect or interpretation of an arbitration agreement usually arise when one party challenges the arbitrability of some or all of the parties’ dispute, for example claims that no arbitration is proper, because the parties’ arbitration agreement is invalid or non-existent, or that the agreement cannot be interpreted to apply to some or all of the party’s dispute.

In England, where the agreement expressly stipulate the law by which it is to be governed, this choice of law will prevail, even if the law chosen differs from the substantive law of the underlying contract and the law governing the remaining procedural aspects of the arbitration.\(^\text{16}\)

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\(^{16}\) Mustill, M and Boyd S, *The Law and Practice of Commercial Arbitration in England*, London; Butterworths; 1982, at P. 89. See also *Hamlyn & Co. v. Talisker Distillery* (1894) AC 202, and also Dicey and
Where however there is no express choice of law in relation to the arbitration agreement itself, the agreement will be governed by the proper law of the underlying contract in which it is embodied, since it is part of the substance of the contract.\textsuperscript{17} It would be however inconceivable, though not completely out of question, to find parties who have agreed to have a separate set of laws to apply to the agreement and another to apply to the substantive underlying contract.\textsuperscript{18}

National laws also seem to conform to the English approach. In Switzerland, Article 178(2) of the Swiss Law on private international law establishes an independent conflicts rule:

"As regards its substance, the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law".

The push that can be deduced from such a provision is a desire by the countries/states to obtain the legal system, which would uphold the validity of the arbitration agreement, even in the face of challenges as to the validity of the underlying contracts.

In the United States however, the position is rather startling. The starting point is the Federal Arbitration Act, and Section 2 in particular, which has been held to govern interpretation of arbitration\textsuperscript{19}, many issues relating to the validity and

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\textsuperscript{17} Mustill & Boyd (supra) at p.90
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\textsuperscript{18} As pointed out by Mustill and Boyd.(1982) (supra) P. 89, it would be an unusual case
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\textsuperscript{19} Moses H. Cone Memorial Hospital v. Mercury Construction Co. 460 US 1 (1983)
\end{flushright}
enforceability of arbitration agreements, some issues relating to the formation of arbitration agreements and remedies for the enforcement of arbitration agreements.

It would appear that the US courts have viewed the question of enforceability of arbitration agreements as a question of remedies to which the procedural law of the forum is applicable, or on the other hand, that the legislature's intention in the enactment was to preclude applicability of foreign law in US courts.

The recognition however that the arbitrations agreement is separate from the underlying contract can be viewed as having a direct impact on the question of choice of law applicable to the arbitration agreement.

In *Gorset*, the French Court de Cassation (Court of Appeal) held that the arbitration agreement only becomes void if the reason for the nullity of the main contract also affected the arbitration agreement. In *Prima Paint vs.- Flood & Conklin*, the US Supreme Court held.

"Except where the parties otherwise intend, arbitration clauses, as a matter of federal law are separate from the contracts in which they are embedded, and where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud."

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21 Lea Tai Textile Co. v. Manning Fabrics, Inc. 411 F Supp 1404 (S.D.N.Y)
22 Case cit. 7 May 1963
Seen from the light of separability, it can be argued that the arbitration agreement can be governed by a system of law separate from the system under which the underlying contract is subjected to

2.2.2 Jurisdictional objection to Arbitration agreements before the Tribunal.

The arbitration agreement can be put under the spotlight before an arbitral tribunal in the context of a challenge to the tribunal’s jurisdiction.

Under modern international and institutional rules of arbitration, express terms are spelt out conferring on the arbitral tribunal the powers to decide on its own jurisdiction, its competence to decide on its own competence. In Dalmia Dairy Industries Ltd v National Bank of Pakistan (1978) 2 Lloyds Rep.223, Megaw LJ held that such power to rule on its own jurisdiction confers on the arbitral tribunal a very wide jurisdiction which the court should be wary of slashing.

As a jurisdictional objection is essentially a matter raised at the preliminary stage of the arbitration, the arbitral tribunal, where it is conferred such competence is duty bound to make a ruling on it, either at that stage, or together with the award. This is if it is so minded to proceed with the arbitration. In determining the question, the arbitral tribunal may apply the same choice of law rules as a local judge would and the result will not be any different from where such an issue is raised before a court. However it may feel free to apply a different rule or principle, if for instance, it were within its discretion to do all it can to ensure that the award it is to give is enforceable.

24 Competence/competence, or in German Kompetenz or in French Compétence de la Compétence, See for example UNCITRAL Arbitration Rules, Art 21(1) and (2) and Reffern & Hunter, (supra) at 213.
26 As for example under Art 26 of the ICC Rules
Further, the tribunal can determine such an objection by reference to the domestic law of the place of arbitration, or law governing the substance of the dispute or to non-national principles such as internationally accepted principles governing contractual relations.27

The impact of the doctrine of separability to the determination of jurisdiction means that the arbitral proceedings can proceed notwithstanding the existence of the objection based on the arbitral agreement on jurisdiction. In such an instance, the arbitral tribunal can tie up the issue of jurisdiction to the merits of the case, and determine it in the final award.

2.2.3. Enforcement or setting aside an Award

The validity of an arbitration agreement can be challenged in an application made to set aside the award made determining the dispute, or in an application by the successful party seeking the recognition and enforcement of the award. In such an instance the court in which the challenge is being raised will have to determine the question.

The UNCITRAL Model Law provides under Ar: 4 (2) for grounds for such a challenge, where an application is made for setting aside. The party can furnish proof that a party to the arbitration agreement was under the law to which the parties have subjected it or failing any indication thereon, under the law of the state where the challenge is being made.

Thus theoretically, the validity of an arbitration agreement can be measured as against the law of the state where the challenge against the award is raised or

opposed to the law of the state where the arbitration is made, if the parties have
not identified the law under which the agreement is to be governed.

However, it is important to bear in mind that the provision of the model law,
including the clause on setting aside, apply only if the place of arbitration is in
the territory of the state.28 Thus it can be argued that under the model law, there
is no regime under which an arbitral award can be challenged by an application
to set it aside in a state or territory outside the place of the arbitrations.

As hitherto set out above, such a challenge to the validity of an arbitration
agreement can also be raised in proceedings for recognition and enforcement of
an award, often by the respondent/losing party. Under the New York
Convention29, the role of the law of the state where the arbitration was made
plays a role in the determination of the validity of the agreement.

Thus, under Art V 1 (a) recognition and enforcement of an award can be refused
where the parties were under some incapacity under the law applicable to them,
or the agreement is not valid under the law to which the parties have subjected it
or failing any indication thereon, under the law of the country where the award
is made.

It can therefore be deduced from this that under the international instruments a
great deal of respect is given to the choice of law by the parties in determining
the validity of the agreement, and where there is a failure to expressly or
impliedly indicate such a choice, the law of the country where the award is made
is applicable. This would by implication rule out the challenge of validity of the
agreement under the laws of other states, such states in this regard being states

28 Model Law Clause 1 (2)
29 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958,
hereinafter referred to as the New York Convention
where a challenge is made, even though its’ laws were not chosen by the parties or the arbitration never took place there.

2.2.4 *The effect of the Law Governing the individual reference*

In a given contract with an arbitration clause, it is theoretically possible to have several arbitrations on the same contract, if the contract lasts for same duration with each arising dispute being subject to a separate arbitration.\(^{30}\)

Once a dispute arises, and notice to arbitrate is given, a contractual relationship arises which is distinct from that of the agreement itself even though it arises from the main agreement. It is therefore possible that each individual reference can be governed by separate legal systems from the one governing the substantive/underlying contract, as well as the other reference.

This was illustrated in the case of **Black Clawson International Ltd. V. Papierwerke Waldhof-Aschaffenburg A.G**\(^{31}\), Black Clawson, an English company (the sellers) agreed to manufacture a papermaking machine for Aschaffenburg, a German company (the buyers) and install it at the buyer’s premises in Germany. The agreement was in the English language with typical English clauses and the price was in sterling and payable in England. In clause XIV, the agreement provided for the arbitration of disputes by the arbitrators appointed in conformity with the rules of the ICC and “such reference to arbitration shall be deemed to be submissions to arbitration within the meaning of the Arbitration Act of England”.

The arbitration was to be held in Zurich, and that “any question as to the construction or effect of this contract shall be decided according to the laws of

\(^{30}\) Pryles, (supra) at 203

England, if the reference ... (be) made by the purchasers and according to the laws of the Federal Republic of Germany if such reference shall have been made by the sellers”.

Disputes arose and 3 arbitrators were appointed in 1965 that all later resigned and were replaced by new ones. The tribunal found for the buyers who sought to enforce it in England under the New York Convention, which had been accepted by the English Arbitration Acts of 1950 and 1975.

The sellers objecting to the enforcement obtained an order from a Zurich Court setting aside the award and remitting the matter back to arbitration for reconsideration. Their objections were that the matter had taken too long for a rehearing, and went to court in England asking for an injunction restraining the lawyers from taking any action on the arbitration and for an order for declaration that the arbitration agreement had been terminated by frustration.

According to Mustill J, the question was whether the arbitration agreement in particular was governed by English law, rather than whether the entire contract in general was governed by English law. He held that the issue of frustration only went to the individual reference of the existing dispute to the chosen arbitrators. It was possible for an individual reference to be frustrated leaving the arbitration agreement in existence to operate in relation to other disputes that may arise. It followed therefore that in theory, at least, it was conceivable that the two sets of contractual relations - the existing reference and the continuing arbitration agreement could be subject to different proper laws. The matter that was in question in the instant case, according to Mustill J was the existing reference and he concluded that its proper law was that of Zurich.32

32 Pryles, supra, at 204
Thus, it is indeed possible for an individual reference to be governed by a separate set of law or legal rules/system from that governing the arbitration agreement in general.
CHAPTER THREE

THE EFFECT OF THE PROCEDURAL LAW ON THE CHOICE OF THE
APPLICABLE LAW

3.1 Separability

The doctrine of separability of the arbitration agreement from the underlying contract has, as noted above, led to an acceptance that the law governing the arbitration agreement is not necessarily the law governing the underlying substantive contract.\textsuperscript{33} And, as is also discussed above, the law governing an individual reference need not necessarily be the same as that governing the entire arbitration agreement.

Still however, there could arise certain procedural issues that may depend on a law different from the law governing the contract of the arbitration agreement.\textsuperscript{34} These issues depend on the procedural law of the arbitration (curial law).\textsuperscript{35} These could include issues for instance such as whether an arbitrator was bound to call witnesses on a disputed issue.\textsuperscript{36} As a contract separate from the underlying contract, an arbitration agreement creates rights and duties, as well as obligations, which the parties to the agreement have bound themselves to abide by. It is therefore, of necessity to impose two sets of obligations, first an obligation to submit future or existing disputes to arbitration and to abide by the award of a tribunal constituted in accordance with that agreement.\textsuperscript{37}

\textsuperscript{33} see also Channel Tunnel Group v. Balfour Beatty Construction [1993] AC 344, and James Miller & Partners v. Witworth Street Estates (Manchester) Ltd. [1970] AC 583
\textsuperscript{34} Collins, L. (supra) at 131
\textsuperscript{35} Also referred to as the curial law, lex arbitri or loi de l’arbitrage
\textsuperscript{37} Mustill & Boyd, (Supra) at 62.
Since the arbitration agreement has a distinct life of its own, it must in theory, be possible that it is governed by a proper law of its own, which need not be the same as the law governing the substantive contract. This law to govern the arbitration procedure may be material as to the status of the agreement to arbitrate, the manner in which the reference is conducted and the legal content of the award.

The second obligation is a springboard from the first, which is concerned with the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute.

3.2 Problem of Curial Law

The practicality of the problem of the procedural law (curial law) was exposed in Compagnie D'Armement Maritime S.A v. Compagnie Tunisienne de Navigation S.A. In this English case, concerning an international contract for carriage of crude oil, the contract was negotiated in Paris between a French company and a Tunisian company. The oil was to be carried between Tunisian ports by a number of vessels over a period of months. The contract provided for arbitration in event of disputes in London, and the question arose as to the law applicable to the contract, whether it was English law or French law.

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39 Mustill & Boyd, (Supra) at 62.
41 (1971) AC 572
Lord Diplock put it thus:

"When parties enter into an agreement which they intend to give rise to legally enforceable rights and liabilities, they must of necessity contemplate that there will be some system of law by reference which their mutual rights and liabilities will be determined, i.e. the substantive or "proper" law of their agreement; and also that the procedure by which disputes about their rights and liabilities will be resolved will also be regulated by some system of law, i.e. the curial law of their agreement. My Lords, it is possible for parties to a contract to choose one system of law as the proper law of their contract and a different system of law as the curial law".42

It was held that the curial law of the contract was English law, and even though there was no express choice of law to govern the substantive issues the law of France was applicable.

Disputes over the curial law often emerge where the arbitration takes place in more than one place, or where a party argues that some law other than that of the arbitral situs has been selected as the curial law.

In determining the curial law, international conventions, though providing that the arbitral situs provides the curial law, is rather uncertain.43 The consensus under this convention is that the parties can make an express choice of curial law, failure to which the law of the arbitral situs is applicable.

42 at p. 603-604
43 See Geneva Protocol of 1923, Art 2 and Art V. (1)(d) of the New York Convention
In certain instances, however, it may become necessary to determine the curial law prior to the commencement of the arbitration proceedings particularly where the arbitration agreement does not specify the seat of the arbitration. In such a case, the curial law may be presumed to be the law governing the arbitration agreement or the substantive contract.\textsuperscript{44}

The place or seat of the arbitration is the territory where the arbitration takes place and under whose law the arbitration is being conducted. It is the central point or, its center of gravity, Saville J. observed in \textit{Union of India v. McDonnell Douglas Corp.}\textsuperscript{45}

“Although the choice of a ‘seat’ also indicates the geographical place for the arbitration, this does not mean that the parties have limited themselves to that place. As is pointed out in a passage approved by the Court of Appeal in \textit{Naviera Amazonia Peruana SA vs. Compania International de Seguros del Peru}, (1988) \textit{1 Lloyd’s Rep. 116 at 121}, it may often be convenient to hold meetings or even hearings in other countries. This does not mean that the ‘seat’ of the arbitration changes with each change of country. The legal place of the arbitration remains the same even if the physical place changes from time to time, unless of course the parties agree to change it. In Short, Mr. Veeder (Counsel) suggested that the word ‘seat’ carried with it much more meaning as clearly conveyed by the French word ‘sieve’ than the English word ‘place’, though his submission was that this word too in an arbitration agreement would be primarily concerned with the legal rather than the physical place of the arbitration.”

\textsuperscript{44} See \textit{International Tank and Pipe SAK v. Kuwait Aviation Fuelling Co. KSC} [1975] KB 224
\textsuperscript{45} [1993] 2 Lloyd’s L. Rep. 48
Thus the general consensus under the conventions as well as English law is that failing an express choice of law to govern the procedure of the arbitration the law of the place in which the arbitration is being conducted is applicable.46 Under US federal law (FAA) the position is similarly that "the parties are free to include in their agreement a choice of law provision which impacts upon procedural rules."47

The quagmire which arises when arbitral hearing are conducted in different places is this: where the parties have agreed to arbitration in country A, but hearings and proceedings are conducted physically in other states, ostensibly for reasons of convenience, does the curial law change with every sitting/hearing or proceeding to the law of the place where such a hearing or proceeding is conducted?

The general consensus has been that it does not, primarily because such hearings or proceedings are conducted for reasons of conveniences only, and does not amount to a change of the seat of the arbitration.48 It would require an agreement of the parties to such a change of seat, and it would appear too remote to think of matters of convenience as requiring a physical change of place of the hearing.

46 See also Bansal (Supra) at p 177-178, see also Bank Mellat v. Helleniki Techniki [1984] QB 291 at 301
3.3 Floating Curial Law.

In certain instances however an arbitration agreement might envisage arbitration being held in one of two places or more. This is illustrated in *The Star Shipping A.S. vs. China National Foreign Trade Transportation Corporation (The Star Texas)*[^49] where the charter party included an arbitration clause providing that any dispute arising under it may be referred to arbitration in Beijing or London in the defendant's option. It was contended, inter alia, that the clause was void because the parties had chosen a floating curial law for the arbitration and this was not permissible. This argument was rejected by Steyn J who observed:

> "We have not been referred to any case which decides that a floating curial law invalidates an arbitration clause nor can I see any good reason why it should. It might be possible, indeed it frequently happens that an arbitration clause provides for one or other of the two or more venues. Nobody has suggested as far as I know that which makes the arbitration clause void for uncertainty or otherwise unworkable. It makes good commercial sense that the law governing the arbitration procedure should be the law of the country where the arbitration takes place, unless which is unlikely, the parties have agreed on some other curial law. A contract without a proper law cannot exist. It is, as has been said, no more than an abstraction or a piece of paper. But an Arbitration Agreement can exist, even if it is not known at the time the arbitration agreement is entered into, what law will govern the arbitration agreement, and what law will govern the arbitration procedure”.

This position seems augmented on the strength of decided cases.\textsuperscript{50} However Saville J. in \textit{Union of India v. Mc Donnell Douglas Corporation}\textsuperscript{51} opined that it would be greatly unsatisfactory where foreign curial law is imported into arbitral or court proceedings, but as will be noted in his analysis, the force of it was hewed out of the applicability of the English Arbitration Act, that the jurisdiction of the court derives from the Act, and the parties cannot exclude it by agreement.\textsuperscript{52}

Such sentiments however have to be taken in the context in which they were made i.e. an English court being asked to apply a foreign curial law. However, in the context of an international arbitration in which, unlike the court which is established to apply the law of the country in which it is sitting, an arbitral tribunal is established in accordance with an agreement by the parties to that end, and is to apply the laws which the parties have stipulated it should.

It can therefore be argued that an arbitral tribunal is mandated to apply foreign curial law, in lieu of the procedural law of the situs even though the law of the seat is still applicable to the entire award in terms of applications to set it aside on issues of validity. Thus, an arbitral tribunal can apply foreign curial law, which is floating in the sense that there could be a choice between two seats of the arbitration and neither has been exercised to determine it.\textsuperscript{53}

\textsuperscript{50} See the Channel Tunnel Group Vs. Balfour Beatty Construction (Supra)
\textsuperscript{51} (1993) 2 Lloyds L.Rep.48
\textsuperscript{52} Similar sentiments were aimed by Mustill J. in Black Clawson International Ltd. v. Papierwerke Waldhof-Asschaffenburg AG. (1981) 2 Lloyds Rep.446, that foreign arbitration governed by English procedural law produces an absurd result.
\textsuperscript{53} This should however be contrasted with the position in Condel Commodities Ltd. v. Siporex Traders S.A.(1988) 2 Lloyds L. Rep.589, where it was held that the courts power under Section 27 of the English 1990 Arbitration Act could not be excluded by contract. It is submitted that an arbitral hearings conducted in a particular state is bounded by the mandatory rules of the state relating to the conduct of arbitral proceedings.
CHAPTER FOUR
AN EXAMINATION OF THE LAW GOVERNING THE SUBSTANTIVE LIABILITY IN RELATION TO THE CHOICE OF APPLICABLE LAW

4.1 Differing Nomenclature

The law governing substantive liability is variously described as the "proper law", "substantive law", "applicable law" or 'governing law' it essentially means the system of law by which the parties intended the contract to be governed.\textsuperscript{54} It is the law applicable to the merits of the parties' disputes. It denotes the particular system of law which governs the interpretation and validity of the contract, the rights and obligations of the parties, the mode of performance and the consequences of breaches of the contract.\textsuperscript{55}

4.2 Choice of Law

One of the most widely accepted principles of private international law is the concept of party autonomy under the concept that the parties to a contract are permitted to designate the law governing their commercial relationship in the contract itself. The doctrine is now embedded in national laws of most states, allowing for the parties to determine the law applicable to the substance of the dispute.\textsuperscript{56}

The doctrine has also found itself embedded in international conventions\textsuperscript{57} as well as in institutional rules of arbitration\textsuperscript{58} signifying at least on the very basic

\textsuperscript{54} Bansal, (Supra) at pp.174.
\textsuperscript{56} Pryles (Supra) at 206 see also Redfern & Hunter, (Supra) at 72, where the concept is defined to mean the freedom of the parties to choose for themselves the law applicable to their contract
\textsuperscript{57} See the 1961 European Convention (The Rome Convention) on the Law Applicable to Contractual Obligations available in (1980) Official Journal of the European Communities, No. L.266/1 and Art.42 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other
level, an international recognition of the doctrine as applicable in international commercial arbitration.\textsuperscript{59}

The recognition by national laws of the doctrine of party autonomy in arbitration implies that the national courts are also prepared to recognize the doctrine in the choice of law applicable to a contract, and little should therefore stand in the way of arbitral tribunals recognizing and applying the doctrine.\textsuperscript{60}

4.2.1 Express Choice of Law

The first question which arises is how the proper law of the contract, the law governing substantive liability is determined. International arbitration agreements often include, or accompany an express choice of law provision addressing the substantive law applicable to the parties’ contract and relationship. Prior agreement on the governing substantive law increases the predictability of the parties’ relationship and in some cases, selection of a particular nation’s law may provide important advantages to one or the other party.\textsuperscript{61}

Thus it is common to find an arbitration agreement with a clause that the arbitration shall be governed by the law of a particular state e.g. England, Swiss

\begin{itemize}
\item \textsuperscript{58} See ICC Rules Art 13(3) UNCITRAL Arbitration Rules, Art 33 (1) and LCIA rules Art.13 (1) the latter by implication.
\item \textsuperscript{59} Redfern and Hunter, supra at 73
\item \textsuperscript{60} Under the Kenyan Arbitration Act 1995 Section 29(1) and the Swiss Law on Private International Law, Art 187 parties are even allowed to choose the rules of law applicable to the substance of the dispute which has been argued could involve more than one system of law, see also Section 46 (1) (6) of the English Arbitration Act.
\end{itemize}
Law etc. Where such an express choice of law is indicated by the parties, the court and the arbitrator as well, must enforce the will of the parties to be bound by that law and apply it accordingly.

However, where such a choice of law clause exists, still pertinent issues arise, first is whether the choice of law agreement is enforceable, and under which law is such a determination to be made. Secondly, if it is so enforceable, are there any exceptions and finally is the question as to how the choice of law clause is to be interpreted. These issues often confound the arbitrator as opposed to the court.

Under previous US law private choice of law agreements were not enforceable, as they were thought to amount to an unacceptable exercise of legislative authority. However the advent of party autonomy gaining ground has driven the point home. Thus in the Restatement (second) Conflicts of Laws, under Section 187, "the law of the state chosen by the parties to govern their contractual rights and duties will be applied" provided there is a reasonable basis for the parties choice and that it violates no applicable public policy.

Under the laws of most other countries the principle of party autonomy is upheld rendering the choice of law agreement enforceable. In Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Lord Reid stated.

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62 Eg. In Vita Food Products Inc v. Unus Shipping Co. Ltd. (1939) AC 277, the contract contained a clause that "the contract shall be governed by English law". Also Bremer Vulkan v. South Indian Shipping, supra (German Law)
63 See Beale, Restatement (First) Conflicts of Laws
64 Beale, Restatement (Second) Conflicts of laws (1971), §2. (1970) AC 583 at 603 see also Dicey & Morris, The Conflict of Laws 12th ed. 1993 at p.1168-80. Earlier in Vita Food Products Inc. v. Unus Shipping Co. (1939) AC 2 at 289 Lord Wright stated that "it is now well settled that by English Law it is the proper law of the contract is the law which the Parties intended to apply... it is true that in questions relating to the conflict of laws, rules cannot generally be stated to absolute terms but rather as prima facie presumptions. But where the English rule that intention is the test applies and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualification are possible, provided that the intention expressed is bona fide and legal and provided there is no reason for avoiding the choice on the ground of public policy."
65 (1970) AC 583 at 603
"Parties are free to agree what is to be the proper law of their contract. There have been from time to time suggestions that parties ought not to be so entitled, but in my view, there is no doubt that they are entitled to make such an agreement and I see no good reason why, subject it may be to some conditions, they should not be so entitled."

As can be noted from Lord Reid’s Statement in Whitworth (case)\textsuperscript{66}, there are some limitations as to the express choice of law. This can also be deduced from Lord Wright’s exposition in Vita Foods Inc. v. Unus Shipping Co. Ltd.\textsuperscript{67} Such express choice of law must be made bona fide, must be legal and must be in conformity with the public policy. These can be seen as the limits of enforceability of private choice of law agreements.

It has been argued that the test for the interpretation and enforcement of choice of law provisions rests, in the first instance, with the arbitration. In so determining the law to be applied in the interpretation and giving effect to the choice of law clause, the arbitrator will have to resort to some rules of construction and enforceability. This will in turn require application of some set of conflict of law rules. The question becomes which law is to provide the conflict of law rules to determine the validity and meaning of the choice of law clause. Should it be (a) the express choice of law set out by the parties (b) law of the state where the arbitration is conducted or (c) the principles of international commerce (lex mercatoria)?

It is submitted that the conflict of law rules to determine the validity and meaning of a choice of law clause should be supplied by the express choice of law determined by the parties in so far as such conflict of law rules will uphold

\textsuperscript{66} supra
\textsuperscript{67} supra note 52
the validity of the choice of law clause. Where such an express choice of law negates the validity of the choice of law clause, it is submitted that the arbitrator is therefore freed from the confines of the express choice of law given by the parties, and can apply the principles of international commerce (*Lex Mercatoria*) but also in so far as they uphold the validity of the choice of law clause.

4.2.2 *Implied or Tacit Choice.*

Where the parties have not expressed a clear choice of law applicable in their contract, it may be possible to infer a choice of law from the terms of the contract and the relevant surrounding circumstance.\(^{68}\) When the intention of the parties to a contract as to the law governing the contract is expressed in words, this expressed intention in general determines the proper law of the contract.\(^{69}\)

This was explained thus by Lord Wilberforce in *Compagnie D'Armement Maritime S.A v. Compagnie Tunisienne de Navigation S.A*\(^{70}\):

> “The law has been more than once in recent times been stated in this house and if one desires a summary of the main principles, the rules in Dicey and Morris, *The Conflicts of Laws*, 8\(^{th}\) ed. are convenient. For myself, I prefer the formulation in the 7\(^{th}\) ed. (1958) p.731, which I find clearer and simpler. In the absence of an express choice of law, rule 127 subrule 2 applies, as follows:

> “Where the intention of the parties to a contract is not expressed in words, their intention is to be inferred from the terms and nature of

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\(^{68}\)Redfern & Hunter, (supra) at 93. See also Hamlyn & Co. v. Talisker Distillery (1891-4) ALLER 849 at 852.

\(^{69}\)Bansal, (Supra) at 175.

\(^{70}\)(supra) at p.595
the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.”

However, for an arbitrator in an international commercial arbitration, the problem which emerges is with regard to the conflict of law rules which will guide the tribunal to arrive at a tacit/implied choice of law. Which conflict of laws rules should the tribunal use in inferring the intention of the parties as leading to a particular implied/tacit choice of law?

The Model Law\textsuperscript{71} deals with this situation by giving the tribunal a greater degree of latitude/discretion to determine the conflict of law rules it considers applicable to the dispute in arriving at a tacit choice of law. This is also mirrored in institutional arbitration rules, which grant the arbitrators a maximum degree of freedom and flexibility in selecting an applicable substantive law.\textsuperscript{72}

On the opposite side of the spectrum are national laws, which require the arbitrators to apply the conflict of law rules established by the law of the arbitral situs.\textsuperscript{73} This would limit the freedom of the arbitrator to the extent allowable by such laws.

\textsuperscript{71} See Art.28(2)
\textsuperscript{72} See Art.33, UNCITRAL Rules and Art.13(3) of the ICC Rules.
CHAPTER FIVE

SUITABILITY OF FLOATING LAW IN DETERMINING THE CHOICE OF LAW

5.1 Definition

The foregoing discussions on the choice of law and conflict of law rules is based on the premises that the process of international commercial arbitration, or parts of it is (are) governed by a national system of law, which can be expressly chosen by the parties, or can be inferred to have been intended by the parties to apply to their dispute. Featuring prominently in this discussion is the law of the place where the arbitration is held.\footnote{Redfern & Hunter, (Supra) at 55.}

On the other hand, one of the most widely accepted principles of private international law is that of party autonomy.\footnote{Pryles, (supra) at 206} This principle as enunciated above, barely is that the contractors (parties to a contract) are permitted to designate the law governing their commercial relationship in the contract itself.\footnote{See also Born G. International Commercial Arbitration in the United States: Commentary & Materials, Kluwer; Boston; 1994, at p.128}

It is presumed that one of the basic purposes of international commercial arbitration is to avoid subjecting either party to the laws and judicial processes of the other party, thus parties will seek to select a legal system which lacks any connection with their transaction.

And given the freedom honoured by the arbitral tribunal, as well as legal systems accorded to the parties to choose whichever system of law or legal rules to govern their contractual relationship, the urge to free international arbitration from the clutches of national laws has spurred the calls for the development of a
demoralized arbitration. Delocalised arbitration implies an arbitration, which is free from the control of the laws of the place where the arbitration is held. It means that the arbitral procedure and any resulting awards are autonomous, being unconnected to any national legal system and deriving its force solely from the agreement of the parties.

The central thesis of the delocalised arbitration is that given the autonomy given to the parties to select the applicable law governing the various aspects of their dispute, the parties should equally have the freedom to delink the law applicable as chosen from any national legal system and instead apply customary commercial law (lex mercatoria), general principles of law or even public international law.

The rationale behind the delocalized arbitrations is that as a matter of principle international commercial arbitrations should not be subject to legal controls which vary considerably from country to country and which indeed, in some countries may be wholly unsuited to the modern practice of international commercial arbitration. Thus delocalisation reflects the desire for uniformity in the regulation of international arbitrations.

The result of a delocalized arbitration is that an award made is stateless and derives its force, not from lex arbitri or indeed any other legal system but solely from the will of parties. In General Maritime Transport Co. -v- Gotaverken Arendal AB the Paris Court of Appeal declined jurisdiction to set aside an ICC

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77 Redfern & Hunter (supra) at 56. Delocalized arbitrations are also referred to as supra-national, transnational, expatriate, denationalized, floating or deterritorialised arbitrations.
79 See Goode R., (supra) at 21.
80 Redfern & Hunter, (supra) at 56.
award rendered in the Paris on the ground that, while the arbitration had taken place in Paris, neither the parties nor the contract had any connection with France and they had not designated French law- or, indeed, any law- as the procedural law apart from the procedural rules of the ICC, and that accordingly the award had no connection with the French legal order and was not a French award.82

Options of Law in Delocalised Arbitrations

Before a discussion into the merits or otherwise of the delocalized arbitration, it is important to identify the options available to the parties for the determination of the dispute in such an arbitration. These include public international law, international development law, general principles of law, concurrent law, international trade law and equity.83

Public International Law.

The traditional conception of public international law was that it is a system governing relationship between states, and little, if any, to do with individuals. Thus public international law was only applicable to states acting in their capacity as subjects of international law, and anything or anybody else, fell to be governed by the municipal law of a state.84 This was exemplified by the following statement by the permanent court of international justice in the Serbian Loans85 case.

83 Redfern & Hunter (Supra) at 75.
84 Redfern & Hunter (Supra).
85 The Serbian Loans case, PCIJ Series A, No.20, at p.40
“Any contract which is not a contract between states acting in their capacity as subjects of international law, is based on the municipal law of some country.”

However modern developments have meant that public international law is no longer restricted in its application to states only, it has been extended to cover international organization such as the UN, and even individuals.

Public international law can apply to international arbitration where the parties to the contract would be a state and a person of private law. However, it would be of doubtful applicability where the parties to the contract are purely persons of private law, because essentially as stated above, public international law’s primary concern is the regulation of relationships between the states, and little if any, on international businessmen.

*International Development Law*

International development law can be taken as a refinement of public international law, which addresses economic relationships between the states. It is inspired by political and economic motives. As such, they also suffer the same hurdle as of international law regarding the issue of its subjects, and appears to be focused on state or state agencies as parties to an arbitration agreement.

The normative content of international development law is still shrouded with clouds of uncertainty. Redfern & Hunter (supra) identifies two resolutions of the

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86 Redfern & Hunter, (Supra) 80.
87 Redfern and Hunter, supra at 81
United Nations General Assembly\textsuperscript{88} which were adopted in May 1974 as reflecting the basic documents of the New Economic Order which inspired their adoption.

This drive for a new international economic order to govern the economic relationships of states was further augmented by the adoption in 1974 of the Charter of Economic Rights and Duties of States, which laid out the basic tenets of economic relationships of states, both developing and developed.

As noted above, the normative character of what can be perceived as international development law, which is largely comprised of UN General Assembly Resolutions is rather uncertain.\textsuperscript{89} The economic and political philosophy underlying the international development law may be of more utility to the arbitrator in determining a dispute than the application of rules derived therefrom, due to the relative absence of concrete detailed rules.

\textit{General Principles of Law}

The Statute of the International Court of Justice refers to “the general principles of law recognized by civilized nations” as constituting a source of international law. In the context of an international commercial arbitration, the focus is on whether these “general principles of law” can constitute a viable system of law or of law itself, in order to render it applicable in the determination of a commercial dispute.

\textsuperscript{88} Redfern and Hunter, supra at p.81-82. The Resolutions are the UN Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, UN Doc. A/RES/3201 (S-VI) May 9 1974 and UN Resolution 3202 (S-VI), Programme of Action on the Establishment of a New International Economic Order, UN Doc. A/RES/3202 (S-VI) May 16, 1974.

\textsuperscript{89} For a discussion of the legally binding effect of UN Resolutions, see Sloan, “The Binding Force of a Recommendation of the General Assembly of the United Nations,” (1948) BYRIL 1
In *Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi*⁹⁰ a dispute had arisen between the Rulers of Abu Dhabi and the claimant concessionaire, out of an oil concession agreement. On the question of proper law, the arbitrator held:

"The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilized nations - a sort of ‘modern law of nature’."⁹¹

Similarly in *Sapphire International Petroleum Ltd v. National Iranian Oil Co.*⁹² the arbitrator found that the parties had intended the interpretation and performance of their contract to be governed by the principles of law recognized by civilized nations, and went ahead to apply them.

Therefore according to these awards by the arbitrators, in practice general principles of law can be applied to determine a commercial dispute in an arbitration, and as such answers the question as to whether it constitutes a viable system of law in the affirmative. However, what precisely constitutes general principles of law which can be applied in a delocalised arbitration is rather vague. Though the general principles of law constitute a viable source of law, their generality implies the lack of a set of concrete principles or rules upon which the arbitral tribunal can choose to apply to a dispute.⁹³

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⁹⁰ [1952] 1 ICLQ 247
⁹¹ at p.250
⁹³ Questions can also abound as to whether general principles of law, as envisaged under the statute of the [C] as well as by the arbitrators in the above awards, can only be those recognized by civilized nations. This is further complicated by the fact that ascribing the tag “civilized” to a nation in order to draw from its recognition of particular principles, or law, the arbitrator will have to use his “good sense” to judge the nation. Such a determination cannot avoid the tag of ‘home-made’ prescriptions per Bankes LJ in *Czarnikow v. Roth Schmidt & Co*[1922] 2 KB 478 at 484.
The Principle of Equity

An arbitral tribunal may be expressed by the parties to disregard strict legal or contractual requirements in the dispute. The arbitration is said to be conducted *ex a quo et bono* and the arbitrator acts as *amiable compositeurs*.

Most institutional rules do not authorize arbitrators to act as *amiable compositeurs* or to decide *ex a quo et bono*\(^\text{94}\) unless the parties specifically agree. In certain jurisdictions notably England, awards rendered on this basis are viewed with doubtful legality.

In *Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algeniene Verzekringen*\(^\text{95}\) the court stated:

"It is the policy of law in this country that ... arbitrators must in general apply a fixed and recognizable system of law... and that they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles." \(^\text{96}\)

However, with the increased autonomy given to the parties, as well as lesser judicial control of the arbitral process as a consequence of the development and growth of the arbitral system, it has been recognized that:

"The striving for legal accuracy may be said to have been overtaken by commercial expediency." \(^\text{97}\)

\(^{94}\) See UNCITRAL Rules Article 33(2), Article 13 (4) of the ICC Rules

\(^{95}\) (1962) 2 Lloyds L. Rep. 257

\(^{96}\) At p. 264

Thus, it can indeed be possible for an arbitral tribunal to act as amiable compositeurs and conduct the arbitration based on equity in a delocalised arbitration.

Concurrent Laws

It might be possible, given the requisite relevant authority, for the arbitral tribunal to blend the applicable law of an arbitration to consist of public international law with a national system of law, out of which public international law acts as a regulator of the national law, ensuring that it does not fall below a minimum international standard in the treatment of foreign investors and others.98

In a delocalised arbitration however, no national law is applicable, effectively meaning that the blend of law applicable will consist of a fusion of the above options of legal systems and laws available to the parties.

Party Autonomy to Delocalise Arbitration

As enunciated above, the fulcrum which holds together international arbitration is the principle of party autonomy, the autonomy of the parties to select and prescribe a particular system of law or rules to govern their contractual relationship as well as the arbitral proceedings. This could as well include selecting a non-national system such as enumerated above.

98 Redfern & Hunter, supra at 87
The concept of delocalisation imports a desire to free arbitral proceedings from the clutches of national law. Proponents of the concept\textsuperscript{99} argue that arbitration does not need to have a national law. Other commentators reject this view, insisting that arbitration must be governed by the laws of some nations even if not of the arbitral situs.\textsuperscript{100}

Judicial determination (litigation) of disputes is fairly straightforward. The theory of territoriality, upon which litigation is premised is based on the general principle of international law that a state is sovereign within its own borders and that its laws and courts have the exclusive right to determine the legal effect of acts done (or not done, and consequently of arbitral awards made) within those borders.

However, an arbitral tribunal is normally constituted by the parties to be in a territory of a particular state out of perceived advantages such as neutrality, cost and convenience which it has over other locations. The tribunal’s primary purpose is to determine the dispute, according to the facts as laid out by the parties as well as in accordance with the relevant applicable law or legal rules which the parties have prescribed. Thus the theory of territoriality conspicuous in international law is inept in such a situation.

The concept of party autonomy can be taken a step further as to include the freedom of the parties to extricate themselves from applying any national law to determine their contractual rights and duties, and instead to indicate, a floating law, as it were, from the array of options available to them as listed above.


\textsuperscript{100} See Mann, Lex Facit Arbitration, reprinted 2 Arb Int’l 241 (1986), also Smit, A-National Arbitration, 63 Tulane L. Rev. 629 (1989), also cited by Born, supra.
However, limits to the autonomy of parties to select an applicable law are recognized as existing.\textsuperscript{101} Thus in establishing the concept in English law, the Privy Council in \textit{Vita Food Products Inc. v. Unus Shipping Co.}\textsuperscript{102} stated that the parties' choice of law is effective provided the intention expressed is bona fide and legal and provided there is no reason for avoiding the choice on the grounds of public policy.\textsuperscript{103}

\textsuperscript{101} Pryles (Supra) at 207
\textsuperscript{102} (1939) AC 277
\textsuperscript{103} At p. 290
CONCLUSION AND RECOMMENDATIONS

Our study demonstrates that the problem of deciding which law is to be applied in an international arbitration is of great importance. It is found that, Arbitral proceedings unlike the state courts are not backed by a law and procedural rules based on a statute or legislation. For this reason, among others, any attempts to find a solution as to where a choice of law has to be made, private international law systems would provide the rules for determining the law governing the contract. Arguably, these rules are supposed to assist in indicating the intentions of the parties initially. Obviously, this alone may not be satisfactory. Even then, the other assistance to be derived from the Rules is the approach that, in the absence of such an implied choice one would associate the choice with the legal system with which the contract is most closely connected. Of course, it is also not easy to determine this connection in practice as can already be evidenced by the number of cases which have been dealt with by the courts. In essence, therefore, the Judge has to look at the array of factors related to the contract and the surrounding circumstances. This includes, among others: “the place of contracting, the place of performance, the place of residence or business of the parties respectively, and the nature and subject of the parties respectively, and the nature of the matter of the contract” as was observed by the judge in Re. United Railways of the Havana and Relga Warehouses Ltd (1960) Ch. 52 at 91. The present provisions in the Model Law on this issue provides in Article 28 (2) that:

“This failing any designation of the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

A similar rule is provided in the UNICTRAL arbitration rules and in the ICC rules in articles 33 and 13 respectively. Likewise the recently enacted English
Arbitration Act 1996 in section 46 (3) results to similar provisions. All these provisions have received different interpretations by different courts and Arbitral tribunals clearly showing that there is still a problem in this area. The only time when an arbitrator may not result to this difficult choice is where the parties have authorized the arbitrator or arbitral tribunal to decide as amiable compositeur or ‘where it is decided’ that the appropriate law is lex mercatoria.

In all, the overall objective of arbitration in international commerce is to offer a practical, sensible, predictable and stable avenues for the settlement of commercial disputes. The main attractive point of arbitration is the flexibility which is accorded to the parties to choose a system of law or legal rules to govern their contractual relationship, which may be well divorced from the legal system of the place in which the arbitration is to be conducted.

In litigation, it is commonly held that, since national courts are established by the laws of the place in which they sit, their primary purpose is to apply the laws of the place constituting or creating them, within the sphere of their territorial jurisdiction. As such, rarely can parties dictate to the court to apply foreign law, if the law of the seat of the court excludes the applicability of foreign law in domestic judicial disputes brought before it.

Arbitration on the other hand, as noted above, exhibits a greater degree of flexibility to this end, requiring the parties in their agreements or in institutional rules of procedure, to indicate the law to govern the various aspects of the dispute resolution procedure, including to a large measure, the particular procedure which the arbitral tribunal should adopt in resolving the dispute.

Thus the parties can agree on a mutually convenient venue for the resolution of the dispute by arbitration, the procedure to be followed by that tribunal and the
law or legal system, which should be applied to determine the dispute. The focus of the arbitral tribunal will therefore be the determination of the dispute before it in accordance with the rules or laws set out by the parties, and not the setting up, adherence or circumvention of a legal norm or an already existing legal norm by way of precedent respectively.

To this extent, the arbitral process becomes an effective and responsive tool of dispute resolution in terms of speed, flexibility and response to the parties’ need. The arbitration proceedings would offer to the parties significant advantages otherwise absent in litigation, in so far as it can be convened at the parties’ convenience on an ad-hoc basis, without much of the congestion inherent in diaries of courts.

However, these significant advantages can be lost where the arbitral tribunal is expected by the parties to apply a law/rules, or legal system, which has not been indicated by the parties, and the tribunal is mandated to determine the dispute. In such an instance, choice of law issues would tend to render the advantage of stability of the arbitral process a distant mirage, for it can never be determined, with sufficient accuracy, the legal system, or rules, which a particular arbitral tribunal or tribunals in general will apply in any given matter, and whether such rules or legal system would lead to a particular conclusion.

The flexibility so glossed above can be a major undoing of the arbitral process, especially where the arbitral tribunal is expected to act as amiable compositeurs or administer proceedings ex aequo et bono by the parties. This is because the determination of the dispute will very much depend on influences of the individual arbitrators’ sense of fairness and justice, which could very well differ considerably from the other arbitrators, and the parties’ sense as well.
Much of this however arises in default situations, where the parties have made no positive choice either of a system of law or of an equity-based approach. In such circumstances, the tribunal must apply the system of law which it considers appropriate. This would necessitate a look at the conflict of law rules, which could either be of the arbitral situs or of some other system, which the tribunal considers appropriate.

This adventure will further require the tribunal to characterize the dispute or issues to be determined, application of the relevant rules of conflict of law, and an arrival at the substantive law applicable. Plainly, this can be a very complex and difficult task, and given that issues of law are open to challenge in national courts, can further complicate the arbitral proceedings, when the mix of judicial determination of particular issues is added.

Much of this however can be avoided by the parties, and especially their legal advisors, making it certain that a particular system of law is chosen, which can be applied by the tribunal or the courts in the unlikely event that it ever gets there. The parties can also agree on an alternative approach in the likely event that the proceedings get bogged down in the sand.

There is much that the arbitral process can offer to the commercial community, if properly administered, and if the appropriate parameters are put in place, such as a default mechanism to avoid clogging of the process, the proceedings of an arbitration can offer the much needed flexibility and effectiveness of a dispute resolution mechanism.

According to my finding based on this study it is possible to work towards one uniform concept of a universal arbitration law, which is not based on the law of one state. The concept of floating law which appears to be looked by some states
like France with some favour can be developed further through further debate and discussions in the international fora with a view to enacting it into a treaty or a protocol to one of the existing treaties. There is no doubt that international arbitration is there to stay given the globalization of international trade. It is also to be noted that while there are attempts in other fields to create one international criminal court there is no such move to create one international civil court. It is only through arbitration that a concept of a uniform approach in civil resolution of disputes has been developed through the enforcement of awards through the New York convention.

It is also my finding that it is necessary that, the now universally accepted concept of party autonomy for parties to an arbitration to allow the arbitral tribunal to chose the law to be applied in case of default, appointment by the parties should be enforced through local legislations while a long term solutions is sought.
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