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CONFLICT OF LAW RULES

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Abstract

The Conflict of laws in international arbitration is a complex issue which has to be carefully addressed This article examines the complexities and challenges of conflicts of laws in international arbitration on the basis of four different choice-of-law issues: substantive law governs the merits of the parties' dispute, substantive law governs the arbitration agreement, procedural law applies to arbitral proceeding, and conflict of laws rules. This paper seeks to deepen the perspectives of the legal community generally and practitioners, arbitrators and parties to international disputes more specifically by walking through a single conflict-of-laws problem-how choice-of-law analysis might operate in a dispute between autonomous states.

This paper starts with the recognition of all forms of substantive law in principle governing the merits discussion, where the tribunal is key. The tribunal usually decides the law governing the arbitration agreement: auf den Willen it is presumed that this is applied by dauyee of the application The Parties, by virtue of the Laws of Country A conflict Rules entail. This section further explores the function of such choice-of-law clauses and how they interact with obligatory national laws.

The discussion then turns to the applicable substantive standard of the arbitration agreement itself, focusing on four major candidates: party autonomy, law of the seat, law governing the contract, and international principles. This leads to the implications and potential of each approach, linking to how the law and these ideas are interpreted and implemented in different jurisdictions.

The research also deals with the procedural law as referred to the scope and application of deis arbitral, both will refer to the procedure in internal aspect among arbitrator but also in external aspect that is on relation between national courts. The importance of the law of the arbitral seat in regulating different elements of arbitration is further stressed, from arbitrator appointments to judicial intervention and award enforcement.

Besides, the paper also attempts to examine how arbitral tribunals decide a law applicable in international arbitration based on the choice-of-law rules in question. This notably applies the conflict of laws rules at the arbitral seat, international conflict of laws rules, successive application of relevant states' civil law, or direct substantive choice without explicit conflicts analysis.

The authority of arbitral tribunals to select the applicable substantive law is discussed, taking into account national arbitration legislation and institutional arbitration rules, along with the limited judicial review of such decisions.

Overall, this research paper provides a comprehensive understanding of the complexities surrounding conflict of laws in international arbitration. By examining the different choice-of-law issues and their implications, this study aims to assist legal practitioners, arbitrators, and parties involved in international disputes in navigating the intricacies more effectively. With this enhanced understanding, stakeholders can strive for a fair and predictable resolution of cross-border conflicts, ultimately promoting the success of international arbitration.

Conflict of Law in International Arbitration

Definition of International Arbitration-

Firstly we have to define the word arbitration:-

A method wherein parties agreeably submit a disagreement to a non-governmental decision-maker chosen by or on behalf of the parties, who then renders a binding judgment resolving the dispute in accordance with fair, impartial adjudicatory procedures and gives each party a chance to present its case.

Most authorities have adopted similar definitions:

– "Consistent with the traditional notion of private arbitration, one may define [the arbitration clause] as an agreement according to which two or more specific or determinable parties agree in a binding way to submit one or several existing or future disputes to an arbitral tribunal, to the exclusion of the original competence of state courts and subject to a (directly or indirectly) determinable legal system." (Judgment of 21 November 2003, DFT 130 III 66, cons. 3.1 (Swiss Federal Tribunal))

– "a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right."(Motunui Ltd v. Methanex Spellman [2004] 1 NZLR 95 (Auckland High Court))

– "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."

OVERVIEW OF CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

In international business arbitration, choice-of-law problems are crucial. There are four types of choice-of-law issues that could concern an international arbitration that need to be distinguished:

Choices of Law in International Arbitration

1. Substantive Law Governing Merits of Parties' Dispute (Including Underlying Contract)
2. Substantive Law Governing Arbitration Agreement
3. Procedural Law Applicable to Arbitral Proceedings
4. Conflict of Laws Rules

The aforementioned choice-of-law concerns can all have a significant impact on international arbitration proceedings. Different national laws offer various - and occasionally drastically different - rules that are applied at various points in the arbitral process. Therefore, it can be crucial to know which national laws may be applicable.

[A] Law Applicable to the Substance of the Parties' Dispute

The parties' fundamental disagreement will typically be settled in accordance with the substantive law principles of a certain country legal system. Normally, the arbitrators will make the initial determination of the relevant substantive law in the parties' disagreement. International arbitral rulings often give effect to the parties' agreements regarding relevant substantive law (referred to as "choice-of-law clauses"), as is covered in more detail below. The main exception is when binding national laws or government regulations take precedence over contractual agreements.

The arbitral tribunal must choose a substantive law to regulate the parties' dispute if they haven't already. The tribunal will occasionally cite regional or global legislation on conflicts of laws when doing this. Although the national conflict of laws norms of the arbitral seat were applied historically, more current practise is more varied. The traditional approach is followed by certain tribunals and commentators, while others look to the conflict resolution procedures of all the states involved in the issue. Certain authorities also use either the international conflict of laws norms or the validation principles.

[B] Law Applicable to the Arbitration Agreement

The arbitral tribunal must choose a substantive law to regulate the parties' dispute if they haven't already. The tribunal will occasionally cite regional or global legislation on conflicts of laws when doing this. Although the national

conflict of laws norms of the arbitral seat were applied historically, more current practise is more varied. The traditional approach is followed by certain tribunals and commentators, while others look to the conflict resolution procedures of all the states involved in the issue. Certain authorities also use either the international conflict of laws norms or the validation principles.

Four options for the law controlling an arbitration agreement are particularly significant, as is stated below: (a) The law that the parties have chosen to govern the arbitration agreement itself; (b) The law of the arbitral seat; (c) The law governing the parties' underlying contract; and (d) International principles, which may be applied as a body of substantive contract law, as in France, or as non-discrimination rules, as in the majority of U.S. authority.

[C] Procedural Law Applicable to the Arbitral Proceedings

Legal regulations govern both "internal" procedural issues and "external" relations between the arbitration and national courts during the arbitral procedures themselves. The arbitration legislation of the arbitral seat is often the law that controls the arbitration proceeding. The law of the arbitral seat typically addresses a variety of topics, including the appointment and qualifications of arbitrators, the credentials and legal obligations of the parties' legal counsel, the scope of judicial intervention in the arbitral process, the availability of provisional relief, the procedural conduct of the arbitration, the nature of an award, and the criteria for an award's annulment. Different country laws address these numerous challenges in different ways. In some nations, the conduct of the arbitration is subject to severe restrictions or limitations, and local courts have broad authority to oversee arbitration processes. Other than the bare minimum of procedural regularity (sometimes known as "due process" or "natural justice"), local law grants international arbitrators practically unrestricted flexibility to administer the arbitral process in most modern nations. The arbitration's procedural law can be chosen by the parties in numerous jurisdictions (as will be covered below). This includes the option to accept the application of a different procedural law than the law of the arbitral seat in some jurisdictions.

[D] Choice of Laws Rules Applicable in International Arbitration

Applying conflict of laws principles is typically necessary when deciding which body of law should be applied to the merits of the underlying contract, the arbitration agreement, and the arbitral procedures. The tribunal must typically use a conflict of laws system when deciding which substantive law will govern the parties' dispute, for instance. Therefore, a tribunal must choose which set of conflicts rules to use when choosing one of these legal systems from the outset. The method used by tribunals to determine which law applies to each of the aforementioned difficulties differs greatly.

As discussed in greater detail below, approaches include application of (a) the arbitral seat's conflict of laws rules; (b) “international” conflict of laws rules; (c) successive application of the conflict of laws rules of all interested states; and (d) “direct” application of substantive law (without any express conflicts analysis).

Parties often choose international arbitration to resolve their disputes because they desire enhanced certainty concerning their ***legal*** rights. Among other things, parties want a stable substantive legal regime and neutral procedural framework. These objectives are particularly important in international contexts, where differences between national laws and procedures can be great and where the needs for predictability are particularly acute.

International arbitration seeks to provide predictability with respect to both substantive and procedural law, often by combining a choice-of-law clause with an arbitration agreement.

As explained by the U.S. Supreme Court in ***Scherk v. Alberto-Culver Company***.

Uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. [Absent such agreements, one enters] the dicey atmosphere of ... a legal noman's-land which would surely damage the fabric of international commerce and trade and imperil the willingness and ability of businessmen to enter into international commercial agreements.

As discussed above, it is important to distinguish several different applicable laws which are relevant in international arbitration: (1) the substantive law applicable to the merits of the parties' dispute, including the underlying contract and non-contractual claims; (2) the substantive law applicable to the parties' arbitration agreement, including its existence, validity and interpretation; (3) the law applicable to the arbitral proceeding (i.e., the "procedural law"); and (4) the conflict of laws rules for selecting each of the foregoing laws. As also discussed above, it is possible for each of these laws to be that of a different state. This Chapter concerns only the substantive law applicable in international arbitration to the merits of the parties' dispute (and not the law applicable to the arbitration agreement or the procedural law of the arbitration).

In considering the choice of substantive law it is essential to distinguish two circumstances: (1) situations where there is no choice-of-law agreement and the tribunal must select the substantive law solely by applying conflict of laws rules or directly choosing an applicable substantive law; and (2) situations where the parties have agreed upon the applicable substantive law. Virtually all legal systems and all arbitral tribunals give effect to choice-oflaw agreements in accordance with their terms; the approach to the choice of law in the absence of a choice-of-law agreement is less uniform, with different courts and tribunals taking different approaches.

ARBITRAL TRIBUNAL'S AUTHORITY TO SELECT APPLICABLE SUBSTANTIVE LAW

Absent a specific agreement to the contrary, arbitrators typically have considerable discretion to choose and apply choice-of-law rules to determine the appropriate substantive law in arbitration. This discretion is akin to that which exists for arbitrators' judgments regarding the application of substantive law rules.

[A] National Arbitration Legislation

National arbitration laws typically stipulate that arbitral tribunals have the power to choose the law that will apply to the core of the parties' disagreement. Most arbitration statutes, as explained below, distinguish between circumstances in which the parties have agreed to a choice-of-law clause, choosing a specific law, and circumstances in which they have not; in both circumstances, however, the arbitrators have the authority to choose the substantive law governing the parties' dispute. The UNCITRAL Model Law, for instance, stipulates in Article 28(1) and Article 28(2) that the arbitrators may use the law determined by the parties or, in the absence of a choice-of-law agreement, the law determined by the tribunal. Even in the absence of statutory provisions, case law in the majority of states recognizes the arbitrators' authority to choose the law regulating the core of the parties' dispute. Practically all other arbitration legislation is identical to this. In most jurisdictions, the choice of substantive law made by the arbitrators is only loosely subject to judicial review during annulment procedures. In many places, judicial review of arbitral awards does not include an examination of the substance of the arbitrators' determinations; this typically includes the arbitrators' choices of and applications of choice-of-law rules. This is explained below.

[B] Institutional Arbitration Rules

In recognizing the power of arbitral tribunals to choose the law regulating the merits of the

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parties' dispute, institutional rules often follow national arbitration legislation. Once more, most institutional regulations make a distinction between situations in which choice-of-law agreements are present and situations in which conflict-of-laws rules must be used in the absence of an agreement. However, in both situations, the majority of institutional rules (such as Article 35 of the UNCITRAL Rules and Article 21 of the 2012 ICC Rules) provide the arbitrators extensive discretion to select the appropriate law. By reaffirming the parties' acceptance of the tribunal's vast jurisdiction, these provisions further restrict the scope of any court review of arbitrators' choice-of-law determinations.

CHOICE OF SUBSTANTIVE LAW IN ABSENCE OF AGREEMENT ON APPLICABLE LAW

In some situations, the parties to an international dispute will not have reached an understanding over the substantive law regulating their interactions, either in their underlying contract or in another manner. The arbitral tribunal will be obliged to decide which substantive law will apply in these situations, either by applying a set of conflict of laws principles or by "directly" applying a substantive law.

[A] Choice of Substantive Law under National Arbitration Legislation in Absence of Choice-of-Law Agreement

In the absence of a choice-of-law agreement, the applicable substantive law is chosen in accordance with various methods according to arbitration statutes. Numerous statutes give arbitrators wide latitude in choosing a suitable set of conflict of laws rules and, after applying those rules, a substantive law. Other statutes, on the other hand, take a different tack and specify a specific choice-of-law provision for all arbitrations with national territory as the venue. It is possible to identify five fundamental choice-of-law strategies in theory.

Simple Choice-of-Law Techniques:-

1. Mandatory Application of Generally-Applicable Conflict of Laws Rules of Arbitral Seat
2. Mandatory Application of Specialized Conflict of Laws Rules of Arbitral Seat
3. “Applicable” or “Appropriate” Conflict of Laws Rules Chosen by Arbitral Tribunal
4. “Direct” Application of Substantive Law by Arbitral Tribunal
5. Mandatory Law Rules

First, although though it has been considered outdated for a long time, the law of the arbitral seat may compel arbitrators to use locally-applied conflict of law rules or local substantive law. Before the 1996 Arbitration Act, for instance, arbitrators in England were reportedly compelled to follow the conflict of interest guidelines used by English courts. Alternately, in some states either law or practice mandate that local substantive law be applied by arbitrators; however, modern laws and practice have generally abandoned this method.

Second, some laws impose specific choice-of-law requirements on arbitral tribunals located within a country (though typically through general formulae that gives tribunals a lot of latitude in choosing an applicable law). For instance, according to Article 187(1) of the Swiss Law on Private International Law, "[t]he arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, in the absence of such a choice, in accordance with the rules of law with which the case has the closest connection." Other states, like Germany, Italy, and Japan, have implemented similar statutory measures.

Third, certain statutes provide arbitrators to use the rules for choosing the applicable law that they deem "applicable" or "appropriate." As a result, the UNCITRAL Model Law's Article 28(2) states that the arbitral tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable, absent any designation by the parties." Similar language may be found in the English Arbitration Act, 1996, which states in section 46(3): "[i]f or to the extent that there is no... choice or agreement [on the applicable substantive law,] the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

Comparably, American courts nearly always decide that arbitral tribunals have extensive discretion in choosing the applicable substantive law and choice-of-law procedures. By its wording, this strategy does not mandate that the tribunal follow the seat's (or any other stated jurisdiction's) rules on conflicts of law, nor does it impose any particular choice-of-law guidelines on the arbitrators. Instead, this strategy gives the tribunal wide latitude to apply the conflicts laws it determines are most pertinent to the situation.

Fourth, certain statutes provide tribunals the authority to "directly" apply any substantive rules of law that they see suitable, disregarding conflict of law principles. For instance, Article 1511 of the French Code of Civil Procedure stipulates that, in the absence of rules of law specified by the parties, the tribunal may settle the case "in accordance with the rules of law it considers appropriate." Similar laws are found worldwide, including throughout Europe. These statutory regimes purportedly allow the "direct" application of substantive legal principles and purport to have zero conflict of law analysis requirements.

Last but not least, a country's law may require that a certain set of claims or defences be heard by the arbitrator in accordance with mandatory national law. For instance, national courts have ruled that arbitrators must take claims based on specific statutory protections—like antitrust, securities, or labour protection laws—into account. This can be viewed as a particular kind of specialized choice-of-law rule that requires the application of a certain substantive rule in a given situation.

[B] Choice of Substantive Law under Institutional Arbitration Rules in Absence of Choice-of-Law Agreement

If the parties are not in agreement, institutional rules typically provide the arbitrators wide latitude in choosing the applicable substantive law. For instance, Article 35(1) of the UNCITRAL Rules states that, in the absence of agreement between the parties, "the arbitral tribunal shall apply the law which it determines to be appropriate." A few further institutional regulations are nearly comparable.

In contrast, the majority of institutional norms allow the tribunal to apply directly the substantive law it deems "appropriate," without explicitly referencing any conflict of laws issues. The 2012 ICC Rules, for instance, state in Article 21(1) that "[t]he parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. The Arbitral Tribunal will apply the legal principles it finds appropriate in the absence of such an agreement. The rules of other institutions are comparable. The arbitrators must, according to a few sets of institutional regulations, follow the law of the state that has the "closest connection" to the parties' dispute. These regulations specify the specific conflict of laws rule that must be used in addition to requiring a choice-of-law analysis.

[C] Relationship between Institutional Arbitration Rules and National Law

As was previously mentioned, some arbitration statutes (such as those in Switzerland and Germany) have a specific conflict of laws provision for international arbitrations that are held within national borders. This raises the question of whether institutional rules (like Article 33(1) of the UNCITRAL Rules), which give arbitrators the power to choose the "appropriate" conflicts rule or substantive law, permit a tribunal to apply a conflict of laws system other than the one that is expressly prescribed by statute. Can an ICC arbitrator, for instance, apply a conflict rule other than the "closest connection" formula in Article 187(1) of the Swiss Law on Private International Law in a Swiss-seated arbitration (without an express choice-of-law clause)? The answer to this problem is primarily a matter of national legislation. Given the significant deference to party sovereignty outlined below, national law should generally be construed as stating that the parties' acceptance to the ICC Rules' choice-of-law formula surpasses the statutory formula. This is supported by the fact that each of these legal systems allows the parties to

choose the law that will govern their interactions directly, and there is no reason why a choice of law that is made indirectly by selecting a conflict of laws rule should not be equally acceptable. However, authorities in other jurisdictions that have statutory choice-of-law clauses come to the opposite result, concluding that these clauses must be used in arbitrations held on local territory.

[D] Choice-of-Law Rules Applied by Arbitral Tribunals in Absence of Choice-of-Law Agreement

Absent a choice-of-law agreement, arbitral tribunals must decide in each instance which substantive law will apply within the aforementioned legal framework. The application of those judgments necessitates the consideration of pertinent international conventions, arbitration law, institutional regulations, and general conflict of laws issues. When the parties have agreed to institutional rules prescribing a choice-of-law rule 16 or have seated the arbitration in a country with a mandatory conflicts rule for international arbitrations, For instance, those sources may occasionally provide the tribunal with rather specific guidance. However, in the majority of cases, arbitrators are either expressly or implicitly given broad authority to select the applicable substantive law (in the absence of a choice-of-law agreement), which includes the right to apply the conflicts rules they deem "applicable" or the substantive rules they deem "appropriate." Due to the resulting flexibility, arbitral tribunals have chosen to apply a wide variety of laws.

[1] Choice-of-Law Rules of Arbitral Seat

Historically, several governments have held that arbitral tribunals must adhere to the choice-of-law laws of the arbitral seat. A different perspective (described below) was that the parties' disagreement should be subject to the mandatory application of the substantive laws of the seat. This method stems from earlier conceptions of international arbitration, which held that a tribunal was bound by the "procedural" law of the arbitral seat, which was commonly understood to include the seat's norms regarding choice of law. This strategy was reflected in the 1957 resolutions of the Institute of International Law, which stated that "[t]he rules of choice of law in the state of the arbitral tribunal's seat must be followed to settle the law applicable to the substance of the difference." Accordingly, a renowned English authority wrote, "[n]or can an English arbitrator apply any conflict of laws rules other than English rules." This was published prior to the English Arbitration Act of 1996. Many judicial rulings and arbitral awards (especially older ones) from civil law jurisdictions arrived at comparable conclusions by directly using the seat's norms regarding conflicts of laws. A similar, but different, perspective was held in the United States, where the conventional view was that the arbitrators should apply the substantive law of the state where the arbitration was seated to the merits of the parties' dispute in the absence of a choice-of-law agreement. A commentator stated that it was "widely held that the parties who have chosen a place of arbitration have thus impliedly agreed on the applicability of both the procedural and substantive law of that place." Little was said about the conflict of laws provisions that led to this outcome or that the arbitrator was supposed to apply. Instead, it was decided that the parties' choice of venue was an implied choice of the venue's substantive law. The traditional belief that arbitrators must follow the seat's substantive law or choice of law rules has significantly weakened in recent years. For more humane solutions, commentators, judges, and other authorities have rejected the "arbitral seat" rule. One commentator claimed that the so-called arbitral forum's conflict resolution guidelines have been "almost completely abandoned." Authorities treating agreement on the seat as an implied choice of substantive law were met with the same degree of skepticism. In the words of a well-known judgment, "[i]t is appropriate to eliminate forthwith the law of the

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forum, whose connection with the case is purely fortuitous."

[2] Choice-of-Law Rules that Arbitral Tribunal Considers "Appropriate"

As was already mentioned, Article 28(2) of the UNCITRAL Model Law and comparable statutes, as well as several important institutional regulations, state that the tribunal must "apply the law determined by the conflict of laws rules which it considers appropriate." This criterion is adopted by a variety of awards, including some that are not governed by the Model Law. It is important to understand that the arbitrators' freedom to choose the "appropriate" conflicts rule does not grant them total discretion. Contrarily, the arbitrators are nevertheless required to choose the conflicts rules that are "appropriate" in light of the arbitration's procedural legislation and the arbitration agreement; this choice has right and wrong answers, and it is not entirely a question of discretion. For instance, an arbitrator cannot choose the conflicts rules of his home jurisdiction if they have no bearing on the dispute just because they are comfortable with them. For reasons covered below, the law of the arbitral seat or the parties' implied agreement to the application of the seat's disputes rules will frequently necessitate their implementation. Accordingly, some recent awards have followed the seat's choice-of-law guidelines, while others have looked to the many additional choice-of-law norms listed below (such as cumulative, international standards).

[3] "Cumulative" Application of Choice-of-Law Rules

Arbitrators occasionally apply the conflict resolution laws of all the states involved in the case. This "cumulative" technique practically always comes to the conclusion that all possibly relevant conflicts rules choose the same law. The application of all possibly applicable national (or other) substantive laws is a form of this process that is used in some awards as an alternative. When one of these outcomes materializes, it illustrates a specific kind of "false conflict." The analysis's proponents point to its "internationalizing" effects, which are (rightly) considered suitable for use in international contexts.

[4] Application of Substantive Law of State with Closest Connection to Dispute

In cases where such law is relevant, tribunals normally have applied the closest connection criterion. As was previously mentioned, some arbitration legislation prescribes a "closest connection" requirement for tribunals located on national territory. In fact, even in cases where there is no such statutory criterion, some awards have used the "closest connection" rule for choosing the applicable law. The Rome I Regulation on the Law Applicable to Contractual Obligations and its predecessor, the Rome Convention, both adopting a "closest connection" standard, and the Restatement (Second) Conflict of Laws, adopting a "most significant relationship" standard, provide support for this approach with regard to the choice-of-law analysis applicable to contracts.

[5] Choice-of-Law Rules of the State Most Closely Connected to Underlying Dispute

The choice of the state's conflict of laws statutes that are most closely related to the parties' dispute is another strategy used by arbitral tribunals. This method encounters significant problems. In particular, it necessitates determining which state is the most "closely connected" to a dispute, which is in and of itself a potentially complex matter, then determining what that state's conflicts rules are, which is also not always simple, and finally using those conflicts rules to choose a substantive law, which necessitates yet another, occasionally difficult analysis.

[6] "International" Choice-of-Law Rules

Some arbitral rulings draw their choice-of-law rules from non-national sources, such as alleged "general" legal principles or "international" conflict-of-laws rules. The goals that motivate parties to choose international arbitration as a way of resolving their disputes—neutrality, predictability, and effective international enforcement—would be effectively served by the identification or development of a

predictable body of international choice-of-law rules. These justifications were well-explained in one recent award:

There is a lot to be stated in favour of implementing universally recognized international law conflict of laws principles. The disagreement has a special international flavor because it results from interactions between one government and an agent of another. Therefore, the parties could have reasonably anticipated that the arbitrators would use universally recognized international conflicts-of-law rules to determine the applicable law to be used to resolve their dispute. The Arbitral Tribunal believes that it should adopt commonly recognized principles of international law regarding conflicts of laws given the specifics of the current arbitration, which is really international in nature.

Unfortunately, there isn't yet a body of such worldwide conflict of laws regulations. In fact, different legal systems take very varied approaches to the conflict of laws. This may change as time goes on and universal choice-of-law concepts are expressed in international conventions, awards, and other places, but for the time being it is still an ideal rather than a reality.

Even where those accords are not expressly relevant, tribunals that have used "international" conflict rules have typically looked to international treaties addressing choice-of-law issues. Tribunals have specifically cited the United Nations Convention on Contracts for the International Sale of Goods, the 1955 Hague Sales Convention, the Rome Regulation on the Applicable Law to Contractual Obligations, and the Rome Convention. As an alternative, some tribunals have referred to general guidelines that they have discovered in prior decisions taking conflict of laws issues into account.

[7] Application of Non-National Legal System in Absence of Parties' Choice-of-Law Agreement

Choice-of-law system or the "direct" application of the pertinent substantive law. The majority of the time, this will be the state's national law as determined by a conflict of laws system. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law ("PECL") are a few examples of so-called non-national legal systems or rules of law that have been implemented by a few international tribunals. Other examples include *lex mercatoria*, general principles of law, and general principles of law. Below, we discuss the various non-national systems' content.

In the absence of a choice-of-law agreement, it is uncertain whether choosing a non-national legal system will lead to a lawful award. Article 28(1) of the Model Law (and several other arbitration acts, as will be detailed below) allows the tribunal to apply the "rules of law" decided upon by the parties. It has been assumed that the parties may choose non-national legal systems in their choice-of-law agreements because the reference to "rules of law," rather than merely "law," was made. In contrast, the Model Law's Article 28(2) directs the arbitrators to follow the "law" established by the relevant conflict rules. The textual disparity between Articles 28(1) and 28(2) suggests that arbitrators cannot use non-national rules of law in the absence of a choice-of-law agreement choosing such a legal system.

Article 28(2) of the Model Law has been changed by a few nations, including Switzerland and Canada, to refer to "rules of law." With this amendment, arbitrators will now be able to choose non-national norms to apply even in the absence of a prior agreement. However, a number of significant nations, including Japan, Germany, and England, have chosen not to adopt the Model Law in this manner.

Even though arbitrators theoretically have the option to choose a non-national legal system, they have, for the most part, declined to do so in business disputes. In general, non-national legal systems are unable to produce predictable outcomes, especially when it comes to complex business matters. Commercial parties' unwillingness to consent to choice-of-law clauses specifying non-national legal systems is evidence of this. Tribunals are

typically highly reluctant to impose non-national law systems on business parties as a result of this hesitation.

[E] "Direct" Application of Substantive Law

According to certain sources, international arbitrators are permitted to "directly" apply substantive law standards without first conducting any type of choice-of-law examination. As mentioned above, Article 1511 of the French Code of Civil Procedure allows arbitrators to "directly" apply the relevant substantive law in an international arbitration. Several additional states (as mentioned above) have passed legislation with similar provisions. Similar to this, many institutional norms allow for the "direct" implementation of substantive laws, ostensibly without the need for a study of potential conflicts of laws. The typical language from Article 21(1) of the 2012 ICC Rules is: "In the absence of any such agreement [by the parties as to applicable law, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."

Although it is natural to be frustrated with modern choice-of-law regulations, "direct" application of national law is not the proper reaction. Conflict of laws regulations are intended to structure the discretion of the decision-maker and give parties some assurance regarding the substantive law guiding their conduct. Without a conflict of laws analysis, "directly" applying a substantive law leaves the parties' substantive rights up to the individual arbitrators' whims and does little to advance the purposes of predictability and fairness.

Other Conflict of law rules considered by the tribunal in determining the proper law of the contract or any agreement:-

1. *Lex – Fori*

Lex - Fori was initially discussed by German and French authors "Kahn" and "Bartin" in the 1890s. It is a well-known concept that English courts have adopted and applied.

The *lex-fori* hypothesis, sometimes known as the law of the forum, is a strategy for dealing with the characterisation issue. The topic of legal controversy is governed by the idea of characterization. Using the concept of characterisation, a court can decide which rule will apply in a certain circumstance. Applying the correct conflict of law rule won't be easy until the issue has been settled.

According to the theory, a specific issue should be categorised in accordance with the relevant domestic laws as well as the international norms of law in accordance with the domestic law that is the closest to both sets of laws.

Where domestic factors are involved in a case, the Court will use domestic laws (*lex - domicili*); but, where foreign factors, such as domicile, are present, the Court must examine three primary factors:

- Whether the Court in question has the authority to hear the matter.
- The problems' classification
- In the issues so classified, the law to be applied is a matter of choice.

The court that takes jurisdiction typically proceeds with the case in accordance with its own domestic laws, unless the parties object or there is a foreign element involved. The Court contends that because the forum's law is thought to be superior under the better-law technique, it is in the parties' best interests for that law to be applied.

Judges and courts, according to Bartin's justification for the *lex-fori*, are sworn "to the obligations of their own legal system and no one else, and can therefore only administer the same."

The law that governs the topics of the Court of jurisdiction should be chosen such that there is no ambiguity over which forum's laws should be applied.

The rules of a comparable law that is in effect in the Court's jurisdiction must be followed if the *lex-fori* does not contain an equivalent law.

Exception to the *Lex-Fori* Principle:-

The rule of characterization that must be formed on the basis of lex fori has two major exceptions:

- *Lex-situs* (applicable to either movable or immovable properties)

- *Lex-loci contractus* (applicable in cases of contract by correspondence)

The premise of both of these arguments is that this law will best enhance the security of real estate and contract transactions.

Associated Issues

Despite the fact that the idea of *lex-fori* aims to resolve the issue of conflict of laws, it is not without flaws and criticisms.

The following is a list of their classifications:

- The theory's implementation might cause the foreign legislation in question to be distorted and rendered useless. None the same way, the application of foreign law may render domestic law inapplicable in a certain situation.
- When the foreign law bears no similarity to domestic law, the idea fails. For example, the grounds for divorce available to Hindus in India under the Hindu Marriage Act of 1955 may differ from those applicable in a foreign country, such as France.
- The use of *lex-fori* might lead to a misreading of a foreign law and its application in situations where it was not intended.
- Finally, proponents of the *lex-fori* theory appear to imply that facts must be categorized on their own, but this is not the case; facts must be given in the context of a foreign law.

2. ***Lex – Arbitri***

The lex arbitri, often known as the "procedural law," "curial law," or "loi de l'arbitrage," is a set of national laws that establishes the overall framework for how an international arbitration shall be conducted. Almost always, this is the arbitration's location's law.

The *lex-arbitri* governs crucial issues like the process for voiding arbitration awards, the division of authority to decide jurisdictional disputes between domestic courts and arbitral tribunals, judicial support for the formation of the arbitral tribunal, the justifications for disputing arbitrators, judicial support for ordering the taking of evidence, and interlocutory judicial review (if allowed) of the arbitral tribunal's procedural decisions.

However, the *lex-arbitri* typically does not go into great detail about how arbitration is to be handled. The relevant institutional rules (such as the 2021 ICC Rules) or ad hoc rules (such as the 2013 UNCITRAL Arbitration Rules), the tribunal's procedural orders, and the arbitration agreement itself primarily define the specifics of the arbitral process.

Every nation has its own *lex-arbitri*, which is an integral part of its domestic law. It may be found incorporated into the Code of Civil Procedure, as is the case, for example, in France (French Arbitration Law) and Germany (German Arbitration Law), or it may exist as a "autonomous" piece of legislation, as is the case with the 1996 English Arbitration Act (see also our commentary on the 1996 English Arbitration Act here). You may get a detailed list of the majority of domestic arbitration legislation here. The 1985 UNCITRAL Model Law on International Commercial Arbitration and its 2006 amended version have served as the foundation for the *lex-arbitri* of 84 States and a total of 117 jurisdictions (see UNCITRAL Model Law status here). Due to the resultant homogeneity across the numerous domestic *lex-arbitri*, which improves legal certainty and promotes the use of international arbitration by commercial parties for the settlement of their disputes, this has been a positive development.

3. ***lex – loci contractus*** and ***lex - loci solutionis***

The legal framework that governs the merits of the parties' disagreement is known as the *lex-contractus*, or "governing law of the contract." The existence, legality, and interpretation of the principal contract are governed by the *lex-contractus*. In accordance with the terms of the arbitration agreement, it also controls any non-contractual claims (such as tort claims) that may be brought before an arbitral tribunal.

In international arbitration, parties typically have a great deal of leeway in deciding which law they want to apply to their agreement. Such a statute does not necessary need to be the state's constitution. The 2016 UNIDROIT Principles

of International Commercial Contracts, the *lex-mercatoria*, Sharia law, and other legal principles may all be taken into consideration by the arbitrators at the request of the parties. If specifically authorised to do so, the arbitrators may even resolve a dispute *"ex aequo et bono"* or as *"amiable compositeur,"* that is, using their own judgment and without consulting any legal guidelines (see, for instance, Article 28(3) of the 2006 UNCITRAL Model Law). Furthermore, it is not unusual for arbitral tribunals to make only cursory mention of the law in their decisions when the outcome of the dispute largely hinges on factual issues (as in international construction arbitrations or construction dispute board procedures, for example).

To improve predictability and save the expense and wasted time of debating the applicable law, should a disagreement develop, it is crucial for parties to contracts with an international component to establish a controlling legislation. Without a governing law clause, arbitrators (and courts) will be asked to choose the law that will be applied most effectively; typically, this will be the law that has the closest relationship to the subject matter of the dispute (see also a discussion on the applicability of the Rome I and Rome II Regulations for choosing the law applicable to the merits of an international arbitration).

Notably, many *lex-arbitri*, as well as applicable institutional regulations, enable arbitrators to directly apply the law (or principles of law) they think appropriate (the so-called direct approach) when determining the *lex-loci contractus*. This is provided for, for example, in Article 1511 of the French Code of Civil Procedure, Article 21(1) of the 2017 ICC Rules, and Article 22(3) of the 2020 LCIA Rules (see also a brief discussion here, question 6). As a result, arbitrators, unlike national judges, are not typically required to follow the traditional conflict of law rules path (the so-called indirect approach), even though in actuality, they may be governed by universally recognized conflict-of-laws rules.

The terms *lex-fori* (i.e., the law of the court where proceedings are brought) and *lex-causae* (i.e., a foreign law chosen to be applied by the forum court), which are frequently used in conflict of laws, are not easily adaptable to the context of international arbitration. Due to the fact that, unlike judges, arbitrators are not members of any legal forum, they lack a legitimate *lex-fori*, and all laws are likely to be equally "foreign" to them.

Determining the proper law of contract:-

Dicey conceives the term 'proper law of a contract' as “law or rules by which the parties intended or may fairly be presumed to have in-tended, in contract to be governed; or (in other words) the law or laws to which the parties intended, in contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves”.

Lex-loci contractus, or the law of the place where the contract is really made, is assumed to be the appropriate law of the contract. The legal framework that governs the merits of the parties' disagreement is known as the *lex-loci contractus*, or "governing law of the contract." The main contract's existence, legality, and interpretation are all governed by the *lex-loci contractus*. In accordance with the terms of the arbitration agreement, it also applies to any non-contractual claims (such as tort claims), which may be filed before an arbitral tribunal.

This criterion is especially relevant when the contract must be completed entirely within the nation in which it was created, yet it may be completed anywhere. It might also apply in situations when the contract calls for some of it—or possibly the entire thing—to be carried out abroad. The second rule may be stated thus:

The law of the nation in which the contract is to be fulfilled is assumed to be the proper law of the contract (*lex-loci solutionis*) if the contract is made in one country but requires that it be completed whole or in part in another. This presumption typically pertains to the manner of execution rather than the actual nature of the

duty. 8 In certain circumstances, it might only apply to particular contract provisions.

According to Lord Mansfield, the courts in England have construed *lex-loci contractus* to mean "not the law of the country where a contract was made," but rather "the law of the country with a view to the law whereof the contract was made" when they tried to give effect to laws other than *lex-loci contractus*.

If the intention is not expressly mentioned, inference as to that may be had from the terms and nature of the contract as also from the general circumstances of the case. *Lex-loci contractus* will be the proper law of contract. But where the contract is made in one country and is to be performed wholly or partly in another country *lex-loci solutionis* governs i.e., the law of the country where the performance is to take place. The validity of a contract will be judged by the Indian law where the application of a foreign law is opposed to the public policy or statutory provision in India.