THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel

Both in Switzerland and in England arbitration law is largely statutory, but with some material differences, different interpretation and different gap-filling. In Switzerland, in the absence of a clear choice of the law applicable to the arbitration agreement, the law at the seat of the arbitration is applied, while in England one then seeks by contract interpretation to find and follow the implied will of the parties. "In general" this is the law at the seat. Well, when is it not so? This leads to an uncertainty of the law that the author hopes will soon be overcome.

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"Arbitration is comparative law in action."[1]

I. Switzerland's international arbitration – A new start in 1989

1 Switzerland is a federal state, and until 1989 each member state, called a *canton*, had its own arbitration law, its own *lex arbitri*. For a civil lawyer, in any arbitration the starting point is the *lex arbitri* at the seat of the arbitration.

2 Originally, all of arbitration was a matter for the *cantons*. However, in 1989 the federal state for the first time legislated in the field of international arbitration. By contrast, at that time domestic arbitration remained with the *cantons*.

3 Switzerland's federal *lex arbitri* is found in about 20 paragraphs of Switzerland's Federal Statute on Private International Law ("PIL Statute") (Arts 176–194). Article 176 provides that any international arbitration (and it defines what that is) having its seat in Switzerland is governed by this particular chapter of the PIL Statute.

1 Andreas F Lowenfeld.

4 Obviously, having for the first time a federal statute, and a new federal statute limited to international arbitration, meant a new start, all the more so as at the time the cantonal arbitration laws were old-fashioned, while the new private international statute was innovative.

5 This meant that previous law could in practice be mostly disregarded, and any *lacunae* in the new statute had to be filled on the basis of the new statute's policies, having due regard to the structure of the new statute and its genesis. A clean new start.

6 But, as we will see, some *lacunae* existed and exist to this day. The Swiss PIL Statute does not answer in so many words our question which law applies to the interpretation and scope of an arbitration agreement. What the Swiss statute *does* is to say when an arbitration agreement is *valid* in the first place.

7 One may wonder how it is possible to know where the seat of an arbitration is, hence which *lex arbitri* applies, *before* one even knows whether there is a *valid* arbitration agreement. This sounds circuitous. It is the effect of a two-step process. In the first step, a *prima facie* decision is made that there is a purported arbitration agreement that *may* be valid and that provides for arbitration at a particular seat. This *prima facie* decision is often rendered not by the arbitral tribunal itself, but by an arbitral institution that sets the arbitration in motion and gathers the arbitral tribunal (at the International Chamber of Commerce ("ICC"), not applying any particular law). The final decision must still be rendered by the arbitral tribunal itself within the framework of its competence-competence, and applying some law.

8 Such an apparently circuitous beginning may be observed in state court litigation also. When a state court must decide whether it has jurisdiction, it will have jurisdiction to decide on whether it has jurisdiction. In other words, it will have, in arbitration parlance, competence-competence as any arbitral tribunal. Historically, it is rather the other way around, since the competence-competence of the state courts has always existed, while that of arbitral tribunals is a more recent achievement.

9 Yet another such apparently circuitous beginning may be observed in the conflict of laws when parties exercise a choice of law, as they often do to determine the *lex contractus* which primarily is the law that they choose themselves, their *lex voluntatis*. Whether that choice of law is *valid* is determined by the law so chosen.

A. Kompetenz-kompetenz

10 In sum, the decision on the validity of the arbitration agreement is for the arbitral tribunal to make. In other words, Swiss international arbitral tribunals have *kompetenz-kompetenz*: Art 186(1) of the PIL Statute.

B. Separability

11 The arbitral agreement is *separable*: see the first part of Art 178(3) of the PIL Statute. In other words, a contract that lives a life of its own.

C. Formal validity of arbitration agreement: Text form requirement

12 So far, the Swiss international arbitration law is not unusual, but now the special aspects start.

13 What the Swiss international arbitration law says about the *validity* of an arbitration agreement providing for arbitration in Switzerland is special. It distinguishes two aspects of validity, formal and intrinsic. This is not in itself unusual, but on both aspects the Swiss international arbitration law is special.

14 First, *formal validity*. Must an arbitration agreement be in writing? Earlier law required this, and the arbitration law of many jurisdictions does to this day. The Swiss PIL Statute, however, provides in Art 178 for a special *text form requirement* as follows:

> 1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

This is an autonomous substantive provision not taking a conflict of laws approach.

15 It is incidentally still in dispute amongst Swiss international arbitration specialists whether this text form requirement unique to Switzerland applies only to the *offer* to make the arbitration agreement, or must also be fulfilled by the *acceptance*.

16 Those who argue that *only the offer* must fulfil the requirement (and the author is of that view) say that all this provision is designed to ensure is that there be a *text* that may possibly require interpretation, first *prima facie*, then by the arbitral tribunal itself. They say that this

way there is a recognisable text basis on which to decide whether there is an intrinsically valid arbitration agreement in the first place.

17 France since 2011 goes even further than Switzerland and says the following in Art 1507 of the Code de Procédure Civile:

> An arbitration agreement shall not be subject to any requirements as to its form.

Those who claim that in Switzerland the *acceptance* should *also* fulfil the text requirement argue that *both* parties entering into an arbitration agreement should be protected against their own folly by having to fulfil a form requirement, though just a relaxed form requirement.

D. Intrinsic validity of arbitration agreement: Three laws **in favorem validitatis**

18 Still on the validity of an arbitration agreement, but now its *intrinsic validity*, Arts 178(2) and 178(3) of the Swiss PIL Statute add the following, also unique:

> 2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.
>
> 3 The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.

For the *intrinsic validity* of an arbitration agreement, as one can see, Art 178(2) takes an unusual conflict of laws approach. *Three laws* are declared applicable, *in favorem validitatis* of the arbitration agreement. If only one of these three laws makes the arbitration agreement, once formally valid as text, valid also intrinsically, there is a fully valid arbitration agreement, and the Swiss arbitral tribunal has jurisdiction based on that clause.

E. Intrinsic validity under the law of the seat, Swiss substantive law

19 In practice, one will often test intrinsic validity first under the third-mentioned law, Swiss substantive law. Swiss law, in all international arbitrations under the PIL Statute is necessarily the law of the chosen seat, the *lex arbitri*, or rather the private law of the *lex arbitri*. This law is easily accessible, and Swiss substantive law in itself favours validity. If the arbitration agreement is formally valid, and also intrinsically valid under Swiss substantive law, the arbitral tribunal need

look no further: The arbitration clause is valid, and the arbitral tribunal has jurisdiction.

20 Applying the Swiss law of the seat of the arbitration has the additional advantage that the Swiss state court, that in setting aside proceedings has full cognition over the arbitral tribunal's decision to accept or decline jurisdiction, can apply its own law.

21 Only if under Swiss substantive law, the arbitration agreement is not intrinsically valid, in practice the analysis continues under the two other laws, but let us pause here for some side-looks that will help us understand Art 178(2) of the PIL Statute in its further aspects.[2]

F. A side-look at the conflict of laws in Swiss international arbitration

22 The Swiss PIL Statute has a special conflict of laws provision just for international arbitration. Articles 187(1) and 187(2) in the international arbitration chapter read as follows:

> 1 The Arbitral Tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection.
>
> 2 The parties may authorise the Arbitral Tribunal to decide the case *ex aequo et bono*.

This was, when the Swiss introduced this provision in their international arbitration law, influenced by the then *nouveau* Code de Procédure Civile of France, in the meantime replaced by Arts 1511 and 1512 of the Code de Procédure Civile which read as follows:

> **Article 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.
>
> **Article 1512**
>
> The arbitral tribunal shall rule as *amiable compositeur* if the parties have empowered it to do so.

23 One more side point. There is a special loop when, as frequently happens, the parties choose particular arbitration rules, because these often include yet another choice of law provision of their own. That provision must then be followed as the parties' primary choice of law

2 See paras 22–38 below.

(within the first part of Art 187(1) of the PIL Statute) to determine the *lex contractus* or *lex causae* to be applied to the merits by the arbitral tribunal.

24 For example, Art 21 of the ICC Rules provides as follows:

> 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.

25 If the chosen arbitration rules in the Swiss-seated international arbitration are those of the Singapore International Arbitration Centre ("SIAC"), the provision is the following:

> 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.
>
> 27.2 The Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the Tribunal to do so.
>
> 27.3 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.

26 Article 22.3 of the London Court of International Arbitration ("LCIA") Rules reads as follows:

> 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.

27 In such cases, the arbitral tribunal will have to follow the ICC, SIAC or LCIA loop.

G. A side-look at Swiss general private international law: Form of choice of law

28 Now let us open a further subject. If the parties in an international arbitration, with or without a loop, *choose* or designate the law or rules of law applicable to their arbitration agreement or their contract on the merits, which *form* must they observe for their choice of law to be valid? There is no answer to this question in Art 187 of the PIL Statute. Another *lacuna*.

29 One may try and find some analogy elsewhere in the PIL Statute. One may take a side-glance to the law in international litigation before the Swiss state courts. There, yet another system of conflict of laws applies, found in Arts 1–175 of the PIL Statute which are not applicable in international arbitration.

30 For the *lex voluntatis* applicable to contracts, in other words the choice of the *lex contractus*, in the *Swiss state courts*, this is based on Arts 116(1) and 116(2) of the PIL Statute:

> 1 Contracts are governed by the law chosen by the parties.
>
> 2 The choice of law must be explicit or clearly evident from the agreement or from the circumstances. Moreover, it is governed by the chosen law.

31 This is influenced by the predecessor of the Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations[3] ("Rome I Regulation") (not applicable in Switzerland which is not a member of the European Union). There, the choice of law must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

32 There are many other occasions where, in the Swiss private international law applicable in state court litigation, the parties are allowed to exercise a choice of law. See, for instance, Art 52(1), Art 90(2), Art 95(3) and Art 104(1) of the PIL Statute. In *all* these cases, in international litigation before the Swiss state courts, a choice by the parties of the law applicable need not be in writing. As Art 116(2) of the PIL Statute provides on contracts, here applied by analogy to other matters, it is sufficient for the choice to be *express or clearly evident* from the agreement or from the circumstances.

33 The important word is "clearly". What would be clear evidence of a non-express choice of law? A reference to a particular feature within that law that could not be applicable unless that law necessarily applied.

3 Regulation (EC) No 593/2008 of 17 June 2008.

For instance, there is a reference to a particular aspect of the law, a reference that clearly presupposes that that law has been chosen to apply.

34 By contrast, the *statistical frequency* with which a particular law is chosen cannot possibly be an indication, let alone a clearly evident indication.

35 Neither is it possible to *presume* that the parties wished the applicable law to one thing, such as the substance of the dispute, and the law applicable to another, such as the contract to arbitrate, to *coincide*. There is no basis for such a presumption. This is not clearly evident.

36 It is not sufficient for the choice to be "implied", that is, by operation of law read into what the parties said (which, in reality means, by the thinking of lawyers and judges). This is not clearly evident.

37 The criterion that the choice of law agreement by the parties needs to fulfil in state court litigation (Art 116(2) of the PIL Statute) is easy to apply.

38 Only in the absence of a valid express or clearly evident choice of law by the parties, is the applicable law determined by an *objective* criterion in Swiss international litigation. Those curious about this may for instance look at Art 117 of the PIL Statute where the influence of the Rome I Regulation, or rather its predecessor, is obvious.

39 This is the conflict of laws in international arbitration and in international litigation in the state courts of Switzerland.

40 But let us now revert to our question: which law governs the intrinsic validity of an arbitration agreement in *international arbitration* in Switzerland. Let us proceed to the analysis under the two other laws of Art 178(2) of the PIL Statute which apply if intrinsic jurisdiction cannot be found under the third-mentioned, the private law of the *lex arbitri*, Swiss private law. In other words, let us continue our analysis from where we left off above.[4]

H. Intrinsic validity of arbitration agreement continued: The specifically chosen law

41 In international arbitration, one of the other two laws expressly mentioned in Art 178(2) of the PIL Statute is the law specifically chosen

4 From para 21 above.

by the parties to govern their separable contract to arbitrate, in other words, their arbitration agreement.

42 What is the form requirement for such an intrinsically valid choice of the law applicable to the arbitration agreement in Swiss international arbitration? Is it different from the form requirement for a valid choice of the *lex contractus* in Swiss state court litigation that we just discussed?[5]

43 Much is to be said in favour of applying, *both* in Art 178(2) of the PIL Statute and in the first part of Art 187(1), by analogy, Art 116(2), just discussed,[6] with its easy-to-apply criterion: the choice of law must be express or clearly evident.

44 There is a special policy consideration in favour of applying Art 116(2) of the PIL Statute, by analogy, in arbitration according to Art 178(2). If anything, it is particularly important that a law that must decide on the validity of an arbitration agreement be *clearly* evident. Here, the question is whether an arbitral tribunal has jurisdiction or not, while in Art 116, and in the first part of Art 187(1), the question is just whether this or that law applies to the merits of a contract, which often makes no difference. This makes two laws in Art 178(2) of the PIL Statute.

I. Intrinsic validity of arbitration agreement concluded: The lex contractus

45 Now we come to the third law, the law applicable to the substance of the dispute in arbitration, which is also mentioned in Art 178(2) of the PIL Statute.

46 All three laws in Art 178(2) of the PIL Statute are somehow laws chosen by the parties, but in a different way and chosen for a different scope and purpose. The law *directly* chosen to apply to the arbitration agreement itself is obviously a chosen law. If the parties choose the seat of the arbitration in Switzerland, they choose the Swiss *lex arbitri*, mentioned last in Art 178(2).[7] By the same token, within the *lex arbitri*, they also choose the choice of law provision that the *lex arbitri* has, for instance, in Switzerland, as we saw earlier, Art 187 of the PIL Statute.[8] And so *indirectly*, they *do* also choose the law applicable to the merits or *lex causae*. Similarly, if the parties go on a loop and make a choice of arbitration rules that have a choice of law provision included, then, in

5 See paras 28–38 above.
6 See paras 30–33 above.
7 See paras 19–21 above.
8 See para 22 above.

this fashion, they also *indirectly* choose the *lex causae*. This law is chosen by the parties, but it is chosen to apply to the contract on the merits, not the arbitration agreement, thus to a *different contract* that has nothing to do with the arbitration.

47 The Swiss international arbitration law expresses no preference for one of the three laws as far as the validity of the arbitration agreement is concerned. For a good reason since all three laws apply alternatively in favour of validity. If the arbitration agreement is intrinsically valid according to only one of these three, it will be considered intrinsically valid by the international arbitral tribunal having its seat in Switzerland, and the decision-maker, normally the arbitral tribunal exercising its *kompetenz-kompetenz*, need look no further.

J. Intrinsic validity of arbitration agreement: Why the lex contractus*?*

48 What is the rationale to also provide, in Art 178(2) of the PIL Statute, the *lex contractus* as one of the three possibly applicable laws *in favorem validitatis*?

49 Suppose, under the law applicable to it, its *lex contractus*, the main contract is invalid, for instance, because it is intrinsically illegal, or was entered into by mistake or another defect of expression of will. If that was *necessarily* the law that applied *exclusively* to the arbitration agreement, the arbitration agreement would be invalid also, and the arbitration could not be conducted. The first part of Art 178(3), however, expressly says that the main contract and the arbitration agreement are *separable*. The arbitration agreement has two more chances to be intrinsically valid.

50 If, conversely, however, the separable main contract *was* valid under the *lex contractus* applicable to it, but if the arbitration agreement was subject to a different law *exclusively*, for instance the *lex arbitri*, or rather the private law belonging to the *lex arbitri*, and under *that* law there was no valid contract to arbitrate, then there would be a valid main contract on the merits, yet an invalid arbitration agreement, and the arbitration could not be conducted. This result should be avoided, and that is one of the effects of Art 178(2) of the PIL Statute.

51 That in Art 178(2) of the PIL Statute the law applicable to the substance or *lex causae* of the dispute is one of the three validating laws has nothing to do with the idea that the parties *chose* that law. In fact, sometimes they did directly, and sometimes only indirectly. Rather, the idea is that if the main contract is valid according to the law that is applicable to the main contract, the arbitral tribunal should accept

jurisdiction even if the arbitration agreement is not intrinsically valid, under either of the two other laws, including the Swiss law at the seat.

52 Similarly with the law expressly or by clear evidence chosen to apply to the arbitration agreement itself, if a law was chosen. If *that* law applied exclusively, the arbitration agreement might be intrinsically invalid. This result should also be avoided. There are two more chances.

53 This is why Art 178(2) of the PIL Statute adds, *in favorem validitatis*, as one of the laws applicable to the intrinsic validity of the arbitration agreement, the *lex contractus* of the main contract. By so providing, *in favorem validitatis*, for three chances, Art 178(2) is an arbitration-friendly provision.

54 Let us note in passing that Art 178(3) of the PIL Statute[9] adds another arbitration-friendly rule, clarifying that an arbitration agreement need not be made *in limine litis*.

55 This three-law system favouring validity will operate well if it is easy to say, in each case, whether the parties have made a choice of law. Therefore, requiring that the choice be express or *clearly* evident makes good sense.

K. Law applicable to interpretation and scope of arbitration agreement: Search for statutory analogy

56 All this concerns the intrinsic validity of the arbitration agreement, not its *interpretation and* its *scope*, on which the Swiss PIL Statute does not have a specific provision. Where does this leave us with respect to interpretation and scope of an arbitration agreement in Swiss international arbitration law? Which law applies to that?[10]

57 Is there an analogy? Should one apply the three-law statutory provision on validity, Art 178(2) of the PIL Statute, by analogy, and if so, how? One would need to apply, as to each aspect of the scope question, in the interest of as wide a scope as possible, the law out of those one, two or three, that provides for validity in the first place. That would lead to the widest scope.

9 See para 18 above.

10 In BGE 130 III 66 (2003), in a Zurich arbitration, the Swiss Federal Supreme Court applied Swiss substantive law to the interpretation and scope of the arbitration agreement without discussing the conflict of laws question.

58 This approach[11] would be wrought with difficulties. When an arbitral tribunal decides whether the arbitration clause is valid or not, just two answers are possible, and, applying Art 178(2) of the PIL Statute, a positive decision according to one law is sufficient. If one has to decide about the scope of an arbitration agreement in various directions, does one then engage in a comparative analysis, in each direction, of possibly three different substantive laws?

59 Moreover, the decision that an arbitral tribunal takes on its jurisdiction may be challenged in Switzerland in setting-aside proceedings before the Swiss Federal Supreme Court. That court has full cognition. Would it also engage in this comparative law exercise?

60 The other approach is far simpler. One considers the arbitral agreement to be a separable agreement, as the first part of Art 178(3) of the PIL Statute[12] expressly provides. It is, however, not completely different from any other agreement. Thus, the starting point will be the arbitral conflict of laws provision of Art 187(1) of the PIL Statute,[13] applied by analogy. Under that provision, the applicable law is determined, first, by the parties themselves in a choice of law agreement. The law that was chosen expressly or by clear evidence is thus primarily applicable, possibly after a loop via the chosen arbitration rules.

L. Subsidiary objective rule: Law of the seat

61 If the parties have not expressly or by clear evidence chosen the law applicable to the arbitration agreement, then, in the absence of a choice of arbitration rules, another, secondary rule applies by analogy, the *objective* rule in the arbitration-specific Art 187(2) of the PIL Statute.[14] The arbitral tribunal must then apply, to the interpretation of the arbitration agreement and its scope, the rules of law with which "the case" has the *closest connection*. The English influence on this Swiss provision is obvious.

62 What then is "the case"? It is the author's submission that, for a separable arbitration agreement, the "case" is necessarily the arbitration as such. Which law has the closest connection with the arbitration? Obviously, the *lex arbitri*, or more precisely, the private law of the *lex arbitri* at the seat of the arbitration. There is indeed no law that has a closer connection with the arbitration than the *lex arbitri*, so the

11 Advocated by the author in *Practitioner's Handbook on International Commercial Arbitration* (F-B Weigand ed) (Oxford University Press, 2nd Ed, 2009) at p 821, para 12.20, but here abandoned.

12 See para 18 above.

13 See para 22 above.

14 See para 18 above.

lex arbitri has necessarily the *closest* connection. This is the law that the parties chose in their arbitration clause when they chose (occasionally with a loop) the seat of the arbitration.

63 This is the law that the arbitral tribunal must apply, but the Swiss Federal Supreme Court, that is the state court in the country of the seat, on setting aside can freely decide.[15]

M. Summary

64 In sum, which law applies to a contract to arbitrate in Switzerland? The analysis was somewhat convoluted, but the answer is simple and easy. The scope and interpretation of an arbitration agreement are governed by its applicable law, namely:

(a) the law expressly or by clear evidence chosen by the parties; or

(b) in the absence of such choice, the law of the seat of the arbitration.

There is no room for a third law. The contract on the merits is a separable contract that has nothing to do with the interpretation and scope of the contract to arbitrate.

II. England's arbitration law

65 Now let us glance across the English Channel and the law applicable to arbitration agreements in English arbitration law. In many respects, in England the law is in practice the same as in Switzerland, and it is also mostly statutory law, but it is less easy to apply, and less predictable in its effect.

A. A new start in 1996?

66 England had a new start[16] with the English Arbitration Act 1996[17] ("AA 1996") which contained significant innovations. However, interpretation of texts, statutory or contractual, is somewhat different in

15 The outcome of BGE 130 III 66 (2003), n 10 above, is consistent with this approach.

16 Called "*terminus a quo*" by Lord Collins in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763; [2010] UKSC 46, and in *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at p 831, para 16-004.

17 c 23.

England from interpretation in Switzerland,[18] and previous case law remained influential.

67 Both England and Switzerland have specific statutory provisions on the *formal validity* of an arbitration agreement. But the provisions are different. Section 5 of the AA 1996 provides that the arbitration agreement must be in writing, but in many cases "in writing" means "oral".

68 Unlike the Swiss PIL Statute, England has no special provision on the *intrinsic validity* of an arbitration agreement. In England, the same law applies to intrinsic validity, interpretation and scope.

69 On the law applicable to the *interpretation and scope* of an arbitration agreement, Swiss law has no specific provision. Neither does the AA 1996. In English law, for historical and traditional reasons, unlike Swiss law, even comprehensive statutory law is not seen as the primary source of law; case law is. In practice, one will therefore resort to case law to show what the law is, not to statutory law. There is also a philosophical background to this: if one's view is that knowing the law means being able to predict with some accuracy what the courts will do, case law, which tells us what the courts have done, is a good source.

70 Since in some cases, at the top level of the Supreme Court and at the next-to-top level of the Court of Appeal, several judges will set out their opinion in full, it will be even harder to say what the law is.

71 In case law development, both in the civil law and in the common law, most courts will be reluctant to depart from earlier decisions, particularly of higher courts. They will normally hold on to earlier law in *dicta*. The courts will not announce future changes of case law in *dicta*, and will avoid changing the law as long as they can. While higher courts may be prepared to depart from decisions of lower courts, they will be reluctant to openly change their own mind. It is therefore unsurprising that in case law developments often only time can tell whether a *dictum* is just repeated but at least in some aspects will not be followed, or whether a novel decision is a landmark departure from earlier law or just a slip-up.

72 Where the law is mostly case law, *legal literature* (not a source of law in England) will tend to present that case law structured as rules, with copious comment. This structure will be used even when discussing an area where the law is mostly statutory law such as international arbitration. *Lord Mustill* who delivered the main speech in

18 See para 88 below.

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd[19] ("*Channel Tunnel*") and *Lord Collins* who delivered the main speech in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*[20] ("*Dallah*"), were of course the authors of the most important books on arbitration law and the conflict of laws. In *Dicey, Morris & Collins* (2012),[21] the structure originally adopted by Dicey back in 1896, at a time when the law of international arbitration was still mostly case law, is continued, after several Arbitration Acts, and having had for more than 20 years a comprehensive statute of about 100 provisions.[22]

B. Lord Mustill's seminal dictum in Channel Tunnel

73 Let us pick as our starting point just before the AA 1996, the *Channel Tunnel* case of 1993 in the House of Lords. The question was whether the courts of England could issue a preliminary measure against an English party to the construction contract for the Channel Tunnel in support of the Brussels arbitration there foreseen. Lord Mustill's speech included the following:[23]

> It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. *Exceptionally*, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. *Less exceptionally* it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the 'curial law' of the arbitration, as it is often called. The construction contract provides an example. The proper substantive law of this contract is the law, if such it can be called, chosen in clause 68. But the curial law must I believe be the law of Belgium. Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least *some very strong pointer* in the agreement to show that such a choice was *intended*, the inference that the parties when contracting to arbitrate in a particular

19 [1993] AC 334.

20 [2011] 1 AC 763; [2010] UKSC 46.

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

22 Lord Collins states in his superb book, *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at p 831, para 16-004, that the Arbitration Act 1996 is the *terminus a quo*, yet on the following pp 833–837, entire footnotes (no doubt kept from earlier editions) are still devoted to pre-1996 Act law: nn 16, 21, 25, 37, 42 and 46.

23 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 357–358.

> place consented to having the arbitral process governed by the law of that place is irresistible.
>
> In all these instances one or more national laws may be relevant because they are expressly *or impliedly* chosen by the parties to govern the various aspects of their relationship. As such, they govern the arbitral process from within. But national laws may also apply ab extra, when the jurisdiction of the national court is invoked independently of any prior consent by the parties. An obvious case exists where the claimant, in face of an arbitration agreement, brings an action before a national court which must apply its own local law to decide whether the action should be stayed, or otherwise interfered with. Equally obvious is the case of the national court which becomes involved when the successful party applies to it for enforcement of the arbitrator's award. But a national court may also be invited, as in the present case, to play a secondary role, not in the direct enforcement of the contract to arbitrate, but in the taking of measures to make the work of the chosen tribunal more effective. Here, the matter is before the court solely because the court happens to have under its own procedural rules the power to assert a personal jurisdiction over the parties, and to enforce protective measures against them. Any court satisfying this requirement will serve the purpose, whether or not it has any prior connection with the arbitral agreement or the arbitration process. In the present case, the English court has been drawn into this dispute only because it happens to have territorial jurisdiction over the respondents, and the means to enforce its orders against them. The French court would have served just as well, and if the present application had been made in Paris we should have found the French court considering the same questions as have been canvassed on this appeal, but from a different perspective.
>
> [emphasis added]

C. Cases under the AA 1996

74 After *Channel Tunnel* in the House of Lords in 1993, there were two more English cases at the top level, *Fiona Trust & Holding Corp v Privalov; sub nom Premium Nafta Products Ltd v Fili Shipping Co Ltd*[24] ("*Premium Nafta*") in 2007, and the Supreme Court case *Dallah* in 2010. One level below, in the Court of Appeal, there were two cases, *C v D*[25] (2007) and, recently, *Sulamérica Cia Nacional De Seguros SA v Enesa Engenharia SA*[26] ("*Sulamérica*") (2012). Still one level below, in the High Court, there was *XL Insurance Ltd v Owens Corning*[27] ("*XL Insurance*")

24 [2008] 1 Lloyd's Rep 254; [2007] UKHL 40.
25 [2007] EWCA Civ 1282.
26 [2012] EWCA Civ 638; [2013] 1 WLR 102.
27 [2000] 2 Lloyd's Rep 500.

(2000), and most recently *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*[28] ("*Arsanovia*") (2012).

75 One thing that all these cases have in common is that the parties expressly chose the law applicable to the contract, but (arguably) did not say anything expressly about the law applicable to the arbitration agreement.

76 In most of these cases, the seat of the arbitration was London, and the arbitral tribunal accepted jurisdiction based on English law. With one exception, appeals against these decisions were rejected. The odd case is *Arsanovia* where the decision by a London arbitral tribunal to accept jurisdiction was set aside on the ground that Indian law applied as the chosen law to the arbitration agreement. In *XL Insurance*, an application for an anti-suit injunction to be issued by the state court in support of a London arbitration was granted. *Dallah*, where the decision was to refuse enforcement in England of a Paris award for lack of jurisdiction, was a New York Convention[29] case.

77 In all these cases, *dicta* appear in which, in essence, the English arbitration law was said to be succinctly summarised (on the basis of Lord Mustill's statement in *Channel Tunnel*)[30] in *Dicey, Morris & Collins* (2012). There, r 64(1),[31] reads as follows:

> The material validity, scope and interpretation of an arbitration agreement are governed by its applicable law, namely:
>
> (a) the law expressly or impliedly chosen by the parties; or
>
> (b) in the absence of such choice, the law which is most closely connected with the arbitration agreement, which will in general be the law of the seat of the arbitration.

78 In all the post-AA 1996 cases but *Dallah*, the question was whether the law expressly chosen to apply to the contract should also apply to the arbitration agreement (as the law chosen by implication), or whether the law of the closest connection, "in general" the law of the seat, should apply to the arbitration agreement. Either way, the law of the seat was found to be applicable to the arbitration agreement in all but one odd case, *Arsanovia*. Nothing surprising here.

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28 [2012] EWHC 3702 (Comm).

29 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959).

30 See para 73 above.

31 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at p 829.

79 English law was also found applicable by Longmore LJ in *C v D*. However, having not found an express choice of English law as the law applicable to the arbitration agreement, he bypassed the possibility of an implied choice of (English) law and went straight to the step to apply the law that had objectively the closest and most real connection to the case, namely, the law of the seat of the arbitration, London.[32] He was obliquely criticised for this shortcut by Moore-Bick LJ in *Sulamérica*.[33]

80 In *Dallah*, the arbitration had been conducted in France, and the award was denied enforcement under the New York Convention.

81 The odd case was *Arsanovia*. Indian law was chosen to apply to the merits. Andrew Smith LJ found that Indian law had been chosen by implication or even expressly to apply (also) to the arbitration clause providing for London arbitration. The circumstances (or matrix) were as follows. After an unhappy Indian decision interfering by preliminary measures with a London arbitration on the ground that Indian law applied to the *merits*, the parties had expressly excluded the jurisdiction of Indian courts to issue preliminary measures. Smith LJ thought that by *excluding* that particular jurisdiction to issue preliminary measures, the parties had *impliedly chosen* Indian law to apply generally to arbitral jurisdiction,[34] or even expressly! This reads as follows:

> 20. There is another consideration that to my mind is relevant in this case: that the arbitration agreement included a specific agreement not to seek interim relief under the Indian Arbitration and Conciliation Act, 1996 ('IACA'), including section 9 of that Act, and that the provisions of Part 1 of IACA were expressly excluded. As was explained by Mr Pinaki Misra, a Senior Advocate who gave evidence for the claimants, the background to this provision was that in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105, the Supreme Court of India had held that Part I of IACA applied to international arbitrations, although it appeared on its face to apply only to domestic references. (In *Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc*, a decision of the Supreme Court delivered on 6 September 2013, *Bhatia International* was overruled with prospective effect, but the SHA was concluded in 2008.) Mr Wolfson submitted that it is inconceivable that the parties intended Indian law to govern the arbitration agreement, given that (i) they contracted for arbitration in London and subject to the English Arbitration Act, 1996 on matters of validity, the conduct of references and challenges to awards, and (ii) they contracted out of the corresponding provisions of the IACA. I disagree: on the contrary, as I see it and as Mr Hirst submitted, where

32 *C v D* [2007] EWCA Civ 1282.

33 *Sulamérica Cia Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102 at [25].

34 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [20]–[23].

parties have expressly excluded specific statutory provisions of a law, the natural inference is that they understood and intended that otherwise that law would apply. Therefore to my mind the reference to IACA in the arbitration agreement supports the claimants' contention that the parties evinced an intention that the arbitration agreement should be governed by Indian law (except in so far as they agreed otherwise).

21. I agree with Mr Hirst that the parties to the SHA are to be taken to have evinced an intention that the arbitration agreement in it be governed by Indian law for the reasons that Moore-Bick LJ explained. The governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement and there is no contrary indication other than choice of a London seat of arbitration. The wording of the arbitration agreement itself reinforces the conclusion that the parties intended Indian law to govern it.

22. Mr Hirst's submission was that the parties' choice of Indian law was implied: he felt unable in light of authority to contend at first instance that the parties made an express choice, but he reserved that argument should the case go to superior courts. It seems to me that Mr Hirst might have been too diffident: that a case for an express choice might have been available even before me. When the parties expressly chose that 'This Agreement' should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. Express terms do not stipulate only what is absolutely and unambiguously explicit, and it seems to me strongly arguable that that is the ordinary and natural meaning of the parties' express words (notwithstanding relatively recent developments in the English law about the separability of arbitration agreements from the substantive contract in which it was made and assuming that these foreign companies are to be taken to have known about the developments in 2008 when they concluded the SHA). The governing law provisions in the agreements in the two Court of Appeal authorities referred to 'the policy' and 'this Policy' being governed by the internal laws of New York and Brazilian law respectively, and the word 'policy' might naturally be taken to connote to obligations and rights more directly relating to the insurance that the arbitration agreement. Some might consider this a 'fussy distinction' of the kind deprecated in *Fiona Trust v Privalov* [2007] UKHL 40 para 27, but to my mind it is simply a response to what the parties' language naturally connotes or more precisely what I think in 2008 it would have connoted to foreign businessmen such as these.

23. However, in view of argument before me, that is not for me to decide: Mr Hirst's submissions were (i) that the parties to the arbitration impliedly chose that Indian law should govern it, and (if they did not) (ii) the arbitration agreement had its closest and most real connection with Indian law. There is, as observed in Chitty on Contracts (31st Ed, 2012) at para 13-002, a close affinity between the implication of terms and the interpretation of express terms, and I

> need only say that in my judgment the parties evinced the intention that the arbitration agreement in the SHA be governed by the law of India: it is unimportant whether the choice is characterised as express or implied.

In common law jurisdictions one often says *exclusio unius est inclusio alterius* (or the other way around). The author does not intend to be uncivil, but to a civil lawyer, this sounds bizarre.

82 Let us now go through the precise analytical steps under English law in comparison with Swiss law.

D. Kompetenz-kompetenz

83 As in Switzerland, the principle of *kompetenz-kompetenz* is recognised in England: ss 30(1)(a) and 30(1)(c) of the AA 1996.[35] Let us at once get some other similarities out of the way. If the parties have gone on a loop and have chosen arbitration rules,[36] these apply to determine the *lex contractus*. This is particularly interesting because Art 22.3 of the LCIA Rules[37] provides, as does the Swiss international arbitration law,[38] for the *voie directe*. Section 46 of the AA 1996 provides for the *voie indirecte*.[39] It is clear also in England that an arbitration agreement need not to be made *in limine litis*.[40]

E. Separability

84 In *Channel Tunnel*, Lord Mustill explained that several laws could apply to different aspects of an agreement. Already then, the idea that the arbitration agreement is separable from the agreement on the merits was trite law (or the "alphabet of arbitration law", see *Lesotho Highlands Development Authority v Impregilo SpA*).[41] See s 7 of the AA 1996.[42]

85 Also in England it is recognised that under s 7 of the AA 1996[43] the law applicable to the merits of a contract, the *lex contractus*, may

35 See para 10 above.
36 See paras 24–27 above.
37 See para 26 above.
38 See para 22 above.
39 See para 97 below.
40 See para 54 above.
41 [2006] 1 AC 221 at [21], *per* Lord Steyn.
42 For the history of this, see *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763; [2010] UKSC 46 at [80]–[94], *per* Lord Collins.
43 For the previous law, see *Fiona Trust & Holding Corp v Privalov; sub nom Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd's Rep 254; [2007]

(*cont'd on the next page*)

make that contract invalid, yet the arbitration agreement inserted into it remains valid, which is one of the *in favorem validitatis* effects of Art 178(2) of the PIL Statute.[44] An illustration was *Premium Nafta*.

F. Formal validity

86 Also in England, there is a direct substantive provision on *formal* validity: s 5 of the AA 1996. This provides in an interesting way that in some cases "in writing" may mean "oral" after all.

G. Intrinsic validity, interpretation and scope of the arbitration agreement: The choice of law by the parties (also by implication)

87 Now the differences start. Unlike Switzerland, England has no separate statutory provision on the intrinsic validity of an arbitration agreement. Accordingly, in England, on the intrinsic validity of a separable arbitration agreement, the law applicable to the arbitration agreement as a whole applies.

88 This has nothing to do with the way contracts are interpreted in England. There, the law has recently changed. It is by now clear that the differences between common law and civil law contract interpretation are no longer dramatic. It used to be that the scope of an arbitration agreement was interpreted in *England* in a peculiar way. Perhaps because of the courts distrust of arbitrators (some, in English tradition, non-lawyers), arbitration agreements were interpreted in a particularly narrow, word-picking arbitration-unfriendly way. For instance, distinctions were drawn between disputes "arising out" of the contract and disputes arising "in connection with" the contract. It was said that the first category presupposes that there was a valid contract, while disputes about the validity of the contract were included in the second type of clauses because they had some "connection" with it. The House of Lords in *Premium Nafta* discontinued this practice which Lord Hoffmann said[45] was no credit to English commercial law.

89 It is also no longer true that, in English law, a contract will be interpreted only on the basis of its wording as it at best must be understood by a reasonable person on the Clapham omnibus. Now the test is what reasonable business people *under the circumstances* had to

UKHL 40 at [9], *per* Lord Hoffmann. For comparative law on this see *Premium Nafta* at [32], *per* Lord Hope.

44 See para 49 above.

45 *Fiona Trust & Holding Corp v Privalov; sub nom Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd's Rep 254; [2007] UKHL 40 at [11]–[14].

understand the contract to mean. The circumstances are now relevant to the interpretation of the contract under the fancy name of "factual matrix".

90 One difference still is that the genesis of a contractual provision (or a statutory position, for that matter) may be relevant to its interpretation under civil law, while in English law any evidence predating the contract is excluded. However, even this difference is not dramatic if one takes into account that civil law courts are often reluctant to hear evidence about the negotiation of a contract and will tend to base themselves on documents only.

91 English law, just like the civil law, also allows evidence on post-contractual understanding of the contract to shed light on the meaning of the contract itself.

92 However, in England, there is also no statutory provision dealing in so many words with interpretation and scope of an agreement to arbitrate *ratione personae* and *ratione materiae*. So far the laws are almost the same.

93 Originally, before separability, the position in England was that where there was an arbitration clause in an agreement and that agreement provided expressly for an applicable law to the contract, that law applied to the entire contract, thus also to the arbitration agreement, which was "included" in the context of the "matrix contract". This is no longer the law, but it still rules us from its grave.

94 There is no strict form requirement for a valid choice of law for the law applicable to the arbitral agreement. In Lord Mustill's words in *Channel Tunnel*,[46] the parties may select the applicable law "expressly *or by implication*". This means that the parties' choice may also be what they reasonably *would have said*, had they been asked, and even what they reasonably would have thought had they put their mind to the question, thus their *hypothetical will*. If one seeks to establish the *hypothetical will* of the parties, then anything that one thinks is right may be elevated to the hypothetical will of the parties, and nobody can disprove this.

95 Separability is also undermined by presumption or "strong indication" that the parties wanted *one* law to apply to all questions (based on what?).[47] One further finds discussion about the frequency

46 See para 73 above.

47 See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 357–358, *per* Lord Mustill, at para 73 above.

with which parties make this or that choice (surely irrelevant in a specific case).

96 The uncertainty is heightened by the fact that in each case, the decision of the arbitral tribunal on its jurisdiction may be reviewed by the state courts not just on one level, as in Switzerland, but on three levels. Obviously, the higher levels will be particularly interesting, with several judges making their own speeches.

H. Subsidiary objective rule – Common conflict of laws – Closest connection

97 If there is no choice of law on the law applicable to the arbitration agreement, unlike Swiss international arbitration law, English arbitration law has no analogy to follow in arbitration law itself. Why? One cannot apply s 46(3) of the AA 1996 by analogy because, unlike Art 187 of the Swiss PIL Statute,[48] it provides for the *voie indirecte* only:

> (1) The arbitral tribunal shall decide the dispute –
>
> (a) in accordance with the law chosen 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 are agreed by them or determined by the tribunal.
>
> …
>
> (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.

98 One must then look to the *general conflict of laws* before state courts. In English litigation, where the Rome I Regulation does not apply, at common law, the "proper law" of the contract is applied, which is the law with which the contract has the "closest connection".

99 In Swiss international litigation, Switzerland uses a somewhat different way of finding the *lex contractus* objectively. Swiss private international law before the state courts is influenced by the Rome I Regulation (or rather its predecessor) even though Switzerland is not a member of the European Union. This is the law before the state courts. However, in Swiss international arbitration law, without a choice of law by the parties, the result reached based on Art 187(1) of the PIL Statute is the same as in English common law.

48 See para 22 above.

100 If the law of the *closest connection* applies, this would have to be the *lex arbitri*. In sum, in England, arbitration agreements for arbitration in London will then be interpreted by and take their scope from the private law at the seat, English substantive law. Here, Swiss and English arbitration law are again at one.

101 Well, almost. In his book[49] (before *Arsanovia*), Lord Collins further fudged the result by saying that this is so "in general".[50] One is tempted to ask: "Well, when is it not so?"

I. Conclusion

102 In sum, the main difference comes earlier, when English arbitration law follows (or so it says) the *implied will of the parties* which must be ascertained by contract interpretation. By contrast, in the absence of an implied will of the parties, the applicable law is determined objectively through different routes, but the result is the same in Switzerland and in England.

103 In *Sulamérica* (before *Arsanovia*), Lord Neuberger MR remarked as follows:[51]

> Given the desirability of certainty in the field of commercial contracts and the number of authorities on the point, it is, at least at first sight, surprising that it is by no means easy to decide in many such cases whether the proper law of the arbitration agreement is (i) that of the country whose law is to apply to the contract or (ii) that of the country which is specified as the seat of the arbitration. However, once it is accepted that that issue is a matter of contractual interpretation, it may be that it is inevitable that the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense.

104 This observation sounds prophetic. In *Arsanovia*, only months later in that same year, 2012, the accident that was waiting to happen occurred.[52]

105 One can only hope that on the next occasion the Supreme Court will take the hint of the Master of the Rolls and, in the interest of legal certainty which it has already furthered on other occasions, the

49 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012); see para 77 above.
50 See para 73 above.
51 *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102 at [51].
52 See para 69 above.

Supreme Court will move away from the search for the parties' "implied" intent.