CHOOSING THE LAW OR RULES OF LAW TO GOVERN THE SUBSTANTIVE RIGHTS OF THE PARTIES

A discussion of *voie directe* and *voie indirecte*

This article explores the differences between two approaches to determining choice of law issues that arise in international arbitration: *voie directe* and *voie indirecte*. The former, also known as the "direct application" method, involves the tribunal determining choice of law issues by directly applying a particular law or rules of law. The latter involves the tribunal determining the choice of law rules to apply to the dispute, and then determining the applicable law or rules of law by the application of the choice of law rules. Both methods are commonly used in institutional rules and national arbitration law. This article seeks to examine the extent to which the two approaches converge in practice, and considers the potential obfuscation of the tribunal's and the party's true objectives involved in the *voie indirecte* method, compared to the uncertainty that can result in an application of the *voie directe* approach.

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I. Choice of law issues in international arbitration

1 A fundamental principle in international arbitration is party autonomy, an aspect of which is that the parties are free to choose the laws or rules of law in accordance with which disputes concerning their substantive rights and obligations will be determined. However, the parties do not always expressly state which laws govern the contract in the contract documents. In the absence of subsequent agreement and in the event a dispute arises, it will fall to the tribunal to determine the applicable substantive law. The tribunal's authority to decide choice of law issues, in the absence of the parties' express agreement to that effect, is contained in national procedural laws or in the rules of the institution under which the arbitration is conducted.

2 A single arbitration may give rise to a number of choice of law issues, and, occasionally, resolution of these issues may be as complex as deciding the substance of the dispute. The potential complications arise out of the fact that not every aspect of arbitration will necessarily be

governed by the same law. In any arbitration there will be at least two categories of applicable laws: (a) the law governing the substance of the dispute and (b) the procedural law governing the arbitration, the "*lex arbitri*".

3 The law governing the substance of the dispute is the law or rules of law governing the contract out of which the dispute arises. The applicable substantive law determines the legal rights and obligations of the parties but, in particular, may also affect the causes of action that may be advanced, the substantive remedies available, the types of damages recoverable, limitation defences, the calculation of the quantum of damages and even the burden of proof.

4 The procedural law or *lex arbitri* is the law of the seat of the arbitration – the place in which the arbitration is conducted for legal purposes. The *lex arbitri* affects not only the conduct of the arbitration proceedings, which may include factors such as the formation of the tribunal, requests for production of documents, the form of pleadings and evidence, and the manner of examination of witnesses but it will also determine the availability and extent of curial support, including interlocutory relief, and the means for challenging a tribunal's award.

5 While the substantive and procedural laws may be one and the same (for example the law of England and Wales) it is not uncommon for the contract to be governed by one system of law (for example the law of Germany) and the arbitration to be conducted in accordance with another (for example the law of England and Wales). It is not difficult to imagine the challenges that this may present and why determination of choice of law issues is so important in the context of an international arbitration.

6 A third potential category of applicable law is the law governing the arbitration agreement itself. A practical consequence of the doctrine of separability, by which the arbitration agreement is deemed separate and distinct from the contract of which it forms part, is that the arbitration agreement may be governed by a different law to the governing law of the remainder of the contract. This may be the case even in circumstances where the parties have expressly designated the law governing the contract. Situations in which the tribunal's decision on the law governing the arbitration agreement are likely to have an impact on the arbitration include the validity of the arbitration agreement, the scope of the arbitration agreement, whether the dispute is capable of settlement by arbitration, the constitution of the tribunal,

the validity of the notice of arbitration and whether the parties are under a continuing obligation to refer future disputes to arbitration.[1]

7 The foregoing discussion illustrates how and why choice of law issues arise in international arbitration, but it is in relation to the first-mentioned category, the laws governing the substance of the dispute, that the distinction between *voie directe* and *voie indirecte* is relevant. (However, the process by which the tribunal determines the substantive law is determined by the provisions of the procedural law or *lex arbitri*.) Whichever method is followed of *voie direct and voie indirecte* the tribunal will usually be undertaking an inquiry to ascertain the applicable law or "rules of law". The choice of the phrase "rules of law" is significant as it means that the tribunal is not limited to choice of one national law, understood as the laws of one particular country. The tribunal may decide that the applicable law to the substance of the dispute is "rules of law" which may be made up by laws of several nations, of transnational laws, international law principles, rules of international conventions and trade usages, among many others.

II. The difference between *voie directe* and *voie indirecte*

A. Voie indirecte

8 The *voie indirecte* method limits the tribunal's power to the determination of the appropriate conflict of laws rule, which is then applied to determine the appropriate substantive law. This is the oldest of the modern approaches to the choice of applicable law by the arbitral tribunal, dating back to the 1961 European Convention on International Commercial Arbitration,[2] which provided in its Art VII (1) that "failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable". This rule was also contained in the 1975 International Chamber of Commerce ("ICC") Rules (Art 13(3)). Just how the tribunal determines which conflicts rule applies varies. The terms of the instrument or rules from which the tribunal's power is derived may give the tribunal a discretion to apply the conflicts rule it considers "applicable" or "appropriate", as is the case in the European Convention previously cited.[3] Or, the instrument may prescribe how the conflicts

1 Michael J Mustill & Stewart C Boyd, *Commercial Arbitration* (Lexis Nexis Butterworths, 2nd Ed, 1989) at p 62.

2 21 April 1961, 484 UNTS 349.

3 See also Art 28 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration (GA Res 40/72, UN GOAR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985)) ("Model Law"); s 46 of the English Arbitration Act 1996 (c 23); Art 28 of the First Sch to the New Zealand Arbitration Act 1996; and s 28 of the Danish Arbitration Act 2005.

rule is to be ascertained. Examples of the latter include the instruments which require the tribunal to determine the substantive law by application of a particular jurisdiction's choice of law rules or by application of the closest connection test. These are discussed in more detail subsequently.

B. Voie directe

9 In contrast, where the applicable *lex arbitri* or institutional rules provide for a *voie directe* approach, the power vests in the tribunal to select the appropriate law, or rules of law applicable to the merits of the dispute directly. Using this method, the tribunal may consider elements such as the contract, the circumstances of the case and the submissions of the parties. When using the direct application method, the arbitral tribunal should determine the law most relevant to the commercial circumstances of the case, that is, the law or rules of law which best suit the international transaction, taking into account the circumstances of each case.

C. The impact of the distinction

10 In principle and in practice, there will be many cases where the application of either a *voie directe* or *voie indirecte* method will lead to the same result. As mentioned, where the *lex arbitri* or institutional rules provide for a *voie directe*, the factors relevant to the tribunal's exercise of its discretion to determine the most appropriate law or rules of law may not be specified. Therefore, the tribunal may consider the same factors it would have considered to determine the applicable conflicts rules, which factors are often materially similar to the conflicts rules themselves. As stated by Karton, *voie directe* most often consists in finding a significant connecting factor between the contract and the law which the arbitrator decides to apply.[4] The similarities between this inquiry and the "closest connection", a conflicts rule applied in international arbitration, are easily discernible. However, there will be a not insignificant number of cases in which a *voie directe* and *voie indirecte* will lead to the application of different laws, particularly where the tribunal is directed to apply a specific conflicts rule in a *voie indirecte* model.

D. A reasoned decision

11 There is a cautionary word worth noting as regards the tribunal's determination of the applicable substantive law. No matter

4 Joshua Karton, "Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of its own Drummer?" (2010) 60 *University of New Brunswick Law Journal* 32 at 34.

which method is used by the tribunal, there should be no limitation on the tribunal's obligation to give reasons for its decision.

12 In particular, in the absence of a cogent, reasoned analysis of the path to the tribunal's conclusion, the application of the *voie directe* method risks being perceived as an arbitrary decision in favour of the most convenient or familiar law, or rule of law, for the arbitrators (for example, the laws of the country of which the members of the tribunal are nationals). The tribunal's decision should include a careful explanation of why the law determined to be applicable is the most appropriate law to decide the parties' dispute. Depending on the circumstances of the particular case, it may also be good practice for the tribunal to consider and discuss the implications of different approaches and results.

13 A further consideration for the tribunal is the enforceability of the award. In some cases the tribunal may be subject to an express duty to render a valid and enforceable award.[5] In this regard, the tribunal should be cognisant of any potential issues arising out of the mandatory substantive laws which may be determined to be applicable and should consider any public policy implications which may affect the enforceability of the award when determining the applicable substantive law.

III. The position in national laws and institutional rules

A. Institutional arbitration rules and other international rules

14 The rules of some of the leading international arbitration institutions adopt the *voie directe* approach. For instance Art 21 of the ICC 2012 Arbitration Rules provides that in the absence of an agreement of the parties regarding the applicable law to the merits of the dispute, "the arbitral tribunal shall apply the rules of law which it determines to be appropriate".

15 *Voie directe* also applies pursuant to the United Nations Commission of International Trade Law ("UNCITRAL") Arbitration Rules 2010. This marks a departure from the 1976 UNCITRAL Arbitration Rules, according to which a *voie indirecte* method was adopted.[6] The American Arbitration Association ("AAA") 2009 Rules

5 For example Art 35 of the International Chamber of Commerce ("ICC") Rules (1998).

6 Article 33(1) of the UNCITRAL Arbitration Rules (1976): "[f]ailing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable", compared with Art 35(1)

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and the World Intellectual Property Organization ("WIPO") 2002 Arbitration Rules also contain provisions for a *voie directe*.[7]

16 Other arbitration institutes or centres worldwide have included in their international arbitration regulations the authority for the arbitral tribunal to apply the *voie directe* method. Examples include the Singapore International Arbitration Centre ("SIAC") 2013 Rules, the London Court of International Arbitration ("LCIA") 1998 Rules, the Australian Centre for International Commercial Arbitration ("ACICA") 2011 Rules, the Stockholm Chamber of Commerce 2010 Arbitration Rules, and the Vienna International Arbitral Centre 2013 Rules of Arbitration.[8]

17 A notable exception to *voie directe* is the 2006 UNCITRAL Model Law on International Commercial Arbitration[9] ("Model Law"). It provides, in Art 28(2): "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable." This is significant given a number of national arbitration statutes are based on the Model Law.

B. National arbitration statutes

18 National arbitration statutes differ in their approaches to selection of the applicable law to the substance of the dispute. While some of them grant international arbitral tribunals the discretion to select a set of conflict of laws rules, other statutes prescribe a specific choice of law rule for all arbitrations seated in the national territory.

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of the UNCITRAL Arbitration Rules (2010): "[f]ailing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate".

7 Article 28(1) of the American Arbitration Association ("AAA") International Dispute Resolution Procedures (2009): "[f]ailing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate"; Art 59(a) of the World Intellectual Property Organization ("WIPO") Arbitration Rules (2002): "[f]ailing a choice by the parties, the Tribunal shall apply the law or rules of law that it determines to be appropriate".

8 Rule 27 of the Singapore International Arbitration Centre ("SIAC") Arbitration Rules (2013): "the law which it determines to be appropriate"; Art 22.3 of the London Court of International Arbitration ("LCIA") Arbitration Rules (1998): "the law(s) or rules of law which it considers appropriate"; Art 34 of the Australian Centre for International Commercial Arbitration ("ACICA") Arbitration Rules (2011): "the rules of law which it considers applicable"; Art 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce (2010): "the law or rules of law which it considers to be most appropriate"; Art 27(2) of the Vienna International Arbitral Centre Rules of Arbitration (2013): "the applicable statutory provisions or rules of law which it considers appropriate".

9 GA Res 40/72, UN GOAR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985).

Even though several national statutes have opted to grant the arbitral tribunal the broader discretion to directly select the applicable law they judge appropriate, there is a predominance of the *voie indirecte* approach in national arbitration statutes. However, there have been several attempts to modernise national arbitration laws, which demonstrate that national legislatures have attempted to align their arbitration laws with the standards adopted by institutional arbitration rules.

C. Voie indirecte

19 An example of the *voie indirecte* approach can be found in s 46(3) of the English Arbitration Act 1996,[10] providing that in the case of no agreement of the parties on the applicable law to the merits of the dispute, "the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".

20 Article 32(2) of the Singapore Arbitration Act[11] provides that "if or to the extent that the parties have not chosen the law applicable to the substance of their dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules".[12] The Singapore International Arbitration Act,[13] in its revised 2002 edition, adopted the Model Law, and similarly to what happens in domestic arbitration, the international arbitral tribunal applies the law determined by the conflict of laws rules which it considers applicable.

21 A common conflict of law method that is used by the arbitral tribunals is the closest connection test. Some national acts or statutes have adopted this method. Article 33 of the Swiss Arbitration Law 2012 provides that in the absence of a choice of law by the parties, the arbitral tribunal should apply "the rules of law with which the dispute has the closest connection". Similarly, s 1051(2) of the Tenth Book of the German Code of Civil Procedure establishes that "where the parties to the dispute failed to determine which statutory provisions are to be applied, the arbitral tribunal is to apply the laws of that State to which the subject matter of the proceedings has the closest ties".[14]

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10 c 23.

11 Cap 10, 2002 Rev Ed.

12 Other examples can be found in Art 28(2) of the First Sch to the New Zealand Arbitration Act 1996 and §28(2) of the Danish Arbitration Act 2005.

13 Cap 143A, 2002 Rev Ed.

14 Other examples regarding dispositions of the application of the closest connection test in the absence of the parties' agreement can be found in Art 36 of the Japanese Arbitration Law 2003: "the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected"; Art 834 of the Italian Code of Civil Procedure: "[i]f the parties are silent, the law with which the relationship has its closest connection shall apply"; and Art 39(2) of the Egyptian

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D. Voie directe

22 A widely acclaimed example of the application of the *voie directe* approach is the French Code of Civil Procedure, which provides in its Art 1511 that where no choice of law has been made, the arbitral tribunal should render its award "in accordance with the rules of law it considers appropriate".

23 The Appendix of this article contains extracts of various arbitration statutes and rules and the methods adopted by them.

IV. How does *voie indirecte* work in practice?

24 As seen in the abovementioned institutional arbitration rules, the applicable rules or the *lex arbitri* may provide that the arbitral tribunal is to choose a conflict of laws rule that it deems "appropriate" or "applicable" to decide which laws or rules of law to apply to the merits of the dispute. This has led to the development of a number of approaches for determining which conflicts rule applies. Generally, the chosen conflict of laws rule is contained in a particular national law, however, arbitral tribunals have also referred to conflicts rules contained in international conventions or even to principles of international commercial law.

25 It is not the intention of this article to select or demonstrate which of the approaches is the most adaptable to the parties' interests, but some of the common *voie indirecte* methods are briefly presented below, along with an analysis of the possible risks that can arise from their application.

A. Conflict of laws rules of the seat of the arbitration

26 Historically, many arbitral tribunals applied the conflict of laws system of the seat of arbitration. This approach is less used nowadays. One reason for the decline in the application of the conflicts rules of the seat is that the seat of the arbitration may have been chosen only for neutrality reasons. Therefore, applying the conflicts rules of the seat may be contrary to the parties' intentions. As noted in one ICC award: "it is appropriate to eliminate forthwith the law of the forum, whose connection with the case is purely fortuitous".[15] Commentators have also accurately noted that "this trend was another aspect of the development of 'delocalised arbitration', which saw the mandatory application of the

Arbitration Law 1994: "the substantive rules of the law it deems most closely connected to the dispute".

15 *Award in ICC Case No 1422* 101 JDI (Clunet) 884 (1974).

choice of law rules of the forum as an unnecessary fetter on party autonomy".[16]

27 Further, the application of the conflict of laws rules of the seat of the arbitration may be the result of two incorrect assumptions: the first being that an arbitral tribunal exercises the same function as a national court, and the second being that the national conflict of laws rules apply not only to judicial, but also to international arbitration proceedings in the particular jurisdiction.

28 More recently, there are few examples of the application of this method that can be quoted. The 1989 International Arbitration Rules of the Zurich Chamber of Commerce impose this method for arbitration proceedings that have their seat in Zurich. Article 4 of these rules stipulates that "if the parties have not chosen an applicable law, the Arbitral Tribunal decides the case according to the law applicable according to the rules of the Private International Law Statute". Likewise, the 2000 Rules of Proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry in Art 14 provide that "failing stipulation by the parties, the arbitral tribunal shall apply the law which it considers to be applicable according to the rules of Hungarian private international law".

29 Numerous international arbitral awards have clarified that it cannot be presumed from the parties' choice of the seat of the arbitration that they have also chosen that seat's law as the law applicable to the substance of the dispute. An ICC arbitral tribunal found that "the most authoritative present day doctrine and international arbitration jurisprudence admit that in determining the substantive law, the arbitrator may leave aside the application of the conflict rules of the forum".[17] More recent decisions have held that the "conflict rules of the place of the arbitration are by no means binding on international Arbitral Tribunals sitting in Switzerland"[18] and that "not only is the Tribunal, sitting in Zurich, not bound to apply the Swiss rules of conflict of laws, but the application of such rules to the dispute would not be appropriate or justifiable since the contractual

16 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at p 850.

17 *Award in ICC Case No 2930* IX YB Comm Arb 105 (1984); see also *Award in ICC Case No 7375* 11(12) Mealey's Int'l Arb Rep A-1 at A-37 (1996): "The choice of the situs of the arbitration (in casu Zurich/Switzerland) cannot in any way justify a conclusion that the Parties had intended to subject themselves to the Swiss substantive Law."

18 *Award in ICC Case No 6030* in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 228 n 227 (2001).

relationship between the parties has no connection whatsoever with Switzerland".[19]

30 Two relevant considerations should be identified at this point. Firstly, and as seen above, several national arbitration statutes mandatorily prescribe the applicable conflict rules for arbitrations seated in their local territory. Secondly, the application of the national law as a result of applying this conflict of laws method may result in relevant matters where corporate, real property and competition legislation, among others, may have an important impact on the enforcement of the decision of the arbitral tribunal.

B. Conflict of laws rules of the State most closely connected to the dispute

31 Some national legislation and institutional rules require tribunals to apply the conflict of law rules of the State that they consider to be most closely connected to the dispute. The criteria to determine the closest connection can be quite extensive, and may include consideration of the State of potential enforcement of the arbitral award, the State that would have had jurisdiction but for the arbitration, and the State of conclusion or performance of the contract.

32 On the one hand, when considering the application of the conflict of laws rules of the potential enforcement jurisdiction, the arbitral tribunal should be aware that there may be a multiplicity of possibilities where enforcement is concerned, and thus some level of uncertainty may arise. Likewise, when considering the conflict of laws rules of the State with jurisdiction but for the arbitration, the arbitral tribunal may find that there is more than one State which could have such jurisdiction. Furthermore, the norms of a system that the parties may have rejected as the applicable law to their future disputes should not be determinative with respect to their arbitration proceedings.

33 On the other hand, some arbitral tribunals have decided to apply the conflict of laws rules of the place of conclusion or performance of the contract, as many national laws provide. Indeed, many national legal systems, when it comes to determining the relevant elements of the contractual relationship, give importance to the place of business or habitual residence of the party that performs the major contractual obligations. However, this method may result in uncertainty in international arbitration – for example, with electronic commerce, and with ongoing negotiations with a range of potential counter-offers. There is also the possibility that a circular proceeding may result, as it

19 *Partial Award in ICC Case No 8113* XXV YB Comm Arb 324 at 325 (2000).

may be necessary to know the applicable law to know where and when the acceptance took place.

C. Closest connection test

34 Even where the tribunal is not required to apply the closest connection test, some tribunals have considered that this test is a transnational principle of private international law and have gone on to apply it as the most appropriate conflicts rule to determine the substantive law. This method appeals to the notion that the law will be tailor-made for the particular contractual circumstance. However, in modern commerce there can be too many relevant factors connected to the dispute. The application of the closest connection test could also lead to *depecage*, where different laws apply to different parts of the contract.

35 As can be seen, the proceedings of the arbitrator when applying the closest connection test are similar to the proceedings when referring to *voie directe*, with regard to the arbitral tribunal's duty to determine a relevant element of circumstance to define the closest law or rule of laws to be applied to the merits of the dispute.

D. The domicile of the person exercising characteristic performance

36 To some commentators, this is one of the more important factors that should be taken into account by the arbitral tribunal when applying the closest connection test to determine the applicable law.[20] However, it has also been considered as a conflict of laws rule in itself.[21] The 1980 Convention on the Law Applicable to Contractual Obligations[22] ("Rome Convention") attempts to combine this method with the closest connection test. In modern international commercial exchanges, however, it is not always possible to determine what constitutes the characteristic performance. Also, the application of this method may result in favouring the laws of one type of contracting party. As stated by Petsche, "while the characteristic performance test does provide some degree of precision, it does not usefully apply to

20 Marc Blessing, "Regulations in Arbitration Rules on Choice of Law" in Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration (ICCA Congress Series, 1994 Vienna vol 7) (Albert Jan van den Berg ed) (Kluwer Law International, 1996) at p 415.

21 *ICC Case No 7205* in *Collection of ICC Arbitral Awards 1991–1995* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer Law International, 1997) at p 622 where the arbitral tribunal applied the law of the country in which the party that effected the characteristic performance had its central administration.

22 19 June 1980, 80/934/ECC.

complex contractual settings devoid of a characteristic performance".[23] Such complex contractual settings might include turnkey agreements, technology transfers, mining concessions and joint ventures.

E. Cumulative method

37 Finally, the cumulative method is an approach that is frequently utilised by international arbitral tribunals. This method consists of simultaneously considering all of the choice of law rules of all legal systems with which the dispute in question is connected. If all of these different choice of law rules point to the same substantive law, the arbitrators apply this law to the merits of the dispute. The idea behind this method consists of demonstrating a "false conflict" to show that all analyses would lead to the same applicable law. In a 1999 ICC award, the arbitral tribunal applied "both the Irish and the French rules of conflict, given that these are the only ones having a direct connection with the parties and the dispute", with both sets of rules producing the same result.[24]

38 A classic example of the application of this method is contained in a 1997 ICC award where a tribunal, seated in Paris, considered whether to apply French, Yugoslav or Egyptian conflict of laws rules. All the conflict of laws rules determined the applicable substantive law differently; the French conflicts rules referred to the substantive law of the Yugoslav seller's domicile, the Yugoslav conflicts rules referred to the substantive law at the principal office of the seller, and the Egyptian conflicts rules referred to the substantive law of the place of signature. However, by coincidence, all three conflicts systems pointed to Yugoslavian substantive law.[25]

39 The cumulative method may well have predictable results for the parties, however, it provides no guidance when the outcome is different for each method applied. As stated by Derains, "the method known as cumulative application of systems of conflict laws of states

23 Markus A Petsche, "International Commercial Arbitration and the Transformation of the Conflict of Laws Theory" (2009–2010) 18:3 *Michigan State Journal of International Law* 461.

24 *Partial Award in ICC Case No 7319* XXIVa YB Comm Arb 141 (1999). See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ch 18.

25 See, *eg*, *Award in ICC Case No 6281* in *Collection of ICC Arbitral Awards 1991–1995* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer Law International, 1997) at p 409. See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ch 18.

involved in a dispute has no sense unless the approach results in convergence".[26]

F. International conflict of laws rules

40 To escape the peculiarities of national laws, some arbitral tribunals have considered that there might exist international conflict of laws rules that are not connected to any national conflicts rules. In those terms, an ICC arbitral tribunal found that the implied choice of Austrian law was confirmed by the "general rules" of conflicts, making reference to the existence of such international rules.[27]

41 Furthermore, an ICC arbitral tribunal in its award of 2001 established that there is:[28]

> … much to be said in favour of adopting generally accepted principles of international conflict of laws. The fact that the dispute arises out of dealings between one government and an instrumentality of another government gives them a unique international flavour. Hence, the parties could reasonably have contemplated that arbitrators would apply generally accepted international conflicts-of-law rules in arriving at the applicable law by which their dispute would be resolved. In the circumstances of the present arbitration, which is truly international in character, the Arbitral Tribunal is of the opinion that it should adopt generally accepted international conflict of laws rules.

42 Arbitral tribunals have relied on several occasions on the 1980 United Nations Convention on Contracts for the International Sale of Goods[29] ("CISG"), the 1955 Convention of the Law Applicable to International Sales of Goods and the Rome Convention. However, it is important to note that there is no such body or single set of international conflict of laws rules which apply universally and specifically in the context of international commercial arbitration.

V. The impact of *voie directe*

43 As established by many of the cited institutional arbitration rules, arbitral tribunals may be entitled to choose the law or "rules of law" which they consider the most appropriate to the merits of the

26 Yves Derains, "Jurisprudence of International Commercial Arbitrators Concerning the Determination of the Proper Law of the Contract" (1996) *International Business Law Journal* 514 at 529.

27 *Award in ICC Case No 7197* 120 JDI (Clunet) 1028 (1993). See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ch 18.

28 *Award in ICC Case No 7071* in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 236 n 249 (2001).

29 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

dispute. This applicable law may not be an exclusively national law, but may instead consist of several sets of rules, such as the general principles of private international law, the *lex mercatoria*, trade usages or particular principles, or international regulations regarding a specific subject such as intellectual property in copyright or patents-related disputes. Although there is nothing to exclude the application of these principles under a *voie indirecte* method, in practice they are more likely to be applied where the tribunal has a discretion to determine the applicable law directly than when the tribunal's discretion is to determine the choice of laws rule, the application of which is more likely to point to a particular national law. This is significant when it is considered that, in some cases, the application of accepted private international law principles may be more aligned with the parties' expectations than the application of a foreign national law.

A. The application of general principles of private international law

44 Numerous commentaries and arbitration awards reveal a preference to apply "general principles of law" over a particular national law. Examples can be found in awards applying the *lex mercatoria*, the "principles of good faith dealings and mutual trust in business relationships", and the "principles generally applicable in international commerce". These rules transcend national boundaries, and may adjust to the complex transactions which are in dispute. Where the parties originate from different legal systems, the arbitral tribunal can explore other factors such as trade usage and practices, and evidence from past dealings between the parties.

45 In *ICC Case No 5030*,[30] the arbitral tribunal concluded, with respect to the rules of applicable law, that "as the parties agree, priority should be given to the provisions of the contract and to international trade usages" and that "to complete the sources, it would be best to have recourse to general principles of international law on international contracts".

46 Several advantages can be highlighted from the application of general principles of private international law. There may be matters where two or more legal systems may be equally connected to the dispute, although they may lead to significantly different results. Also, the application of a national law may result in the application of rules

30 Award rendered in 1992 in *ICC Case No 5030*, concerning a contract in which the parties had not chosen the applicable law (JDI 1993, p 1003, note by Y Derains, unofficial translation). See Yves Derains, "Jurisprudence of International Commercial Arbitrators Concerning the Determination of the Proper Law of the Contract" (1996) *International Business Law Journal* 514 at 528.

aimed at the protection of weaker entities (consumers, tenants, employees), and this may be something that the parties may have wanted to avoid. Furthermore, the parties may have sought to avoid the application of a national law that contains idiosyncratic rules of law which are contrary to the international consensus on a specific commercial matter, and would be unlikely to meet the expectations of the parties. However, it should be taken into account that difficulties will always remain when determining the degree of acceptance required for a principle to be seen as truly international.

47 These considerations reveal the importance for arbitral tribunals to view the parties of the dispute as international commerce actors, in order to decide to "delocalise" their views on the law which would be more appropriate to apply in order to decide their disputes. In this context, an ICC tribunal hearing a dispute between a Japanese manufacturer and a Middle Eastern distributor held that the contract should be governed by "principles of international business law".[31] In another case, an ICC tribunal decided to apply "what is more and more called *lex mercatoria*" as the application of international principles that "take into account the particular needs of international relations".[32]

48 In *Norsolor v Pabalk Ticaret*,[33] the arbitral tribunal sitting in Vienna relied on the *lex mercatoria* and the principles of good faith dealings and mutual trust in business relations. The claimant applied to the Austrian Supreme Court to have the award set aside on the grounds that the arbitral tribunal had exceeded its authority in failing to apply a "rule of conflict" as required by Art 13(3) of the ICC Rules at that time, and by failing to determine whether French or Turkish law would govern the contract. The Supreme Court rejected the challenge holding that the arbitral tribunal had applied a principle inherent in private law systems which was not contradictory to the strict legal regulations of the countries concerned.

49 In fact, national courts have repeatedly upheld the decisions of arbitral tribunals to have principles of international law and the *lex mercatoria* as the applicable rules of law to the merits of the dispute in arbitrations. In *Banque du Moyen-Orient v Fougerolle*,[34] the French *Cour de Cassation* rejected an attack on an ICC award rendered in Geneva. The arbitral tribunal had applied principles "generally

31 Yves Derains, "Transnational Law in ICC Arbitration" in *The Practice of Transnational Law* (Klaus Peter Berger ed) (Kluwer Law International, 2001) at pp 43 and 47.

32 *The Practice of Transnational Law* (Klaus Peter Berger ed) (Kluwer Law International, 2001) at p 228 quoting *ICC Case No 8385*.

33 (18 November 1982) (Austrian Supreme Court), 1993 Rev Arb 516; 110 JDI 645 (1983).

34 (9 December 1981) (Cour de Cassation, France) 1982 Rev Arb 183; JDI 931 (1982).

applicable in international commerce", and was accused by the losing party of having acted as *amiables compositeurs*. Likewise, in *Deutsche Schachtbau-und Tiefbohrgesellschaft v Ras al Khaimal National Oil Co*,[35] the English Court of Appeal recognised an ICC award rendered in Geneva where the arbitral tribunal had applied internationally accepted principles of law.

50 In *ICC Case No 9875 of 2001*, the arbitral tribunal did not find decisive factors to determine that either Japanese or French law was applicable to the merits of the dispute, highlighting the inadequacy of the choice of a domestic legal system, and decided that "the most appropriate 'rules of law' to be applied to the merits of this case are those of the '*lex mercatoria*', that is the rules of laws and usages of international trade which have been gradually elaborated by different sources".[36] Similarly, in a 2003 ICC arbitral award, the arbitral tribunal concluded that "in view of the fact that the parties apparently wanted a neutral solution, the tribunal has decided to apply general principles and rules of international contracts, *ie*, the so-called *lex mercatoria*".[37]

51 Arbitral tribunals may also opt for the application of those principles as a means of interpreting and supplementing the applicable national law. Concurrent application may also be established, as occurs in arbitrations within the International Centre for Settlement of Investment Disputes ("ICSID"). The Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention"),[38] in Art 42(1), establishes that in the absence of an agreement of the parties on the applicable law, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". Additionally, as explained by Blessing, "a reference to international law is made as a corrective means to test the authority of the national law".[39] In this way, the ICSID Convention opens the possibility for the arbitral tribunal to refer to general principles of law to

35 *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras al-Khaimal National Oil Co and Shell International Petroleum Co Ltd* [1987] 3 WLR 1023; [1987] 2 Lloyd's Rep 246, [1987] 2 All ER 769, extracts in XIII YB Com Arb 522 (1988).

36 *ICC Case No 9875 of 2001* in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 237–238 (2001).

37 *Final Award in ICC Case No 10422* 130 JDI (Clunet) 1142 (2003).

38 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

39 Marc Blessing, "Regulations in Arbitration Rules on Choice of Law" in Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration (ICCA Congress Series, 1994 Vienna vol 7) (Albert Jan van den Berg ed) (Kluwer Law International, 1996) at p 420.

avoid local standards of the applicable domestic law that may be contrary to the parties' expectations.[40]

B. Consistency of voie directe *with party autonomy and the parties' expectations*

52 Application of the *voie indirecte* method can sometimes produce an unfair and unexpected result. Application of the *voie directe* method may better balance the rights between the parties and may better align with their expectations. Nevertheless, equity cannot be confused with selection of the law that grants the same rights to both parties, but the law which parties would have expected when deciding to submit their disputes to arbitration, insofar as it can be determined.

53 In addition, by the *voie directe* method, the arbitral tribunal can choose a law to promote the validity of the contract, assuming that the parties' original intent was to have a valid agreement. In one particular ICC award, the arbitral tribunal applied the Swiss law rather than the laws of the Arab claimant given that their application "might partially or totally affect the validity of the Agreement" and that it was "reasonable to assume that from two possible laws, the parties would choose the law that would uphold the validity of the Agreement".[41]

54 Another ICC decision held that an agency contract between an Italian company and a French agent should be governed by French rather than Italian law, because the latter's requirement, according to which all commercial agents need to be registered in Italy, would have invalidated the contract.[42]

55 Parties' expectations have even been taken into account in order to decide on the application of mandatory rules. An ICC arbitral tribunal hearing a dispute subjected to New York law between an American and a Belgian party had to decide if the Racketeer Influenced and Corrupt Organization Act ("RICO Act") was applicable to the dispute. The tribunal decided that the RICO Act did not apply because, in the absence of a choice of law by the parties, the dispute would have been governed by Belgian law as it was the law of the place of performance of the contract. The tribunal had relied on "the necessity to

40 Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Kluwer Law International, 2008) ch 2 at p 49.

41 *ICC Case No 4145* in *Collection of ICC Arbitral Awards 1986–1990* (S Jarvin, Y Derains & J-J Arnaldez eds) (Kluwer Law International, 1994) at pp 53 and 57.

42 *ICC Case No 4996* in *Collection of ICC Arbitral Awards 1986–1990* (S Jarvin, Y Derains & J-J Arnaldez eds) (Kluwer Law International, 1994) at pp 53 and 57.

comply with the parties' expectations and to ensure predictability".[43] As the arbitral tribunal is not a gatekeeper of any country's laws, it can determine whether to apply a mandatory rule, and which one, and it is likely to be more attuned to the interests of the parties than to the interests of the legal system and the society as a whole, as compared to national courts.

C. Is there always a reasonable expectation of the parties related to the substantive applicable law?

56 Observing the parties' expectations when deciding the applicable law might well be a successful formula for arbitral tribunals, however, in practical terms, the tribunal may not have any firm indications of what these expectations are, or may have been, at the moment of the conclusion of the contractual relationship. There is also the possibility that the arbitral tribunal may not be able to identify the implied intent of the parties about the law which would have been likely to be selected by them.

57 Several considerations may be taken into account under these circumstances. First, the arbitral tribunal may find that there has been a negative choice by the parties. The determination of the existence of a negative choice gives rise to the difficulty of deciding whether there is an unequivocal rejection by both of the parties of a particular national law. It cannot be inferred that the parties made a negative choice from the fact that they were unable in their negotiations to agree on a choice of law.

58 In a 1996 ICC preliminary award, an arbitral tribunal considered it appropriate to apply general principles of law in the presence of an implicit negative choice of law. The case involved nine contracts made in the 1970s between Iran and a US supplier, which did not contain a choice of law clause. The tribunal concluded that at the time of entering into the agreements, neither party would have agreed to the use of the other party's national laws:[44]

> The Tribunal will apply those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a *lex mercatoria*, also taking into account any relevant trade usages as well as the

43 *ICC Case No 8385* in *Collection of ICC Arbitral Awards 1996–2000* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer Law International, 2003) at p 474.

44 The award has been reported in 11(12) Mealey's Int'l Arb Rep A-1 *ff* (1996) and is available in excerpts at UNILEX <http://www.unilex.info/case.cfm?id=625>.

> UNCITRAL Principles, as far as they can be considered to reflect generally accepted principles and rules.

59 In *Compañía Valenciana de Cementos Portland (Spain) v Primary Coal Inc (New York)*,[45] the arbitral tribunal concluded that neither of the two national laws were the most appropriate for resolving the dispute, holding that the absence of a choice of law clause in the contract revealed a "deliberate tacit omission", as the parties did not want a domestic law applied to their contract. Indeed, the arbitral tribunal concluded that the parties had intended to have a "purely international law" as the applicable law, *ie*, the "ensemble of the usages of international commerce". On appeal, and upheld by the French *Cour de Cassation*, the Paris Court of Appeals determined the arbitrator rightly held that the parties had the intention to exclude the application of Spanish, New York and English law. The court held that an ICC arbitral tribunal is not bound to apply conflicts rules stemming from a domestic legal system, and that it can resort to general principles of conflict of laws.

60 There may also be an implied choice of law made by the parties. In this case, the arbitral tribunal should be able to determine if there are strong connecting factors to a law revealed in the analysis of the cases which permit the tribunal to conclude that it was the parties' implied intention to rely on a particular applicable law. This determination remains a difficult one. It has to be remembered that an explicit choice of the *lex arbitri* by the parties does not imply *per se* a preference to have that rule as the applicable law to the substance of the dispute.

61 In *ICC Case No 8502*, the arbitral tribunal heard a dispute regarding a contract between a Vietnamese seller and a Dutch buyer acting through a French company as its agent and held that although the contract contained no choice of law clause, it referred to international trade usages which should be applied as the law of the dispute. Indeed, the contract included some provisions imposing the application of the Incoterms 1990 and the clause of the Uniform Customs and Practice for Documentary Credits 500 to specific contractual obligations. The arbitral tribunal was of the view that:[46]

> … by referring to both the Incoterms and the UCP 500 the Parties showed their willingness to have their Contract governed by

45 (13 July 1989) (Cour d'appel de Paris) (1Ch suppl), (1990) 3 Revue de l'Arbitrage 663–674; Klaus Peter Berger, "Lex mercatoria in der internationalen Wirtschaftsschiedsgerichtsbarkeit; Der Fall 'Compañía Valenciana'" (1993) 13 Praxis des Internationalen Privat-und Verfahrensrechts 281–288.

46 Award in ICC Case No 8502 of November 1996, ICC Bull 1999, 72–74, UNILEX. See Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Kluwer Law International, 2008) ch 2 at pp 43–56.

> international trade usages and customs … in particular, the Arbitral Tribunal shall refer, when required by the circumstances, to the provisions of the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by UNCITRAL, as evidencing admitted practices under international trade law.

62 Finally, in a complex multiparty international arbitration, it may be impossible to determine the parties' implicit choice, and, even more, ensure that all parties to the contract shared a common intention.

VI. Convergence of the two approaches

63 Certainly, the line dividing the reasoning behind the *voie directe* approach and the rules that may be applied under the *voie indirecte* method is not clearly identified. For example, the relevant factors for consideration in a *voie directe* approach may be the same as those in a closest connection test when reaching the conclusion of the law to be applied. Under either method, arbitral tribunals may also opt for the application of a particular national law, but rely on general international contract principles to interpret and supplement it. For instance, arbitral tribunals have applied soft law, such as the UNCITRAL Principles of International Commercial Contracts ("UPIC"), in order to supplement the chosen national law.

64 For example, where the States of both contracting parties have adopted the CISG,[47] the tribunal might deem it appropriate to apply the CISG. The same can occur when deciding to apply conventions or principles that regulate relationships involving intellectual property issues.

47 *Award in ICC Case No 7331 of 1994* JDI 1001 (1995), note by Dominique Hascher, unofficial translation: "The application of the Vienna Convention to the present dispute is all the more pertinent because Yugoslavia and Italy are signatories to it." See Yves Derains, "Jurisprudence of International Commercial Arbitrators Concerning the Determination of the Proper Law of the Contract" (1996) *International Business Law Journal* 514 at 529 and Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ch 18. For other arbitral awards applying the CISG Convention, see *Award in ICC Case No 2930* IX YB Comm Arb 105 (1984); *Final Award in ICC Case No 6527* XVIII YB Comm Arb 44 (1993); *Award in ICC Case No 8128* 123 JDI (Clunet) 1024 (1996); *Award in ICC Case No 7197* 120 JDI (Clunet) 1028 (1993); *Final Award in ICC Case No 10377* XXXI YB Com Arb 72 (2006); *Interim Award in ICC Case No 11333* XXXI YB Comm Arb 117 (2006); and *Final Award in ICC Case No 11849* XXXI YB Comm Arb 148 (2006).

VII. Conclusion

65 Arbitration is ultimately a matter of consent. Parties' intentions and expectations, and arbitrators' discretion should be given priority. Arbitral tribunals should avoid the application of singular local standards of any particular domestic law if it is not necessarily related to the specific circumstances of the case, and if it would affect the parties' reasonable expectations. The application of general principles of international private law may, more accurately, establish the real intent of the parties than the application of conflict of laws rules which seek to impose a single choice of national law.

66 It is suggested that there are advantages in the use of the *voie indirecte* approach. The tribunal, in many cases, ends up performing a comparative analysis taking into account national legal systems, arbitral case law, international conventions on arbitration and compilations of general principles of law, as well as the particular facts and circumstances of the case. Also, the tribunal may apply the *voie directe*, but support its decision by demonstrating that the substantive applicable law would have been the same if applying several conflict of laws rules to the case. This results in the combination of the direct method and the cumulative method application, for example.

67 Thus there is not a definitive dividing line between *voie directe* and *voie indirecte*, rather they are commonly applied concurrently, and may consider the same elements when selecting the applicable law to the merits of the case. As international arbitration has an independent, non-national and transnational character varying from case to case, the applicable laws and the choice of law methodologies also differ in every case, ensuring that parties' expectations are attended to, and that certainty, foreseeability and neutrality remain the hope that parties of international business disputes seek in arbitration.

Appendix

Examples of the *voie indirecte* approach in arbitration rules and national arbitration statutes

Model Law Art 28	(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) *Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.* (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.
Australian International Arbitration Act 1964 (Cth) Sch 2, Art 16(1)	The Model Law has the force of law in Australia.
ICSID Convention Art 42	(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. *In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.* (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

English Arbitration Act 1996 (c 23) s 46	(1) The arbitral tribunal shall decide the dispute – (a) in accordance with the law by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as agreed by them or determined by the tribunal. (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules. (3) *If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*
Singapore Arbitration Act (Cap 10, 2002 Rev Ed) s 32	(1) The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. (2) *If or to the extent that the parties have not chosen the law applicable to the substance of their dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules.* (3) The arbitral tribunal may decide the dispute, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
New Zealand Arbitration Act 1996 First Sch, Art 28	(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) *Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.* (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* (according to considerations of general justice and fairness)

	only if the parties have expressly authorised it to do so. (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of any contract and shall take into account any usages of the trade applicable to the transaction.
Danish Arbitration Act 2005 s 28	(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules. (2) *Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.* (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.
Swiss Arbitration Law 2012 Art 33	(1) The arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, *in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection*. (2) The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so. (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the trade usages applicable to the transaction.
German Code of Civil Procedure Tenth Book, s 1051	(1) The arbitral tribunal is to decide on the matter in dispute in accordance with the statutory provisions that the parties have designated as being applicable to the content of the legal dispute. Unless the parties to the

	dispute have expressly agreed otherwise, the designation of the laws or the legal system of a specific State is to be understood as a direct referral to the rules of substantive law of this State, and not to its rules relating to the conflict of laws. (2) *Where the parties to the dispute failed to determine which statutory provisions are to be applied, the arbitral tribunal is to apply the laws of that State to which the subject matter of the proceedings has the closest ties.* (3) The arbitral tribunal is to take its decision based on considerations of what is fair and equitable only if the parties to the dispute have expressly authorised it to do so. The authorisation may be granted up until the time the arbitral tribunal takes such decision. (4) In all cases, the arbitral tribunal is to decide in accordance with the provisions of the agreement and is to take account of any commercial practices that may exist.
Italian Code of Civil Procedure Art 834	The parties may agree among themselves upon the rules which the arbitrators shall apply to the merits of the dispute or provide that the arbitrators shall decide *ex aequo et bono*. *If the parties are silent, the law with which the relationship has its closest connection shall apply.* In both cases the arbitrators shall take into account the provisions of the contract and trade usages.
Japanese Arbitration Law 2003 Art 36	(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute. In such case, any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) *Failing agreement as provided in the preceding paragraph, the arbitral tribunal shall apply the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected.*

	(3) Notwithstanding the provisions prescribed in the preceding two paragraphs, the arbitral tribunal shall decide *ex aequo et bono* only if the parties have expressly authorized it to do so. (4) Where there is a contract relating to the civil dispute subject to the arbitral proceedings, the arbitral tribunal shall decide in accordance with the terms of such contract and shall take into account the usages, if any, that may apply to the civil dispute.
Egyptian Law No 27/1994 (as amended by Law No 9 of 1997) Art 39	(1) The Arbitral Tribunal shall apply the rules agreed by the parties to the subject matter of the dispute. If they agree to apply the law of a specific State, then the substantive rules of that law, not those governing conflict of laws, shall be followed, unless the parties otherwise agree. (2) *If the parties fail to agree on the legal rules to be applied to the subject matter of the dispute, the Arbitral Tribunal shall apply the substantive rules of the law it deems most closely connected to the dispute.* (3) The Arbitral Tribunal must, when adjudicating the merits of the dispute, take into account the conditions of the contract, subject of the dispute and the usages of commerce in similar transactions. (4) The Arbitral Tribunal may, if it has been expressly empowered to act as an '*amiable compositeur*' by agreement between the parties to arbitration, adjudicate the merits of the dispute according to the rules of justice and equity without being bound by the provisions of law.
German DIS-Arbitration Rules (1998) s 23	(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) *Failing any designation by the parties, the arbitral tribunal shall apply the law of the State*

	with which the subject-matter of the proceedings is most closely connected. (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. The parties may so authorize the arbitral tribunal up to the time of its decision. (4) In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction.
Rules of the Zurich Chamber of Commerce International Arbitration (1989) Art 4	The Arbitral Tribunal decides according to the substantive law declared applicable by the parties. *If the parties have not chosen an applicable law, the Arbitral Tribunal decides the case according to the law applicable according to the rules of the Private International Law Statute.* If however, the application of the PIL at the seat, domicile or habitual residence of all parties leads similarly to a different result, the case must be decided accordingly on motion of one of the parties.
Rules of Proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (2000) Art 14	(1) The arbitral tribunal and the sole arbitrator (hereinafter the 'arbitral tribunal') shall apply the law stipulated by the parties. The stipulation of a given legal system is to be understood to be the stipulation that refers directly to the substantive law and not to the conflict of law norms of the given State. (2) *Failing stipulation by the parties, the arbitral tribunal shall apply the law which it considers to be applicable according to the rules of Hungarian private international law.* (3) The arbitral tribunal renders a decision on the basis of equity (*ex aequo et bono*) or as a friendly intermediator (*amiable compositeur*) only if it has been expressly authorized to do so by the parties. (4) In each case, the arbitral tribunal makes its decisions in compliance with the stipulations of the contract and by taking into consideration applicable commercial customs.

Examples of the *voie directe* approach in arbitration rules and national arbitration statutes

ICC Rules of Arbitration (2012) Art 21	(1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. *In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.* (2) The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages. (3) The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.
UNCITRAL Arbitration Rules (2010) Art 35	(1) The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. *Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.* (2) The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so. (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.
AAA International Dispute Resolution Procedures (2009) Art 28	(1) The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. *Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.* (2) In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract. (3) The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so.

	(4) A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law. (5) Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.
WIPO Arbitration Rules (2002) Art 59	(a) The Tribunal shall decide the substance of the dispute in accordance with the law or rules of law chosen by the parties. Any designation of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. *Failing a choice by the parties, the Tribunal shall apply the law or rules of law that it determines to be appropriate.* In all cases, the Tribunal shall decide having due regard to the terms of any relevant contract and taking into account applicable trade usages. The Tribunal may decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized it to do so.
LCIA Arbitration Rules (1998) Art 22.3	The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. *If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.*

Arbitration Rules of the Stockholm Chamber of Commerce (2010) Art 22	(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. *In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.* (2) Any designation made by the parties of the law of a given State shall be deemed to refer to the substantive law of that State and not to its conflict of laws rules. (3) The Arbitral Tribunal shall decide the dispute *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.
Vienna International Arbitral Centre Rules of Arbitration (July 2013) Art 27	(1) The arbitral tribunal shall decide the dispute in accordance with the statutory provisions or rules of law agreed upon by the parties. Unless the parties have expressly agreed otherwise, any agreement as to the law or the legal system of a given State shall be construed as a direct reference to the substantive law of that State and not to its conflict-of-laws rules. *(2) If the parties have not determined the applicable statutory provisions or rules of law, the arbitral tribunal shall apply the applicable statutory provisions or rules of law which it considers appropriate.* (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only in cases where the parties have expressly authorised it to do so.
ACICA Arbitration Rules (2011) Art 34	(1) The Arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. *Failing such designation by the parties, the Arbitral Tribunal shall apply the rules of law which it considers applicable.* (2) The Arbitral Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have, in writing, expressly authorized the Arbitral Tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the

	contract and shall take into account the usages of the trade applicable to the transaction.
SIAC Arbitration Rules (April 2013) r 27	(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. *Failing such designation by the parties, the Tribunal shall apply the law which it determines to be appropriate.* (2) The Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the Tribunal to do so. (3) In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.
French Code of Civil Procedure 2011 Art 1511	The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, *where no such choice has been made, in accordance with the rules of law it considers appropriate.* In either case, the arbitral tribunal shall take trade usages into account.
Netherlands Arbitration Institute Arbitration Rules (2010) Art 46	If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. *Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law which it considers appropriate.*